

REPRESENTATIVE FOR PETITIONER:
David Whisler, Tax Representative

REPRESENTATIVE FOR RESPONDENT:
F. John Rogers, Attorney

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

W & S Properties, LLC	)	Petition No.:	02-072-09-1-4-00614
)		
Petitioner,	)	Parcel No.:	02-08-06-200-001.000-072
)		
v.	)	County:	Allen
)		
Allen County Assessor,	)	Township:	St. Joseph
)		
Respondent.	)	Assessment Year:	2009
)		

Appeal from the Final Determination of the
Allen County Property Tax Assessment Board of Appeals

February 28, 2013

FINAL DETERMINATION

The Indiana Board of Tax Review (“Board”), having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Introduction

1. In this assessment appeal, the parties offered valuation evidence that was largely conclusory and in many instances of questionable probative value. Nonetheless, both parties offered opinions of certified assessor-appraisers who, when applying the income

approach, estimated the subject property's value as being over a million dollars less than its assessment. On those facts, the Board finds that the assessment should be reduced.

Procedural History

2. W & S filed a Form 130 petition with the Allen County Assessor contesting the subject property's March 1, 2009 assessment. On September 28, 2011, the Allen County Property Tax Assessment Board of Appeals ("PTABOA") issued its determination upholding the assessment. W & S then timely filed a Form 131 petition with the Board. The Board has jurisdiction over W & S's appeal under Indiana Code §§ 6-1.1-15 and 6-1.5-4-1.
3. On August 9, 2012, the Board's administrative law judge, Jennifer Bippus ("ALJ"), held a hearing on the petition. Neither the Board nor the ALJ inspected the subject property.
4. The following people were sworn in and testified:
 - For W & S: David Whisler, certified tax representative, CPA, CFO & controller of Sturges Development Group, LLC
Brad Sturges, commercial real estate broker, co-owner
CBRE/Sturges and Sturges Development Group, LLC
 - For the Assessor: Charles "Mike" Stone, commercial appraisal deputy, Allen County Assessor's Office
5. W & S submitted the following exhibits:
 - Petitioner Exhibit 1: Position Statement and Summary Information of Petitioner
 - Petitioner Exhibit 2: Summary of Values
 - Petitioner Exhibit 3: April 18, 2011, e-mail from Charles Stone to Dave Whisler
 - Petitioner Exhibit 4: The Zacher Company 2011 Fort Wayne, IN Office Market Survey
 - Petitioner Exhibit 5: Cap Rate Survey Year End 2009 by CB Richard Ellis
 - Petitioner Exhibit 6: Analysis of sales comparables with Property Tax Record Cards ("PRCs") attached
 - Petitioner Exhibit 7: Analysis of land comparables, DLGF Sales Disclosure Online Search, and PRCs
 - Petitioner Exhibit 8: Building 2 Rent Roll 2009
 - Petitioner Exhibit 9: Indiana Farm Bureau lease
 - Petitioner Exhibit 10: Northeast Indiana Prostate Cancer Center Lease

Petitioner Exhibit 11: Calculation of Cap Rate by the Band of Investment
Technique using Mortgage and Equity Components

6. The Assessor submitted the following exhibits:

- Respondent Exhibit 1: Position Statement of the Allen County Assessor's Office
- Respondent Exhibit 2: Six photographs of 10307 Dupont Circle Dr. W. (Building 2)
- Respondent Exhibit 3: Two photographs of 10315 Dupont Circle Dr. W. (Building 1)
- Respondent Exhibit 4: PRC for 02-08-06-200-005.000-072 (the subject property)
- Respondent Exhibit 5: Allen County iMap (aerial photograph of subject property)
- Respondent Exhibit 7: Copies of 10 building permits for Buildings 1 and 2¹
- Respondent Exhibit 8: January 14, 2008 lease listing for 10307 Dupont Cir Dr (Building 2)
- Respondent Exhibit 9: AIA Document A107-1997 (construction contract) between Witwer Construction, Inc. and W & S, signed November 8, 2007
- Respondent Exhibit 10: Diagram of "vault"
- Respondent Exhibit 11: September 15, 2011 e-mail from Barry Wood to Charles Stone and September 14, 2011 e-mail from Stone to Wood
- Respondent Exhibit 12: 2009 Form 104 Business Tangible Personal Property Return for Northeast Indiana Prostate Cancer Center, LLC
- Respondent Exhibit 13: Copy of article from www.journalgazette.net
- Respondent Exhibit 14: Sales disclosure form for \$1,735,000 sale from Dupont Auburn, LLC to W & S
- Respondent Exhibit 15: David W. Whisler's e-mail signature block with title
- Respondent Exhibit 16: Sales disclosure form for \$1,350,000 sale from W & S to Dupont Auburn Real Estate, LLC
- Respondent Exhibit 17: CBRE Sturges listings for 10315 Dupont Circle Dr. W. (Building 1)
- Respondent Exhibit 18: Pro-forma income approach for 10307 Dupont Circle Dr. West (Building 2)
- Respondent Exhibit 18A: Support for lease rates and net leasable area (5 pages)
- Respondent Exhibit 18B: Excerpts from Indiana Farm Bureau Insurance and Northeast Indiana Prostate Cancer Center leases
- Respondent Exhibit 18C: 2009 Fort Wayne Indiana Office Survey published by Zacher Company July 9, 2009, page from Harding & Dahm publication, sheet with Office Vacancy Rate Estimates Fort Wayne Area 1992-2009 from Harding

¹ On her exhibit coversheet, the Assessor broke Exhibit 7 into multiple subparts and labeled them 7A through 7J. But she did not label the exhibit in that manner. Instead, she offered a stapled 10-page exhibit containing 10 building permits and labeled the entire exhibit as Exhibit 7.

