

**STATE OF INDIANA**  
**Board of Tax Review**

EDWARD ROSE OF INDIANA	)	On Appeal from the Johnson County
	)	Property Tax Assessment Board
	)	of Appeals
Petitioner,	)	
	)	
v.	)	Petition for Review of Assessment, Form 131
	)	Petition No. 41-026-01-1-4-00002
	)	Parcel No. 2100-30-20-013/00
JOHNSON COUNTY PROPERTY TAX	)	
ASSESSMENT BOARD OF APPEALS	)	
And PLESANT TOWNSHIP	)	
ASSESSOR,	)	
	)	
Respondents.	)	

**Findings of Fact and Conclusions of Law**

On January 1, 2002, pursuant to Public Law 198-2001, the Indiana Board of Tax Review (IBTR) assumed jurisdiction of all appeals then pending with the State Board of Tax Commissioners (SBTC), or the Appeals Division of the State Board of Tax Commissioners (Appeals Division). For convenience of reference, each entity (the IBTR, SBTC, and Appeals Division) is hereafter, without distinction, referred to as "State". The State having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

## Issue

Whether the subject apartment buildings should be valued as three stories or two stories and a basement.

## Findings of Fact

1. If appropriate, any finding of fact made herein shall also be considered a conclusion of law. Also if appropriate, any conclusion of law made herein shall also be considered a finding of fact.
  
2. Pursuant to Ind. Code § 6-1.1-15-3, Paul Kropp of Kropp & Associates, on behalf of Edward Rose of Indiana (Petitioner), filed a Form 131 petition requesting a review by the State. The Form 131 petition was filed on December 17, 2001. The Johnson County Property Tax Assessment Board of Appeals (PTABOA) Notification of Final Assessment Determination on the underlying Form 130 is dated November 21, 2001.
  
3. Pursuant to Ind. Code § 6-1.1-15-4, a hearing was held on March 6, 2002, before Hearing Officer Paul Stultz. Testimony and exhibits were received into evidence. Mr. Kropp represented the Petitioner. Mr. Mark Alexander represented the Johnson County PTABOA. No one appeared to represent Pleasant Township.
  
4. At the hearing, the subject Form 131 petition was made a part of the record and labeled as Board's Exhibit A. Notice of Hearing on Petition is labeled as Board's Exhibit B. In addition, the following exhibits were submitted to the State:

Petitioner's Exhibit 1 – Copy of letter dated February 6, 2002 from Mr. Kropp listing witnesses and evidence to be presented at the hearing

Petitioner's Exhibit 2 – Three (3) page statement of exhibits and issue

- Petitioner's Exhibit 3 – Copy of photograph and description of comparable property in Evansville, Indiana
- Petitioner's Exhibit 4 – Copy of State Final Determination and written findings for the comparable property in Evansville, Indiana
- Petitioner's Exhibit 5 – Copy of photograph and description of comparable property in Lafayette, Indiana
- Petitioner's Exhibit 6 – Copy of State Final Determination and Findings for comparable property in Lafayette, Indiana
- Petitioner's Exhibit 7 – Copy of photograph and description of comparable property in Indianapolis, Indiana (Bavarian Village) with property record card (PRC)
- Petitioner's Exhibit 8 – Copy of photograph and description of comparable property in Indianapolis, Indiana (Scarborough Lake)
- Petitioner's Exhibit 9 – Form 133 of comparable property in Indianapolis, Indiana (Scarborough Lake)
- Petitioner's Exhibit 10 – Copy of photograph and description of subject property in Greenwood, Indiana (Polo Run)
- Petitioner's Exhibit 11 – Copy of 50 IAC 2.2-16-4.1 (Illustrations Modern Story Height Designs)
- Petitioner's Exhibit 12 – Copy of 50 IAC 2.2-16-2
- Petitioner's Exhibit 13 – Copy of four (4) pages of facsimile including a design drawing of subject property, specification sheet, and letter dated February 2, 2002 from J. Houchin to Mr. Kropp
- Petitioner's Exhibit 14 – Copy of description of story from the uniform building code, and design drawing of the Pheasant Run apartments
- Respondent's Exhibit 1 – Copy of 50 IAC 2.2-16-4.1 (Illustrations Modern Story Height Designs)
- Respondent's Exhibit 2 – Copy of subject PRC

5. The subject property is an apartment complex located at 801 Kings Mill Road, Greenwood, Pleasant Township, Johnson County.

