BEFORE THE COOK COUNTY BOARD OF REVIEW

IN RE:	**)**	
	)	
Motions of 5005 West Touhy Building, et al.,	**)**	
Taxpayer	**)**	**2010 Overvaluation**
PINS: 10-33-201-020-0000	**)**	**Complaint No. 218177**
10-33-201-021-0000	**)**	
Niles Township	**)**	
Hearing Date – April 9, 2010	**)**	

I.
BACKGROUND

For the first time in over twenty-five years, the Board took the extraordinary step of summoning the Cook County Assessor pursuant to the Illinois Property Tax Code to address the matters of serious concern raised in this case. 35 Ill. Comp. Stat. 200/16-10 (2010).[1] This hearing comes against the backdrop of the detailed ten page written request from the Board of Review to the County Assessor (*Letter from Scott Guetzow, Chief Deputy Commissioner, Cook County Board of Review to James Houlihan, Cook County Assessor, January 12, 2010),* pursuant to 35 ILCS 200/16-5 and 16-8 to explain the reasons for the dramatic increases in market values across the County in 2009 and to disclose the specific market data upon which they were based. The fifteen page reply from the Assessor is generally unresponsive to the valuation, appraisal, and market data inquiries which were made by the Board of Review (*Letter from James Houlihan, Cook County Assessor, to Scott Guetzow, Chief Deputy Commissioner, Board of Review, February 26, 2010*).

On April 9, 2008, Assessor Jim Houlihan proposed to change the levels by which Cook County properties are assessed. *See Press Release, Cook County Assessor Jim Houlihan, Cook County Assessor Jim Houlihan Proposes Changes in the Classification Ordinance* (April 9, 2008) (on file with Author). At the time of his proposal, residential properties were assessed at 16% of the market value and commercial and industrial properties were assessed at 38% and 36% of market value, respectively. In addition, the Assessor proposed to change the level of assessment for residential properties to 10% of market value and to change the levels of assessment for commercial and industrial property to 25% of market value. (Hereinafter "10/25 Ordinance"). At the time, Assessor Houlihan said, **"There is a certain disconnect with a property's market value in relationship to property taxes and this change will bring transparency and allow for even more accountability and fairness in the property tax system."** *Id*. Moreover, Assessor Houlihan argued, **"This change will cement the relationship between the assessment and market value."** *Id*. Most importantly, the Assessor said that the change in assessment levels **"will give taxpayers the ability to review their assessments and**

[1] *See Motion of Sheldon Stern,* Docket 155955 (2003) for legal authority. (The last time this Board summoned the Assessor was in 1982 concerning golf course valuations which applied a 55% pro-ration factor to debase the land unit pricing assessment ratio from 40% to 22%).

determine if it clearly reflects the correct market value for their properties." *Id*. On September 17, 2008 the Cook County Board of Commissioners approved Assessor Jim Houlihan's proposal.

Between May 17, 2009 and February 23, 2010, the Assessor mailed a new 2009 assessment notice to every Cook County property owner. The new 2009 assessment notice listed the 2008 and 2009 assessed values, but did not contain the 2008 or 2009 market values. By way of implementation of the ordinance, the Assessor increased the market values on nearly two-thirds of all property in Cook County that were not scheduled to be revalued in 2009 under the triennial system. The Assessor's 2009 market value increases typically range from 30% to 50% more than the market values established by the Assessor in 2008.

Changing the ordinance levels of assessment is nothing new in Cook County. Historically, the Assessor has successfully lobbied the County Board of Commissioners numerous times to change levels of assessment prior to the 10/25 Ordinance discussed herein. For example, the level of assessment for apartments with seven or more units has decreased incrementally over several years with the stated purpose of keeping affordable rental housing in the City. However, the Assessor took a markedly different approach than he did in the past when implementing the 10/25 Ordinance. The apparent departure in practice is evident in two respects: (1) Prior to 2009, the Assessor typically maintained the market value of the property while reducing the assessment by the new level. Conversely, in 2009, the assessment remained the same or was adjusted by a factor, but the market value was increased dramatically; and (2) Prior to 2009, the notices of assessment for properties impacted by a change in level of assessment included both the prior level of assessment and the new level of assessment allowing taxpayers to calculate the new market value.