- Dahm & Co. and Office Buildings with Vacancies
Inventory – 2009 from John M. Thistlethwaite Interests,
LLC
- Respondent Exhibit 18D: Analysis of local operating expense ratios with excerpts from publications of Price Waterhouse Coopers, LLP, RealtyRates.com Investor Surveys
- Respondent Exhibit 18E: Support for selected capitalization rate
- Respondent Exhibit 19: Pro-forma income approach analysis for 10315 Dupont Circle Dr. West (Building 1)
- Respondent Exhibit 19A: Support for lease rates and net leasable area (three listings)²
- Respondent Exhibit 20: Comparable Sales and Assessment Synopsis Grid (Spreadsheet)
- Respondent Exhibit 21: Comparable #1 description and photo
- Respondent Exhibit 21A: PRC of 02-08-06-200-024.000-072
- Respondent Exhibit 22: Comparable #2 description and photo
- Respondent Exhibit 22A: PRC of 02-08-06-200-024.001-072
- Respondent Exhibit 23: Comparable #3 description and photo
- Respondent Exhibit 23A: PRC of 02-08-06-200.002-000-072
- Respondent Exhibit 24: Comparable #4 description and photo
- Respondent Exhibit 24A: PRC of 02-08-06-200-004.000-072
- Respondent Exhibit 25: Comparable #5 description and photo
- Respondent Exhibit 25A: PRC of 02-08-06-200-005.000-072
- Respondent Exhibit 26: Comparable #6 description and photo
- Respondent Exhibit 26A: PRC of 02-08-06-200-012.000-072
- Respondent Exhibit 27: Comparable #7 description and photo
- Respondent Exhibit 27A: PRC of 02-07-01-201-003.000-073
- Respondent Exhibit 28: Comparable #8 description and photo
- Respondent Exhibit 28A: PRC of 02-11-24-153-001.000-038
- Respondent Exhibit 29: Comparable #9 description and photo
- Respondent Exhibit 29A: PRC of 02-13-06-202-005.000-070
- Respondent Exhibit 30: Comparable #10 description and photo
- Respondent Exhibit 30A: PRC of 02-08-06-200-026.000-072
- Respondent Exhibit 32³: Comparable #12 description and photo
- Respondent Exhibit 32A: PRC of 02-11-24-178-002.002-038
- Respondent Exhibit 33: Comparable #13 description and photo
- Respondent Exhibit 33A: PRC of 02-08-15-101-001.001-072
- Respondent Exhibit 34: Comparable #14 description and photo
- Respondent Exhibit 34A: Property record card of 02-02-35-380-001.000-191
- Respondent Exhibit 35: Comparable #15 description and photo

² The Assessor's exhibit coversheet refers to exhibits 19B - 19D. Counsel for the Assessor also referred to those exhibits, but said that they were the same as exhibits 18B -18D. The Assessor, however, did not offer any exhibits labeled as 19B – 19D.

³ Although the Assessor's exhibit list references exhibits 31 and 31A, she did not offer those exhibits into evidence.

- Respondent Exhibit 35A: PRC of 02-11-12-201-001.001-075
- Respondent Exhibit 36: Comparable #16 description and photo
- Respondent Exhibit 36A: PRC of 02-11-12-201-001.000-075
- Respondent Exhibit 37: Support for land value (aerial photograph with portions of PRCs for subject property, 3250 Dupont Rd. and 2850 Dupont Commerce Ct.)⁴

7. The Board recognizes the following additional items as part of the record of proceedings:
 - Board Exhibit A: Form 131 petition and attachments
 - Board Exhibit B: Hearing Notice
 - Board Exhibit C: Notice of Appearance for F. John Rogers
 - Board Exhibit D: Hearing Sign-In Sheet

8. The subject property consists of a single parcel with two commercial buildings. Building 1 is located at 10315 Dupont Circle Drive West and Building 2 is located at 10307 Dupont Circle Drive West in Fort Wayne, Indiana.

9. The PTABOA determined the following assessment for the subject property:
Land: \$892,500 Improvements: \$3,268,200 Total: \$4,160,700

10. On its Form 131 petition, W & S requested the following assessment:
Land: \$410,300 Improvements: \$2,318,300 Total: \$2,728,600

11. At the Board's hearing, W & S requested a total assessment of \$2,948,600.

Objections

12. The parties made several objections, all of which the ALJ took under advisement. The Board therefore turns to those objections.

⁴ The Assessor also submitted copies of three decisions issued by the Board, a copy of Ind. Evidence Rule 408, excerpts from two Indiana Tax Court decisions, and a copy of one of those decisions. Although those documents were referenced as objection and rebuttal exhibits at the hearing, there is no need to mark those published authorities as exhibits.

A. The Assessor's objections

13. The Assessor first objected to evidence addressing settlement discussions concerning the appeal of the subject property's 2009 assessment. The Assessor objected both to Mr. Whisler's testimony about those discussions and to Petitioner's Exhibit 3, an e-mail from Mr. Stone to Mr. Whisler conveying a settlement offer. The Assessor grounded her objection on Rule 408 of the Indiana Rules of Evidence.

14. The Board sustains the Assessor's objection. Indiana courts strongly favor settlement agreements. *Klebes v. Forest Lake Corp.*, 607N.E.2d 978, 982 (Ind. Ct. App. 1993). Those agreements allow courts to operate more efficiently and the parties to fashion the outcomes of their disputes through mutual agreement. *Natare Corp. v. Aquatic Renovation Systems, Inc.*, 987 F. Supp. 695, 700 (S.D. Ind. 1997). Indiana law therefore provides several incentives for parties to engage in settlement negotiations. Most importantly for this case, it prohibits parties from using statements made in settlement negotiations to prove liability for or invalidity of a claim or its amount. *Dep't of Local Gov't Fin. v. Commonwealth Edison Co.*, 820 N.E.2d 1222, 1227, (Ind. 2005); Ind. Evidence Rule 408. Indeed, the Indiana Tax Court has refused to afford consummated settlement agreements any precedential effect in property tax appeals, because to do so "would have a chilling effect on the incentive of all assessing officials to resolve cases outside the courtroom." *Boehning v. State Bd. of Tax Comm'rs*, 673 N.E.2d 502, 505 (Ind. Tax. Ct. 2001) (granting State Board of Tax Commissioners' motion to strike a portion of the taxpayers' brief that referred to the settlement of a related appeal).

15. Second, the Assessor objected to Mr. Whisler's testimony that the PTABOA held hearings and determined the subject property's assessment at \$2,950,000 for 2010 and 2011 based on the same leases that were in place in 2009. In support of her objection, the Assessor pointed to the principle that each assessment year stands alone. Indeed, both the Tax Court and the Board have repeatedly applied that general principle, holding that evidence of a property's assessment in one year is not necessarily probative of its true tax value in another year. *E.g., Fleet Supply, Inc. v. State Bd. of Tax Comm'rs*, 747 N.E.2d

645, 650 (Ind. Tax Ct. 2001) (citing *Glass Wholesalers, Inc. v. State Bd. of Tax Comm'rs*, 568 N.E.2d 1116, 1124 (Ind. Tax Ct. 1991)) (“Finally, the Court reminds Fleet Supply that each assessment and each tax year stands alone. . . . Thus, evidence as to the Main Building's assessment in 1992 is not probative as to its assessed value three years later.”).

16. That rule is not absolute, however. For example, the Tax Court held that an assessor was collaterally estopped from re-litigating a building's quality grade when a county board had determined the building's grade in a prior year's appeal and there were no allegations that the property had changed in the interim. *Lindemann v. Wood*, 799 N.E.2d 1230, 1233-34 (Ind. Tax Ct. 2003). But W & S has not alleged collateral estoppel in this appeal. Indeed, W & S gave almost no information about the issues that were actually litigated and decided in its 2010 and 2011 appeals. See *Microvote General Corp. v. Ind. Election Comm'n*, 924 N.E.2d 184, 197 (Ind. Ct. App. 2010) (explaining that collateral estoppel applies only to issues that were actually litigated and determined in a former action). The Board therefore sustains the Assessor's objection.
17. Third, the Assessor objected to Mr. Whisler's testimony that a newly constructed house may not actually sell for the amount that it cost to build. The Assessor grounded her objection on the fact that Mr. Whisler is not an “MAI appraiser.” *Rogers objection*. The Board overrules the Assessor's objection. An expert may testify to relevant matters within his expertise. Although Mr. Whisler did little to expound on his expertise, he testified that he was a Level II certified assessor-appraiser, and he was giving his opinion about the relationship between cost and value in exchange.
18. Fourth, the Assessor objected to testimony from Mr. Whisler as well as to portions of exhibits that Mr. Whisler prepared regarding the operating expenses that he estimated for the subject property and his decision to add 1% to the capitalization rate that he took from a published survey. According to the Assessor, Mr. Whisler was making unsupported conclusions.