6. The Hearing Officer did not view the subject property.

7. At the hearing, the parties agreed the year under appeal is 2001 and the assessed values of record are:

Land	\$738,900
------	-----------

Improvements	\$8,047,700
--------------	-------------

8. After the hearing, the Hearing Officer noted the subject PRC showed an assessed value for the improvements as \$8,048,800. The Hearing Officer contacted Mr. Alexander and Mr. Kropp regarding this difference and asked the parties to address this issue.

9. Mr. Alexander responded by letter dated March 7, 2002 stating that the correct assessed value of record for the improvements should be \$8,048,800. Mr. Alexander's response is entered into the record and labeled as Board's Exhibit C. Mr. Kropp responded via a facsimile dated March 22, 2002, agreeing that the correct assessed value of record is \$8,048,800. Mr. Kropp's response is entered into the record and labeled as Board's Exhibit D.

10. Based on the parties responses to this concern, it is determined the assessed values of record in this appeal are:

Land	\$738,900
------	-----------

Improvements	\$8,048,800
--------------	-------------

**Issue - Whether the subject apartment buildings should be valued as three (3) stories or two (2) stories and a basement..**

11. The Petitioner has four (4) additional apartment complexes in Indiana. All have

some structures that have three (3) levels and are comparable in design with the subject property. *Kropp testimony.*

12. The three (3) level structures at the other locations were assessed as having two (2) stories with basements. Two (2) of the structures were assessed in this manner as a result of Form 131 appeals, one (1) was assessed in this manner by the Township Assessor, and the other was assessed in this manner as a result of the local offices approving a Form 133 petition. *Kropp testimony & Petitioner's Exhibits 3 – 9.*
13. The Petitioner provided exterior photographs of the subject structures and the comparable structures, a design drawing of the subject property and a design drawing for the Pheasant Run comparable property. *Petitioner's Exhibits 13 and 14.*
14. The subject property's lowest level is three (3) to four (4) feet below grade. The subject structures fit the definition of a basement per 50 IAC 2.2-16-2(5). The lowest level of the comparable properties, are also three (3) to four (4) feet below grade and are similar in design to the subject property. *Kropp testimony.*
15. 50 IAC 2.2-16-4.1 (Illustrations Modern Story Height Designs) determines if the level under grade is basement or first story level by the type of room that is present in the story under grade. The illustration classifies the lowest level a basement if the level is occupied by a recreation room and/or utility area. The lowest level is classified as a first floor if it is occupied by a family room and/or utility area. The Township used this illustration to determine that the subject property's lowest level was a first story. *Alexander testimony.*
16. The photographs presented by the Petitioner of alleged comparable properties were not sufficient evidence to prove that the other properties are indeed comparable. *Alexander testimony.*