Regarding the matter at hand, on January 5, 2010, attorney Gordon Millner timely filed property tax appeals on behalf of numerous properties. Each of these properties realized an increase in market value in 2009 from the prior year. On March 17, 2010, Attorney Millner amended his original motion and alleged that the Assessor's market value increases on his properties were void generally for the following reasons: (1) the Assessor's notice did not fully inform the taxpayer of the market value increase; (2) the Assessor did not afford the taxpayer an avenue to appeal; and (3) the Assessor had no basis to support non-triennial increases of the market value on each of the taxpayer's properties. On April 9, 2010, the Board of Review held a hearing during which the taxpayer argued these issues and the Cook County Assessor testified in response.

II.
ANALYSIS

Notice

In this case, the taxpayer argues that the Assessor did not give adequate notice of an increase in market value. Notice is a prerequisite to the protection of taxpayer rights. "[I]n order to determine if his assessment is disproportionate or excessive, he must be able to compare his assessment with other taxpayers." *People v. Holmes*, 98 Ill.App.2d 11, 17 (1968), quoted in

Andrews, 71 Ill.2d at 21, 22. However, Illinois law demands very little in terms of notice from the Cook County Assessor. The Property tax code requires that the Cook County Assessor give written notice of any increase in an assessment. 35 ILCS 200/12-55 (a). The law further mandates that the Cook County Assessor tell the taxpayer the reason for the increase in assessment. 35 ILCS 200 16-8(b). Finally, the notice of assessment must provide an avenue for the taxpayer to challenge the change in assessment. "Due Process requires that the property owner be given notice and an opportunity to be heard upon the valuation of his property at some point in the tax process before his liability to pay the tax becomes conclusively established. " *Anst v. Lake County*, 147 Ill. App. 3d 243 (2nd Dist. 1986). In sum, the Cook County Assessor must inform a taxpayer of an increase in assessment, the reason for the increase, and afford the taxpayer an opportunity to appeal.

In this case the Cook County Assessor met the minimum notice requirements of The Property Tax Code. First, the Assessor mailed each taxpayer a letter indicating a change in assessment. The information mailed by the Assessor lists the property index number, property location, 2008 assessed valuation and new 2009 assessed valuation. Additionally, the Assessor's notice states:

> Recently, changes were made to a county ordinance in order to adjust the assessment levels used to calculate assessed values in 2009… Please note that this new assessment level does not necessarily result in a lower assessment for your property in 2009. Information regarding the proposed 2009 assessment of the property and additional assessment information from the previous year are available at our Web site, www.cookcountyassessor.com

Finally, the Assessor's notice provides the taxpayer with information necessary to appeal the assessment and states the appeal deadline.

Here, the taxpayer claims, "The Assessor has used an incomplete, if not misleading notice which he claims is a notice; yet his letter fails to advise or inform that the restatement of a 2008 assessment is, in effect, an increase in a property's 2009 market value." The Assessor's notice does not state the increase in market value for each property. In fact, his notice makes no mention of market value at all.

Appellant argues that the omission of an increase in market value from the notice, especially when there is a corresponding decrease in assessment, will undoubtedly mislead some taxpayers into believing that the Assessor recognized a decrease in the value of their property. The ultimate question, however, is whether the law requires the Cook County Assessor to give this type of market value information to taxpayers. The simple answer is no. In fact, the Cook County Assessor is specifically exempt from giving this information. The law demands that every other Assessor in the state give this information. Specifically, The Property Tax Code requires Assessors in counties with a population of 3,000,000 or less to include the fair market value in their notice to taxpayers. 35 ILCS 200 12/30. The legislature included this language in counties of 3,000,000 or less to protect taxpayers from hidden increases in market value. Unfortunately for Cook County taxpayers, the legislature did not give them similar protections. In this case, the Cook County Assessor complied with the notice requirement as it pertains to

him albeit a departure from his past practice and incongruent with his stated outcome touting transparency.

In this case, the taxpayer concedes that there is no direct, precise or specific statutory requirement that the assessment notice *must* contain the "fair cash value" for the property (Hearing Tr. at pp. 20-21, 23-24, 33, 35, 37, 38-39, 55). Instead, the taxpayer maintains that given the context of the notice, the accompanying press releases, and the inclusion of only assessed valuations (which remain the same for all commercial properties for 2008 and 2009), the notice is misleading, deceptive and unfair (Hearing Tr. at pp. 35, 40, 51, 53, 55, 56, 99). When asked whether he would be "providing any material on the issue of notice of the adequacy of a notice," the Assessor replied, "We were not intending to provide any material" but would rely on the State's Attorney opinion (Hearing Tr. at p. 62). The Assessor testified that "their market value increasing significantly is not the most important thing that the notice is communicating" (Hearing Tr. at pp. 82-83). Further, when asked by the Board whether the presence of a "market value" on the notice would have made the notice "more understandable or less understandable", he replied: "I think that's something you are going to have to determine" (Hearing Tr. at p. 84). Since the legislature specifically excluded the Cook County Assessor from this type of notice, the taxpayer's argument that the Assessor's notice was misleading because it failed to include this information cannot stand. Additionally, by virtue of having filed the 2009 appeal to the Board of Review and presenting the current motion, the movant was on notice of the change in market value from 2008 to 2009. Clearly, the Assessor's notice in this case would have been more transparent, open and honest if it included the 2009 and prior 2008 market values for the property or, at least, an explanation of the mathematical formula the Assessor used to determine market value. However, the law does not require that the Cook County Assessor give this information.