19. Once again, the Board overrules the Assessor's objection. Mr. Whisler used his assumptions about operating expenses and capitalization rates in forming his opinion of the subject property's market value-in-use. The extent to which Mr. Whisler either supported or failed to support those assumptions affects the probative weight, if any, that his opinion carries. But he was entitled to testify about the bases for his opinion. The Board will address the support or lack thereof for Mr. Whisler's assumptions when it considers the merits of W & S's case.
20. Fifth, the Assessor objected to Mr. Whisler's testimony that a hotel is a more intense property use than an office building on grounds that the testimony was speculative. As already explained, Mr. Whisler was entitled to give his opinion regarding valuation-related issues, although the Board certainly considers Mr. Whisler's lack of citation to any underlying support in weighing the reliability of his opinion. The Board therefore overrules the Assessor's objection.
21. Finally, the Assessor objected to Mr. Whisler's testimony that Witwer Construction assumed that it would be finishing both of Building 2's suites and that Witwer did not know W & S would get a tenant who would want to finish its own suite. The Assessor objected on grounds that nobody from Witwer Construction appeared at the Board's hearing to testify and that Mr. Whisler's testimony was therefore "subjective." *Rogers objection.*
22. The Board overrules the Assessor's objection. The mere fact that testimony is subjective does not make it inadmissible. Of course, the Assessor also objected based on Mr. Whisler's lack of personal knowledge about what Witwer Construction assumed when it applied for building permits. Mr. Whisler, however, offered his testimony to explain that simply adding the estimates reflected in building permits does not necessarily reflect actual construction costs because some of the permits might be duplicative. Thus, although Mr. Whisler phrased his testimony in terms of what Witwer Construction assumed, his testimony can also be understood as referring to the information that Witwer

Construction had available to it when it applied for permits to finish the interior of one of Building 2's suites, work that the tenant—not Witwer Construction—ultimately performed.

B. W & S's objections

23. W & S objected to the following exhibits offered by the Assessor:
- Exhibit 7: Building permits. W & S argued that permits are simply estimates of work to be performed and may not reflect the cost of the work actually performed.
 - Exhibits 8 & 17: Listings for Buildings 1 and 2. W & S argued that, unlike sales and leases, listings do not project actual income streams and are therefore irrelevant.
 - Exhibit 14: Sales Disclosure Form for Dupont Auburn, LLC's sale to W & S. W & S argued that the sale was irrelevant because it was a "1031" transaction.⁵ *Whisler objection.*
 - Exhibit 16: Sales Disclosure Form for W & S's sale to Dupont Auburn Real Estate, LLC. W & S argued that the sale was invalid because it was an installment contract upon which the buyer defaulted.
 - Exhibit 18C: Excerpts from various surveys regarding vacancy rates. W & S took issue with the fact that the exhibit does not address properties from the Fort Wayne area.
 - Exhibit 20: Comparable sales and assessment synopsis. W & S argued that the Assessor offered no support for why various properties listed in the exhibit were described as being of inferior construction quality.
24. W & S's objections all go to the weight of the Assessor's exhibits rather than to their admissibility. The Board therefore overrules those objections.

⁵ Mr. Whisler did not explain what he meant by a "1031 transaction." The Board assumes he was referring to an exchange that qualifies under Section 1031 of the Internal Revenue Code. *See* 26 U.S.C. § 1031(a) (Providing that "[n]o gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like kind which is to be held either for productive use in a trade or business or for investment.").

Parties' Contentions

A. Summary of W & S's evidence and contentions

25. Kyle Witwer, a commercial builder, and Barry Sturges, a real estate developer, own W & S. In 2007, W & S acquired the subject property from Dupont Auburn, LLC, a related entity that Barry Sturges controls, via a "1031" transaction. *Whisler testimony*. Brad Sturges described a 1031 transaction as more of an investment option than a true sale.

26. At that time of the sale, the subject property consisted of one building (Building 1) with a single tenant. Building 1 has 6,936 square feet and was leased to Raymond James Financial Services ("Raymond James"). In 2008, Raymond James vacated Building 1 and W & S listed the building for lease or sale. In April 2009, W & S entered into an installment sale contract with Dupont Auburn Real Estate, LLC to sell Building 1 for \$1,350,000. The buyer defaulted on the contract, and W & S had to sue to regain possession. The building remains vacant, and W & S has actively marketed it for lease or sale without success. At the time of the Board's hearing, Building 1 was listed for sale with an asking price of \$1,400,000. *Whisler testimony; Pet'r Ex. 1*.

27. W & S started construction on Building 2 in late 2007 and finished it in 2008. Building 2 has two suites (A & B). W & S leased Building 2 to United Farm Family Mutual Insurance Company ("Farm Bureau") and Northeast Indiana Prostate Cancer Center, LLC ("NEIPCC"). Those leases began running on June 1, 2008, and February 1, 2009, respectively. Construction on Building 2 started just as the economy was beginning to decline. As a result, W & S got lower rents than originally projected. If W & S had known the kind of rents it would actually receive, it might have decided not to build. NEIPCC had specific requirements for its space; it needed a large concrete vault to house a \$4,000,000 linear accelerator used to treat prostate cancer. NEIPCC therefore paid the cost for building the vault. *Whisler testimony; Pet'r Exs. 1, 8*.