### **Other Findings of Fact**

17. Mr. Kropp stated that he is compensated in this appeal under a contingency fee arrangement.

### **Conclusions of Law**

1. The Petitioner is limited to the issues raised on the Form 130 petition filed with the Property Tax Assessment Board of Appeals (PTABOA) or issues that are raised as a result of the PTABOA's action on the Form 130 petition. 50 IAC 17-5-3. See also the Forms 130 and 131 petitions authorized under Ind. Code §§ 6-1.1-15-1, -2.1, and -4. . In addition, Indiana courts have long recognized the principle of exhaustion of administrative remedies and have insisted that every designated administrative step of the review process be completed. *State v. Sproles*, 672 N.E. 2d 1353 (Ind. 1996); *County Board of Review of Assessments for Lake County v. Kranz* (1964), 224 Ind. 358, 66 N.E. 2d 896. Regarding the Form 130/131 process, the levels of review are clearly outlined by statute. First, the Form 130 petition is filed with the County and acted upon by the PTABOA. Ind. Code §§ 6-1.1-15-1 and -2.1. If the taxpayer, township assessor, or certain members of the PTABOA disagree with the PTABOA's decision on the Form 130, then a Form 131 petition may be filed with the State. Ind. Code § 6-1.1-15-3. Form 131 petitioners who raise new issues at the State level of appeal circumvent review of the issues by the PTABOA and, thus, do not follow the prescribed statutory scheme required by the statutes and case law. Once an appeal is filed with the State, however, the State has the discretion to address issues not raised on the Form 131 petition. *Joyce Sportswear Co. v. State Board of Tax Commissioners*, 684 N.E. 2d 1189, 1191 (Ind. Tax 1997). In this appeal, such discretion will not be exercised and the Petitioner is limited to the issues raised on the Form 131 petition filed with the State.

2. The State is the proper body to hear an appeal of the action of the County pursuant to Ind. Code § 6-1.1-15-3.

### **A. Indiana's Property Tax System**

3. Indiana's real estate property tax system is a mass assessment system. Like all other mass assessment systems, issues of time and cost preclude the use of assessment-quality evidence in every case.
4. The true tax value assessed against the property is not exclusively or necessarily identical to fair market value. *State Board of Tax Commissioners v. Town of St. John*, 702 N.E. 2d 1034, 1038 (Ind. 1998)(*Town of St. John V*).
5. The Property Taxation Clause of the Indiana Constitution, Ind. Const. Art. X, § 1 (a), requires the State to create a uniform, equal, and just system of assessment. The Clause does not create a personal, substantive right of uniformity and equality and does not require absolute and precise exactitude as to the uniformity and equality of each *individual* assessment. *Town of St. John V*, 702 N.E. 2d at 1039 – 40.
6. Individual taxpayers must have a reasonable opportunity to challenge their assessments. But the Property Taxation Clause does not mandate the consideration of whatever evidence of property wealth any given taxpayer deems relevant. *Id.* Rather, the proper inquiry in all tax appeals is “whether the system prescribed by statute and regulations was properly applied to individual assessments.” *Id.* at 1040. Only evidence relevant to this inquiry is pertinent to the State's decision.

### **B. Burden**

7. Ind. Code § 6-1.1-15-3 requires the State to review the actions of the PTABOA, but does not require the State to review the initial assessment or undertake

reassessment of the property. The State has the ability to decide the administrative appeal based upon the evidence presented and to limit its review to the issues the taxpayer presents. *Whitley Products, Inc. v. State Board of Tax Commissioners*, 704 N.E. 2d 1113, 1118 (Ind. Tax 1998) (citing *North Park Cinemas, Inc. v. State Board of Tax Commissioners*, 689 N.E. 2d 765, 769 (Ind. Tax 1997)).

8. In reviewing the actions of the PTABOA, the State is entitled to presume that its actions are correct. “Indeed, if administrative agencies were not entitled to presume that the actions of other administrative agencies were in accordance with Indiana law, there would be a wasteful duplication of effort in the work assigned to agencies.” *Bell v. State Board of Tax Commissioners*, 651 N.E. 2d 816, 820 (Ind. Tax 1995). The taxpayer must overcome that presumption of correctness to prevail in the appeal.
9. It is a fundamental principle of administrative law that the burden of proof is on the person petitioning the agency for relief. 2 Charles H. Koch, Jr., *Administrative Law and Practice*, § 5.51; 73 C.J.S. Public Administrative Law and Procedure, § 128.
10. Taxpayers are expected to make factual presentations to the State regarding alleged errors in assessment. *Whitley*, 704 N.E. 2d at 1119. These presentations should both outline the alleged errors and support the allegations with evidence. “Allegations, unsupported by factual evidence, remain mere allegations.” *Id* (citing *Herb v. State Board of Tax Commissioners*, 656 N.E. 2d. 890, 893 (Ind. Tax 1995)). The State is not required to give weight to evidence that is not probative of the errors the taxpayer alleges. *Whitley*, 704 N.E. 2d at 1119 (citing *Clark v. State Board of Tax Commissioners*, 694 N.E. 2d 1230, 1239, n. 13 (Ind. Tax 1998)).
11. One manner for the taxpayer to meet its burden in the State’s administrative proceedings is to: (1) the taxpayer must identify properties that are similarly