1. Mr. Whisler's analysis under the income approach

28. When W & S filed its appeal, it asked for an assessment of \$2,728,600. Based on Mr. Whisler's analysis of the property's value under the income approach, however, W & S now seeks an assessment of \$2,948,600. According to Mr. Whisler, construction costs do not necessarily reflect a property's market value. Instead, investors buy and operate properties based on the projected return of, and on, their investment. *Whisler testimony; Pet'r Ex. 1.*

a. Building 1

29. To determine Building 1's potential gross income, Mr. Whisler looked at a 2011 market survey for Fort Wayne published by the Zacher Company. The survey includes information from 2008 through 2011. Mr. Whisler focused on the survey's data for leases of Class B suburban office buildings. According to Mr. Whisler, Building 1 is best viewed as a Class B building because it has a wood frame and lacks the amenities and architectural features found in many Class A buildings. The survey list includes rent information from 2011 as well as information regarding vacancy rates from 2008-2011. It lists average full-service rents ranging from \$10.00 to \$13.50 per square foot for Class B suburban office buildings. Mr. Whisler settled on a gross rent of \$16.00 per square foot for Building 1 to account for its Dupont Road location, which commands higher rents. *Whisler testimony; Pet'r Exs. 1-2, 4.*

30. Although Building 1 has been completely vacant for four years, Mr. Whisler subtracted a vacancy rate of 25% from the building's potential gross income. That is consistent with the 2011 Zacher Survey, which indicates that office buildings in the Northeast Quadrant of Fort Wayne had average vacancy rates of 24.6% for 2008 and 25.6% for 2009. It is also consistent with the various surveys that the Assessor offered into evidence. For example, the 2009 Zacher survey shows a vacancy rate of 25.6% for the northeast quadrant of Fort Wayne while Harding Dahm & Company and John Thistlethwaite show vacancy rates of 28% and 25.6%, respectively. Of the three surveys, John Thistlethwaite

is a MAI appraiser and therefore had to do more research than Zacher and Harding Dahm, which tend to build their surveys based on information from LoopNet and do not inventory the actual market. *Whisler testimony; Brad Sturges testimony; Pet'r Ex. 1-2, 4; Resp't Ex. 18C.*

31. Mr. Whisler then subtracted operating expenses, excluding taxes, from Building 1's effective gross income. He used expenses of \$4.00 per square foot, which covered cleaning, utilities, landscaping, snow plowing, management, lot maintenance, etc. Based on his 30 years of experience in commercial real estate, Mr. Whisler believed that an office building could be operated for \$4.00 per square foot and that such an expense rate was reasonable for the market. Mr. Whisler also felt that his expenses were reasonable in light of information from RealtyRates.com showing typical office expenses for Indianapolis. Those expenses were \$8.95 per square foot for the central business district and \$8.33 per square foot for the suburbs. They equate to roughly 65% of Building 1's income, a much higher ratio than the 33% that Mr. Whisler's \$4.00 per square foot reflects. Even Racine, Wisconsin had an expense rate of \$8.10 per square foot. Mr. Whisler, however, acknowledged that the RealtyRates.com expenses include taxes. *Whisler testimony; Pet'r Exs. 1-2.*
32. On top of the operating expenses, Mr. Whisler subtracted reserves at \$.50 per square foot, and legal and professional expenses of \$1,500 to arrive at net operating income of \$130,423. *Whisler testimony; Pet'r Exs. 1-2.*
33. To determine an appropriate capitalization rate, Mr. Whisler started with a rate of 10.875%, which he based on a 2009 survey of Indianapolis capitalization rates published by CB Richard Ellis ("CBRE"). Mr. Whisler took the mid-point of the range for Class B office buildings and added 1%. He made that adjustment to account for the fact that Fort Wayne is a weaker, tertiary market with less industrial demand than Indianapolis. According to Mr. Whisler, both an appraiser on the PTABOA and the Assessor's office have previously endorsed such an adjustment. To verify that his adjusted rate was

reasonable, Mr. Whisler separately calculated a capitalization rate using the band of investment technique. He assumed a 70% debt-to-equity ratio with a 10.21% mortgage constant and a 12% required return on equity. That calculation yielded a rate of 10.747%. *Whisler testimony; Pet'r Exs. 1-2, 4, 11.*

34. Mr. Whisler then loaded his capitalization rate by 2.875% to account for real estate taxes. When Mr. Whisler applied his loaded capitalization rate of 13.751% to his estimated net operating income for Building 1, he arrived at a value of \$948,500, which equates to \$136.75 per square foot. *Whisler testimony; Pet'r Exs. 1-2, 5, 11.*

b. Building 2

35. To estimate Building 2's potential gross income, Mr. Whisler used an average of the building's actual triple net lease rates (\$16.47 per square foot). Mr. Whisler felt that he was being conservative in light of a 2009 Zacher survey offered by the Assessor, which shows a range of \$17.50 to \$18.50 per square foot for full-service leases of Class A suburban office buildings. *Whisler testimony; Pet'r Exs. 1, 2; Resp't Ex. 18C.*
36. Mr. Whisler used the same 25% vacancy rate for Building 2 that he used for Building 1. Because Building 2's leases are triple net, Mr. Whisler did not subtract operating expenses, although he did subtract expenses for leasing commissions, reserves, legal and professional expenses, and unreimbursed common area expenses. *Whisler testimony; Pet'r Exs. 1-2.*
37. Mr. Whisler used a rate of 10.125% to capitalize Building 2's income. Similar to what he did for Building 1, Mr. Whisler added 1% to the mid-point of CBRE's survey rates, but this time for Class A office buildings. He did not load his capitalization rate with an effective tax rate because the building's tenants were under triple net leases and were responsible for real estate taxes. Once again, Mr. Whisler felt that his calculations under the band-of-investment technique supported the reasonableness of his survey-derived capitalization rate. *Whisler testimony; Pet'r Exs. 1-2, 5, 11.*

38. When Mr. Whisler capitalized Building 2's net operating income using his 10.125% rate, he arrived at a value of \$1,405,800, excluding the vault. That equates to \$107.53 per square foot. *Whisler testimony; Pet'r Exs. 1-2.*

c. The vault

39. The vault is a 1,500 square foot concrete room attached to Building 2. It does not generate any additional income for Building 2. In fact, if NEIPCC moves, it will have to destroy the vault to remove the linear accelerator. The vault therefore has limited value; yet the Assessor priced it at \$594,300, or more than \$300 per square foot, making it one the highest assessed properties in Allen County. Nonetheless, because of a lack of comparable sales or income data, W & S is not challenging the vault's assessment. When the vault's assessment is added to Mr. Whisler's estimate of Building 2's value under the income approach, the total is \$2,000,100, or \$136.17 per square foot. *Whisler testimony; Pet'r Exs. 1-2.*

2. The sales-comparison approach

40. Mr. Whisler pointed to what he characterized as comparable properties from Fort Wayne that sold between January 1, 2008 and February 28, 2009. The average sale price was \$91.79 per square foot of building area and the median sale price was \$90.81 per square foot. *See Whisler testimony; Pet'r Ex. 6.*

3. Land value

41. To assess the subject land, the Assessor used a base rate of \$6.00 per square foot, which she adjusted with a positive 50% influence factor. The effective rate of \$9.00 per square foot is much higher than the \$4.00 and \$4.50 per square foot base rates used to assess many neighboring properties. While the subject property is located on the corner of Dupont and Auburn Roads, there is no access from either of these roads. Adjusting the subject property's land value from \$9.00 per square foot to \$4.00 per square foot would

reduce the property's assessment by \$482,200. *Whisler testimony; Resp't Ex. 4; Pet'r Ex. 7.*

42. Mr. Whisler found one land sale at \$5.21 per square foot. That property is on Dupont Road, but east of I-69. It is superior to the subject property with easier access from Dupont Road and high visibility from I-69. And it has a hotel, which is a more intense use than office space. *Whisler testimony; Pet'r Exs. 1, 7.*

4. W & S's response to Mr. Stone's valuation opinion

43. The Assessor's witness, Mr. Stone, used building permits to value Building 2. But those permits merely reflect estimates by contractors rather than actual costs. And both the developer and builder were related to W & S, so the costs were not necessarily the same as they would have been had builders and developers competitively bid on the job. Plus, permits can be duplicative; the general contractor may apply for a permit for the entire job while various subcontractors may separately apply for permits regarding their specific work. For example, when W & S hired Witwer Construction, it was assumed that Witwer would be building the shell as well as finishing both office suites. But one of the tenants ended up finishing its own suite. *See Whisler testimony; see also, Brad Sturges testimony.*
44. In performing his analysis under the income approach, the Assessor's witness, Mr. Stone used actual lease rates (Building 1) and asking rates (Building 2) rather than market rates as required by appraisal practice. And he used a capitalization rate from a national survey rather than a rate specific to the Fort Wayne market. Plus, while Mr. Stone included a deduction for replacement reserves for Building 2, he did not do so for Building 1. Mr. Whisler also disagreed with Mr. Stone's decision to use a vacancy rate of only 15.10%. *Whisler testimony.*
45. As to Mr. Stone's sales-comparison analysis, Mr. Whisler could not tell how Mr. Stone arrived at his numbers. Mr. Whisler believed that the property identified as Comparable

10, which Mr. Stone did not actually use in his analysis, was the most similar to the subject property. And it sold for only \$110.28 per square foot in 2011. Of the sales that Mr. Stone actually used, Comparable 8 was a 1031 exchange and Comparable 7 was a sale leaseback with the owner still occupying the space. Similarly, Comparables 15 and 16 are superior to the subject buildings because they have more lobby space and architectural amenities. *Whisler testimony; Resp't Ex. 20.*

46. Mr. Stone also relied on the transactions in which W & S bought the subject property and later sold the property on an installment contract. But W & S bought the property from Dupont Auburn, LLC, a related entity that Barry Sturges controls. And it was a 1031 transaction. Plus, when W & S bought the property, it assumed that Raymond James would continue as a tenant and pay substantial rent. For those reasons, the \$1,735,000 sale price does not reflect Building 1's market value-in-use. The installment sale is similarly invalid. The contract called for interest-only payments for the first year and the buyer defaulted after approximately six months. *Whisler testimony; Brad Sturges testimony.*

B. Summary of the Assessor's evidence and contentions

47. The subject land measures 129,156 square feet. Building 1 has been allocated 38% of the land and Building 2 has been allocated 62%. Using those allocations, Mr. Stone broke down the subject property's March 1, 2009 assessment as follows: \$896,000 for Building 1, \$2,484,400 for Building 2, and \$780,300 for the vault. Although Mr. Whisler referred to a different assessment for the vault, he neglected to account for the 1% location cost multiplier and the B+1 grade factor that the Assessor applied. *Stone testimony; see also Resp't Ex. 1.*
48. Applying the three generally accepted valuation approaches (cost, sales-comparison, and income) shows that the subject property was accurately assessed. And comparing the subject property's assessment to the assessments of similar properties shows that the assessments were fair and equitable. *Stone testimony; Resp't Ex. 1.*

1. Cost approach

49. Building 1 was built in 2000 and Building 2 was built in 2007. Because the cost approach is the most reliable value indicator for newly constructed buildings, Mr. Stone gave his conclusions under that approach significant weight in estimating Building 2's value. Mr. Stone used the cost estimates reflected in building permits because W & S did not provide any actual cost information. The permits for Building 2 total \$2,886,075, which breaks down to \$1,936,075 for the building itself and \$950,000 for the vault. The land value attributed to Building 2 is \$480,460. Thus, based on the cost approach, Building 2's total value, including the vault and Building 2's share of the land, is \$3,366,535. *Stone testimony; Resp't Exs. 1, 7.*
50. To further demonstrate the accuracy of Building 2's assessment, Mr. Stone pointed to the assessments of what he described as similar properties. For the improvements, Mr. Stone removed depreciation and added \$3.00 per square foot for sprinklers where necessary but made no adjustments for differences in wall or frame types. He also adjusted each property's land rate to \$6 per square foot. The adjusted assessments ranged from \$146.07 to \$219.17 per square foot of gross building area, with a median of \$171.83 and an average of \$180.92. While Building 2's assessment of \$189 per square foot is near the upper end of the range, it is fair. *Stone testimony: Resp't Ex's 1, 20, 23, 26, 28-30, 32-35.*
51. As to the land value allocated between the two buildings, two local appraisers came up with the land rates used to assess property in the area. Two comparable properties sold in the range of \$9.00 per square foot during the period relevant to the March 1, 2009 assessment date. One of those properties, 2850 Dupont Commerce Ct., sold for \$9.13 per square foot in 2008. That property has no access to Dupont or Auburn Roads and is in the back portion of the office park, although it is highly visible from I-69 and I-469. The subject parcel enjoys the same visibility. The sale therefore justifies the effective rate of \$6.00-per-square-foot used to assess W & S's land. *Stone testimony; Resp't Exs. 1, 37.*

2. Sales-comparison approach

52. In applying the sales-comparison approach to Building 1, Mr. Stone used three sales from Fort Wayne. The sales occurred in 2007-2008 and the sale prices ranged from \$92.77 to \$158.47 per square foot of gross building area, with a median of \$142.64 and an average of \$131.29 per square foot. Building 1 was assessed solidly within that range at \$129.18 per square foot. The sales-comparison approach therefore supports Building 1's assessment. *Stone testimony; Resp't Exs. 1, 20, 27, 33, & 34.*
53. The Assessor also offered a sales disclosure form showing that W & S bought Building 1 for \$1,735,000 in 2007. W & S then sold Building 1 to Dupont Auburn Real Estate, LLC for \$1,350,000 in 2009. And CBRE/Sturges was listing the building for sale at \$1,400,000 or for lease at \$17.00 per square foot as of November 11, 2011. In Mr. Stone's view, that sale and listing history supports his conclusions under the sales-comparison approach. *Stone testimony; Resp't Exs. 14, 16-17.*
54. For Building 2, Mr. Stone used sales of four properties that he described as similar to Building 2 in terms of use, amenities, and construction quality. Once again, the properties sold during 2007-2008 for prices ranging from \$124.32 to \$270.70 per square foot of gross building area, with a median of \$186.28 and an average of \$191.90. Building 2 was assessed within that range at \$189.42 per square foot. *Stone testimony; Resp't Exs. 1, 20, 28-29, 32, 35.*