situated to the contested property, and (2) the taxpayer must establish disparate treatment between the contested property and other similarly situated properties. In this way, the taxpayer properly frames the inquiry as to “whether the system prescribed by statute and regulations was properly applied to individual assessments.” *Town of St. John V*, 702 N.E. 2d at 1040.

12. The taxpayer is required to meet his burden of proof at the State administrative level for two reasons. First, the State is an impartial adjudicator, and relieving the taxpayer of his burden of proof would place the State in the untenable position of making the taxpayer’s case for him. Second, requiring the taxpayer to meet his burden in the administrative adjudication conserves resources.
13. To meet his burden, the taxpayer must present probative evidence in order to make a prima facie case. In order to establish a prima facie case, the taxpayer must introduce evidence “sufficient to establish a given fact and which if not contradicted will remain sufficient.” *Clark*, 694 N.E. 2d at 1233; *GTE North, Inc. v. State Board of Tax Commissioners*, 634 N.E. 2d 882, 887 (Ind. Tax 1994).
14. In the event a taxpayer sustains his burden, the burden then shifts to the local taxing officials to rebut the taxpayer’s evidence and justify its decision with substantial evidence. 2 Charles H. Koch, Jr. at §5.1; 73 C.J.S. at § 128. See *Whitley*, 704 N.E. 2d at 1119 (The substantial evidence requirement for a taxpayer challenging a State Board determination at the Tax Court level is not “triggered” if the taxpayer does not present any probative evidence concerning the error raised. Accordingly, the Tax Court will not reverse the State’s final determination merely because the taxpayer demonstrates flaws in it).

### **C. Review of Assessments After *Town of St. John V***

15. Because true tax value is not necessarily identical to market value, any tax appeal that seeks a reduction in assessed value solely because the assessed

value assigned to the property does not equal the property's market value will fail.

16. Although the Courts have declared the cost tables and certain subjective elements of the State's regulations constitutionally infirm, the assessment and appeals process continue under the existing rules until a new property tax system is operative. *Town of St. John V*, 702 N.E. 2d at 1043; *Whitley*, 704 N.E. 2d at 1121.

### **Credibility of Witness – Contingency Fee**

17. At the hearing, the Hearing Officer asked Mr. Kropp whether his arrangement with the taxpayer was on a contingency fee basis. Mr. Kropp responded that it was.
18. The contingency fee agreement between the taxpayer and the taxpayer representative is relevant in consideration of the credibility of the testimony and evidence presented. Likewise, the contingent fee nature of the representative's agreement goes to the weight of the testimony. *Wirth v. State Board of Tax Commissioners*, 613 N.E. 2d 874 (Ind. Tax 1993).

### **Issue - Whether the subject apartment buildings should be valued as three (3) stories or two (2) stories and a basement.**

19. It is the Petitioner contention that the subject apartment buildings should be valued as two (2) story structures with a basement rather than three (3) story structures.
20. The Respondent contends that the subject buildings are three (3) story apartment structures and should be valued as such.
21. The Petitioner submitted four (4) properties purported to be comparable with the

subject. The first levels of three of the comparables, being under grade level, were assessed as basements: one (1) of the properties had the first levels assessed as basements based on a State determination (Petitioner's Exhibit 4), one (1) had the first level assessed as basement based on the original assessment (Petitioner's Exhibit 7), and one (1) had the first level assessed as basement based on the local officials approval of a Form 133 petition (Petitioner's Exhibit 9). The fourth comparable did not have the first level changed to a basement upon appeal to the State (Petitioner's Exhibit 6).