3. Income approach

55. To determine potential gross income, Mr. Stone developed a pro forma income and expense statement. For Building 1, he used an effective lease rate of \$17.00 per square foot, which he took from the building's November 11, 2011 listing. He used \$19.20 per square foot for Building 2, which reflected the building's actual lease rates plus a prorated amount (\$5.03 per square foot) for the vault, which W & S's tenant, NEIPCC, paid to construct. Mr. Stone subtracted a vacancy rate of 15.10% for each Building,

which was what the 2009 Zacher Survey listed for Class A office buildings in Fort Wayne. He found that rate to be the most applicable to the Dupont Medical Office Park area. Mr. Stone got his leasing and management expenses and replacement reserves from national surveys. *Stone testimony; Resp't Exs. 18-18D; 19.*

56. Mr. Stone then capitalized each building's net operating income using national rates from RealtyRates.com. Because there are no surveys for the Fort Wayne area, Mr. Stone compiles national surveys for the Assessor's office. For Building 1, Mr. Stone chose 9.22%—the survey rate for suburban office buildings—to which he added a tax rate of 2.74% for a loaded capitalization rate of 11.96%. For Building 2, Mr. Stone blended the rates for suburban office buildings and medical office buildings and came up with 9.17%. His rates for both buildings were higher than some other survey-derived rates, which leads to a lower overall value. But the Assessor's office errs on the side of taxpayers. When Mr. Stone applied his chosen rates to capitalize the buildings' net incomes, he arrived at values of \$711,227 for Building 1 and \$2,113,172 for Building 2. *Stone testimony; Resp't Exs. 1, 18, 18D, 18E, 19.*
57. Ultimately, Mr. Stone used the income approach primarily as a feasibility check. For Building 1, Mr. Stone gave more weight to the sales comparison approach, while he gave more weight to the cost approach for Building 2. *Stone testimony; Resp't Exs. 1.*

4. The Assessor's response to Mr. Whisler's valuation opinion

58. Mr. Whisler is not only a certified tax representative; he is also the chief financial officer of CBRE Sturges and Sturges Development, both of which are owned by Barry Sturges, one of W & S's principals. Thus, unlike an independent appraiser, Mr. Whisler has an interest in the outcome of W & S's appeal. *Stone testimony.*
59. In any case, Mr. Whisler relied almost exclusively on the income approach in estimating the subject property's value. The Indiana Tax Court, however, has made it clear that all three generally accepted valuation approaches should be addressed. Mr. Whisler's

decision to forego the cost approach is particularly troubling given that Building 2 was built shortly before the assessment date at issue in this appeal. The Tax Court has repeatedly explained that construction costs are the best evidence for valuing a newly constructed building, and the Assessor offered evidence of Building 2's construction costs in the form of building permits. If, as W & S alleged, those permits did not reflect the actual costs, W & S could have shown what the costs actually were. Simply offering an opinion of an interested witness who is not an appraiser and who ignored a generally accepted valuation approach, however, was not enough to make a prima facie that the subject property was inaccurately assessed. Even if W & S made a prima facie case, the Assessor's own evidence shows that the property was accurately assessed. *Rogers argument.*

Discussion

A. Burden of Proof

60. Generally, a taxpayer seeking review of an assessing official's determination has the burden of proving that his property's assessment is wrong and what its correct assessment should be. *See Meridian Towers East & West v. Washington Twp. Assessor*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also, Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998). To make a prima facie case, a taxpayer must explain how each piece of evidence relates to his requested assessment. *See Indianapolis Racquet Club, Inc. v. Washington Twp. Assessor*, 802 N.E.2d 1018, 1022 (Ind. Tax Ct. 2004)("[I]t is the taxpayer's duty to walk the Indiana Board ... through every element of the analysis."). If the taxpayer makes a prima facie case, the burden shifts to the assessor to offer evidence to impeach or rebut the taxpayer's evidence. *See American United Life Ins. Co v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004); *Meridian Towers*, 805 N.E.2d at 479.
61. Effective July 1, 2011, however, the Indiana General Assembly enacted Indiana Code § 6-1.1-15-17, which has since been repealed and re-enacted as Ind. Code § Code 6-1.1-15-

17.2⁶ That statute shifts the burden to an assessor in cases where the assessment under appeal has increased by more than 5% over the previous year's assessment:

This section applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal increased the assessed value of the assessed property by more than five percent (5%) over the assessed value determined by the county assessor or township assessor (if any) for the immediately preceding assessment date for the *same property*. The county assessor or township assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal under this chapter and in any appeals taken to the Indiana Board or the Indiana Tax Court.

Ind. Code § 6-1.1-15-17.2 (emphasis added).

62. In the case at hand, the subject property's record card shows an increase of \$2,423,500, or 139%, between the March 1, 2008 and March 1, 2009 assessment dates. The parties, however, agree that the vast majority of the increase stemmed from W & S completing construction of Building 2. Indiana Code § 6-1.1-15-17.2 shifts the burden of proof to the assessor only when the assessed value of the *same property* increases more than 5%. The Board interprets the statute to mean that an increase in a parcel's assessment stemming directly from values being assigned to improvements or portions thereof that did not previously exist—and therefore had not previously been assessed—is not an increase in the assessed value “for the same property.” Because the Assessor was not assessing the same property in 2009 as she assessed in 2008, W & S retains the burden of proof.

B. Analysis

63. Indiana assesses real property on the basis of its true tax value, which the 2002 Real Property Assessment Manual defines as “the market value-in-use of a property for its current use, as reflected by the utility received by the owner or a similar user, from the property.” 2002 REAL PROPERTY ASSESSMENT MANUAL 2 (incorporated by reference at 50 IAC 2.3-1-2 (2009)). Appraisers traditionally have used three methods to determine a property's market value: the cost, sales-comparison, and income approaches. *Id.* at 3,

⁶ HEA 1009 §§ 42 and 44 (signed February 22, 2012). This was a technical correction necessitated by the fact the two different provisions had been codified under the same section number.

13-15. Indiana assessing officials generally use a mass-appraisal version of the cost approach set forth in the Real Property Assessment Guidelines for 2002 – Version A.

64. A property's market value-in-use, as determined using the Guidelines, is presumed to be accurate. *See* MANUAL at 5; *Kooshtard Property VI, LLC v. White River Twp. Assessor*, 836 N.E.2d 501, 505 (Ind. Tax Ct. 2005) *reh'g den. sub nom.*; *P/A Builders & Developers, LLC*, 842 N.E.2d 899 (Ind. Tax Ct. 2006). But a taxpayer may rebut that presumption with evidence that is consistent with the Manual's definition of true tax value. MANUAL at 5. A market-value-in-use appraisal prepared according to the Uniform Standards of Professional Appraisal Practice often will be probative. *Kooshtard Property VI*, 836 N.E.2d at 506 n.6. A taxpayer may also offer actual construction costs, sales information for the subject or comparable properties, and any other information compiled according to generally accepted appraisal principles. MANUAL at 5.
65. Regardless of the method used to rebut an assessment's presumed accuracy, a party must explain how its evidence relates to the appealed property's market value-in-use as of the relevant valuation date. *See O'Donnell v. Dep't of Local Gov't Fin.*, 854 N.E.2d 90, 95 (Ind. Tax Ct. 2006); *see also, Long v. Wayne Twp. Assessor*, 821 NE2d 466, 471 (Ind. Tax Ct 2005). Otherwise, the evidence lacks probative value. *Id.* For March 1, 2009 assessments, the valuation date was January 1, 2008. 50 IAC 21-3-3 (2009).

1. W & S's case

66. W & S offered information about the subject and other properties as well as market surveys regarding rent, vacancy rates, and capitalization rates for office buildings. Of course, that raw information does not, by itself, translate into any particular value or range of values. To that end, W & S also offered a valuation opinion from its certified tax representative, Mr. Whisler.

a. Mr. Whisler's sales- and assessment-comparison analyses

67. The Board turns first to Mr. Whisler's analyses based on the sales and assessments of nearby properties. For sales data to be probative, the sold properties must be sufficiently comparable to the property under appeal. Conclusory statements that a property is "similar" or "comparable" to another property do not suffice. *See Long*, 821 N.E.2d at 470. Instead, one must identify the characteristics of the property under appeal and explain how those characteristics compare to the characteristics of the sold properties. *Id.* at 471. Similarly, one must explain how any differences between the sold properties and the property under appeal affect the properties' relative market values-in-use. *Id.*
68. Mr. Whisler did little to compare the other properties in his analysis to the subject property other than to make some very basic comments on capitalization rates and, in one instance, on the property's location. And he did nothing to adjust the properties' sale prices to account for relevant ways in which they differed from the subject property. Instead, Mr. Whisler simply computed a median and average sale price. Mr. Whisler did not show that his cursory methodology complied with generally accepted appraisal principles, and the Board therefore gives his conclusions under the sales-comparison approach little or no weight.
69. Mr. Whisler also pointed to the land assessments for various nearby properties. Although the Assessor argued that a taxpayer cannot prove a property's market value-in-use through comparable properties' assessments, the Indiana General Assembly has said otherwise. Effective July 1, 2012, the Indiana General Assembly enacted Ind. Code § 6-1.1-15-18, which allows parties to offer evidence of how comparable properties were assessed in order to determine the market value-in-use for a property under appeal:
- (a) This section applies to an appeal to which this chapter applies, including any review by the board of tax review or the tax court.
 - (b) This section applies to any proceeding pending or commenced after June 30, 2012.
 - (c) To accurately determine market-value-in-use, a taxpayer or an assessing official may:

(1) in a proceeding concerning residential property, introduce evidence of the assessments of comparable properties located in the same taxing district or within two (2) miles of a boundary of the taxing district; and
(2) in a proceeding concerning property that is not residential property, introduce evidence of the assessments of any relevant, comparable property.

However, in a proceeding described in subdivision (2), preference shall be given to comparable properties that are located in the same taxing district or within two (2) miles of a boundary of the taxing district. The determination of whether properties are comparable shall be made using generally accepted appraisal and assessment practices.

I.C. § 6-1.1-15-18.

70. The subject property was divided into primary and secondary commercial land. The primary land was assessed at \$6.00 per square foot with a 50% influence factor, while the secondary land was assessed at \$0.75 per square foot. W & S offered property record cards for 11 properties, all from what appears to be the same assessment neighborhood as the subject property. Those properties were assessed using various base rates ranging from \$4.00 per square foot to \$8.00 per square foot. The most common rate was \$4.00 per square foot, which was used for five of the properties.
71. Mr. Whisler's analysis of other properties' land assessments suffers from the same problems as his sales-comparison analysis. Without a more-detailed comparison of relevant features such as access, visibility, and topography, the raw assessment data has little probative weight.

b. Mr. Whisler's analysis under the income approach

72. Mr. Whisler, however, ultimately relied on the income approach to estimate the subject property's market value-in-use at \$2,948,600. That approach calls for taking the net income that a property is expected to earn and discounting that income to present value using a capitalization rate that reflects things such as "apparent risk, market attitudes toward future inflation, the prospective rates of return for alternative investments, the rates of return earned by comparable properties in the past, the supply of and demand for

mortgage funds, and the availability of tax shelters.” *Lacy Diversified Industries, Ltd. v. Dep’t of Local Gov’t Fin.*, 799 N.E.2d 1215, 1224 (Ind. Tax Ct. 2003) (quoting AM. INST. OF REAL ESTATE APPRAISERS, *THE APPRAISAL OF REAL ESTATE*, 417 (10th ed. 1992)).

73. Mr. Whisler used Building 2’s actual leases to estimate the building’s potential gross income. But he did not do much to test those leases against the market, other than to point to the slightly higher full-service-lease rates from the 2009 Zacher survey. For Building 1, however, Mr. Whisler used rates for Class B office buildings published in the 2011 Zacher survey. That is problematic for two reasons. First, Mr. Whisler used data from 2011, which is three years removed from the relevant January 1, 2008 valuation date. Second, as Mr. Stone pointed out, CBRE/Sturges, an entity owned, in part, by one of W & S’s principals, described Building 1 as a Class A building in a published listing. And the 2009 Zacher survey shows higher rent for Class A suburban office buildings than for Class B buildings. While Mr. Whisler dismissed the listing’s description of Building 1 as salesmanship and asserted that Building 1 does not have the same architectural amenities as a Class A building, that listing casts at least some doubt on the reliability of Mr. Whisler’s rent estimate.
74. Mr. Whisler’s treatment of Building 1’s expenses also raises concerns about the reliability of his valuation opinion. He simply asserted that \$4.00 per square foot is typical for full-service leases. When pressed for support, Mr. Whisler pointed to his 30 years of experience in dealing with commercial properties and to a RealtyRate.com survey. Mr. Whisler, however, acknowledged that the RealtyRates.com expenses include property taxes, which he could not include as operating expenses in his analysis because he loaded his capitalization rate with an effective tax rate.
75. Mr. Whisler did not do much more to support his choice of capitalization rates. For each building, he used the midpoint of a range from a published survey of Indianapolis properties and adjusted that midpoint by 1% to account for the difference between the Indianapolis and Fort Wayne markets. Mr. Whisler did not support his 1% adjustment beyond claiming that Indianapolis is a better market than Fort Wayne and that the

PTABOA and Assessor previously had endorsed his methodology. The Assessor, however, actively contested Mr. Whisler's methodology at the Board's hearing, and what the PTABOA has done in other cases is irrelevant. While Mr. Whisler ostensibly checked his adjusted survey-derived rate using the band-of-investment technique, his calculation contained similarly unsupported assumptions. Most importantly, he assumed a required return on equity of 12% without giving any explanation for that choice.