22. The Petitioner submitted design drawings of the subject apartments (Petitioner's Exhibit 13). The Petitioner claims the design is very similar for all comparable properties and the subject property. The Petitioner also submitted copies of photographs of all four (4) comparable properties and photographs of the subject property to support his argument that the properties were comparable.
23. The Petitioner also submitted a letter from John Q. Houchin with Edward Rose of Indiana, dated February 2, 2002 (Petitioner's Exhibit 13). In this letter Mr. Houchin states that Edward Rose of Indiana constructed a number of communities throughout the State utilizing the same model and building techniques. That their construction consisted of all two-story buildings with a basement. The communities in question were: the subject (Polo Run Apartments) in Greenwood, Scarborough Lake Apartments and Bavarian Apartments in Indianapolis, Pheasant Run Apartments in Lafayette, and The Timbers in Evansville. The Petitioner submitted information on these apartments – Petitioner's Exhibits 3 – 10, 13 and 14.
24. The Petitioner also pointed to 50 IAC 2.2-16-2(5) which defines a "basement" to mean a building story which is wholly or partially below the grade level (Petitioner's Exhibit 12).
25. The Respondent supports their position based on 50 IAC 2.2-16-4.1 - Illustrations Modern Story Height Designs (Respondent's Exhibit 1). The Respondent states

that the illustrations show whether the level under grade is basement or first story, based on the type of room present in that level under grade. The Respondent opines that the illustrations classify the lower level a basement if the lower level is occupied by a recreation room and/or utility area. And that the lower level is classified a first floor if it is occupied by a family room and/or utility area.

26. It should be noted that Respondent's Exhibit 1 depicts residential type structures such as ranches, ranches with basements, bi-levels, tri-levels and tri-levels with basements. Though the Respondent may be correct as to how lower levels for residential structures may be reviewed and valued, this information would not be correct for commercial entities. None of the illustrations shown are representative of or relevant to commercial buildings like apartments that are under review in this appeal.
27. In addition, at no time did the Respondent present any testimony or submit any evidence that rebutted the Petitioner's position that some portion of the structures was below grade level.
28. As stated in Conclusions of Law ¶¶9, 10 and 13, it is the fundamental principle of administrative law that the burden of proof is on the person petitioning the agency for relief. That taxpayers are expected to make factual presentations to the State regarding alleged errors in the assessment. To meet their burden, the taxpayer must present probative evidence in order to make a prima facie case. In order to make a prima facie case, the taxpayer must introduce evidence "sufficient to establish a given fact and which if not contradicted will remain sufficient."
29. The State determines the Petitioner has met their burden in this appeal by providing probative evidence of an error in assessment. The State determined the Petitioner introduced evidence sufficient to establish the fact that the subject apartment's lowest levels should be priced as basements. Thus making the

structures two (2) stories with basement. See Conclusions of Law ¶¶22, 24, and 25.

30. Once the Petitioner met their burden, the burden then shifted to the local assessing officials to go forward and justify its position and rebut the evidence presented by the Petitioner. The Respondent failed to do so.
31. The Respondent's position rests solely on the illustrations found in 50 IAC 2.2-16-4.1 to support their contention that the lower level is the first story. The Respondent also alleges that the evidence submitted by the Petitioner was not sufficient evidence to require a change.
32. As stated in Conclusions of Law ¶¶25, the evidence presented by the Respondent (50 IAC 2.2-16-4.1) are illustrations of different types of residential homes showing the most typical uses of a particular level. These illustrations are not relevant to commercial structures or specifically to apartment buildings.
33. For the reasons set forth above, it is determined that the apartment buildings presently valued as three (3) stories are to be valued as two (2) stories with basements. A change in the assessment is made as a result of this issue.

The above stated findings and conclusions are issued in conjunction with, and serve as the basis for, the Final Determination in the above captioned matter, both issued by the Indiana Board of Tax Review this \_\_\_\_ day of \_\_\_\_\_, 2002.

---

Chairman, Indiana Board of Tax Review