76. Thus, Mr. Whisler offered a fairly conclusory valuation opinion in which he gave little support for some of his key assumptions beyond pointing to the facts that he is a certified level II assessor-appraiser and that he has 30 years of experience in commercial real estate. Mr. Whisler's training and experience are certainly relevant. But they are not a substitute for more objective support, especially where that type of support should be readily available.
77. Plus, as the Assessor noted, Mr. Whisler is employed by an entity in which Barry Sturges—one of W & S's principals—has a significant interest. In a vacuum that connection arguably might be too attenuated to show that Mr. Whisler has an interest in the outcome of W & S's appeal. But Mr. Whisler and Brad Sturges both highlighted the connections between Barry Sturges's various entities and W & S in arguing that the sale from Dupont Auburn, LLC to W & S and the construction permits for Building 2 were invalid as indicators of the subject property's market value. Thus, while the Board does not give too much weight to Mr. Whisler's apparent interest in outcome of W & S's appeal, his relative lack of independence is at least relevant.
78. That being said, the Assessor's own witness and deputy, Mr. Stone, admitted that the income approach was a valid methodology for estimating the subject property's value. And when he applied that approach, he came to an overall value \$2,824,399 (\$711,227 for Building 1 and \$2,113,172 for Building 2). That is \$1,336,301 less than the subject property's assessment and \$124,201 less than Mr. Whisler's valuation opinion. Notably, Mr. Stone's estimate includes the vault, to which he attributed rent of \$5.03 per square foot in selecting Building 2's pro forma lease rate. The Board cannot ignore Mr. Stone's

conclusions, which ultimately support Mr. Whisler's otherwise shaky valuation opinion. Under those circumstances, the Board finds that Mr. Whisler's opinion is enough to make a prima facie case.

2. The Assessor's case

79. Mr. Stone, however, ultimately gave less weight to his conclusions under the income approach than he did to his conclusions under the cost and sales-comparison approaches. And the Assessor contends that those approaches are better evidence of the subject property's market value-in-use.
80. The Board agrees that for a newly constructed building, such as Building 2, the cost approach may be relevant. But Mr. Stone used building permits to support his analysis. And those permits do little to describe the work that was involved. Indeed, Mr. Whisler and Brad Sturges persuasively explained why those permits, which at best are simply estimates for the cost of proposed work that may or may not have been completed, are unreliable indicators of the building's actual construction costs. Of course, W & S did not offer invoices or other evidence to show what W & S and its tenants ultimately paid to construct Building 2. Had the permits been more detailed, W & S's failure to contradict them with evidence of actual expenditures arguably might lead to a different conclusion. As things stand, though, the permits have little probative value.
81. Mr. Stone's sales- and assessment-comparison analyses are unpersuasive for much the same reasons that the Board explained in addressing with Mr. Whisler's analyses under those same approaches. Mr. Stone made at least some effort to compare the properties in his analyses to the subject property in terms of their uses, relative ages, and construction quality. But he did little to adjust the purportedly comparable properties' assessments for relevant ways in which they differed from Building 2 other than eliminating depreciation, adding a cost for sprinklers, and adjusting land rates to \$6.00 per square foot. And Mr. Stone did not adjust his sale prices at all, opting instead to simply calculate average and

median prices. Mr. Stone therefore failed to show that his analyses complied with generally accepted appraisal or assessment practices.

82. Finally, Mr. Stone pointed to two sales involving portions of the subject property—one from January 8, 2007, where W & S bought the subject land and Building 1 from Dupont Auburn, LLC for \$1,735,000, and another from April 1, 2009, where Dupont Auburn Real Estate, LLC bought Building 1 (and presumably only a portion of the subject property's land) on contract. Mr. Stone also pointed to a listing from 2011 where W & S advertised Building 1 for sale at \$1,400,000.
83. The listing was from November, 2011, more than three years after the January 1, 2008 valuation date at issue in this appeal. Yet Mr. Stone did not attempt to explain how that list price related to the subject property's market value-in-use as of January 1, 2008. For that reason alone, the listing lacks probative value. Regardless, a property's list price, by itself, does little to show the property's market value-in-use. Where a property has been marketed in a commercially reasonable manner and has failed to sell, one may infer that the property is worth no more than the price at which it was listed. Without more, however, the list price does little to show the property's actual market value—the property could be worth any amount less than its list price. Thus, while the listing at issue might tend to show that Building 1 was worth no more than \$1,400,000 (at least as of 2011), it does little to rebut Mr. Whisler's estimate that the building was worth \$948,500.
84. Like the listing, the contract sale to Dupont Auburn Real Estate, LLC occurred more than a year after the relevant January 1, 2008 valuation date. Once again, Mr. Stone did not explain how the sale price related to Building 1's market value-in-use as of that valuation date. In any case, W & S financed the sale through an installment contract. Thus, Mr. Stone needed to at least examine whether it was necessary to adjust the sale price. He did not do so.

85. The transaction in which W & S bought the subject property from Dupont Auburn, LLC occurred in April 2007, less than a year before the January 1, 2008 valuation date. Mr. Whisler, however, testified that the seller was controlled by Barry Sturges and therefore was a related party. He also testified that the sale was a “1031 transaction,” although he did not attempt to explain what that type of transaction entails or how it disqualified the sale as a valid indicator of the property’s market value-in-use. In any event, the sale predated Building 2. Thus, it cannot be used to value the subject property as a whole. Of course, the sale might still be relevant to valuing Building 1. But even then, one would need to abstract the portion of the total sale price that was attributable to Building 1 and its share of the land. Mr. Stone did not attempt to do that, although he elsewhere attributed 38% of the subject land’s assessment to Building 1. Given all the circumstances, the sale carries little probative value.

3. The Board’s conclusions

86. Thus, the Board is left to weigh Mr. Whisler’s valuation opinion, which is fairly conclusory but which is supported by Mr. Stone’s own analysis under the income approach, against the rest of the Assessor’s valuation evidence. As explained above, Mr. Stone’s sales-comparison analysis is even more conclusory than Mr. Whisler’s valuation opinion, and Mr. Stone based his cost-approach analysis solely on vague construction permits. Similarly, the Assessor’s sales and listing information has little probative value for a variety of reasons. Ultimately, the Board gives more weight to Mr. Whisler’s valuation opinion, if only barely.

SUMMARY OF FINAL DETERMINATION

87. Based on Mr. Whisler’s opinion, as supported by Mr. Stone’s conclusions under the income approach, W & S proved that the subject property was over assessed and that its true tax value was \$2,948,600. The property’s March 1, 2009 assessment must therefore be changed to \$2,948,600.

The Indiana Board of Tax Review issues this Final Determination of the above captioned matter on the date written above.

Chairman, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

IMPORTANT NOTICE

- APPEAL RIGHTS -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5, as amended effective July 1, 2007, by P.L. 219-2007, and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice. The Indiana Tax Court Rules are available on the Internet at <<http://www.in.gov/judiciary/rules/tax/index.html>>. The Indiana Code is available on the Internet at <<http://www.in.gov/legislative/ic/code>>. P.L. 219-2007 (SEA 287) is available on the Internet at <<http://www.in.gov/legislative/bills/2007/SE/SE0287.1.html>>.