Taxpayer's Right to Be Heard

The taxpayer also argues that the Assessor denied the taxpayer's opportunity to be heard. Where personal and property rights are involved, due process requires "some kind of [a] hearing" *Board of Regents v. Roth*, 409 U.S. 564, 569-570 (1972). It "contemplates a listening to facts and evidence for the sake of adjudication" and suggests that one would "give audience to" and "determine an issue of fact" based upon argument and evidence. *Goodfriend v. Board of Appeals*, 18 Ill.App.3d 412 at 424 (1st Dist. 1973).

The Assessor's Office has a process to offer such an exchange of ideas that was available in this case. Further, the taxpayer's receipt of the Assessor's final determination, his subsequent appeal to the Board of Review, and his oral hearing with the Board of Review in the presence of the Cook County Assessor clearly demonstrate that the taxpayer was given "an opportunity to be heard upon the valuation of his property at some point in the taxing process before his liability to pay the tax becomes conclusively established." *Anest v. Lake County*, 147 Ill. App 3d 243 (2nd Dist. 1986). citing *Dietman v. Hunter,* 5 Ill.2d 486, 489 (1955).

Valuation of Taxpayer's Property

Finally, the taxpayer argues that there is no justification for the market value increase on each of his properties. We analyze this claim like we do every other appeal at the Cook County Board of Review on the merits of the individual case. With regard to 5005 West Touhy Building, we find that the extent to which the Assessor raised the market value is unwarranted. Based on the evidence submitted by the taxpayer the market value should be reduced accordingly.

The Assessor's market value evidence was considered, but fails in a number of respects. First and foremost, the Assessor's evidence states that it is not verified, not warranted, and **should not be construed to be an appraisal or an estimate of value**. The memorandum and data tendered do not disclose the Assessor's process in arriving at the market value for the subject property nor does it allege to include the sales or rental comparables relied upon in establishing his initial value. Reliance on "a formula, not explained, and not shown to have any relation to market value" is not permitted. *People ex rel. Rhodes v. Turk*, 391 Ill. 424, 426 (1945). The memorandum is dated and/or created on April 7, 2010, substantially after the Assessor issued the value for the subject property. The evidence appears to be an assemblage of mostly retrospective sales attempting to support the Assessor's market value. The sales include two transactions from 2003 (six years before the lien date), one transaction from 2005 (four years before the lien date), and one transaction in 2010 after the lien date. The Assessor's memorandum specifically states that, "These sales have not been adjusted for market conditions: time, location, age, size, land to building ratio, parking, zoning and other related factors", which ultimately begs the question how are they comparable. Ultimately, the Assessor's evidence provides insufficient support for the value it assigned to the subject property.

III.
CONCLUSION

The Board of Review finds that the Appellant had notice of the change in market value as evidenced by the appeal and motion at issue. This notwithstanding, the Board of Review finds that the Assessor's 2009 notices of assessment meet the bare minimum requirements of the law. The notices employed by the Assessor in 2009 however are not as meaningful, transparent, informative, clear, and intelligible as they could have been to fairly and completely place all taxpayers on notice that the "fair cash values" of their properties had been significantly increased over the prior year. The Board of Review further finds that the extent to which the Assessor raised the market values for the property subject to this motion were unwarranted and the assessments have thereby been reduced accordingly.

ENTERED: 12/3/2010

COMMISSIONER JOSEPH BERRIOS

COMMISSIONER LARRY R. ROGERS, JR.

COMMISSIONER BRENDAN HOULIHAN

Commissioner Joseph Berrios, concurring.

I fully adopt the findings of fact and conclusions of law advanced by the opinion of Commissioners Rogers and Houlihan and therefore concur in their ultimate disposition of this matter. However, given the very serious question before us, I believe that it is beneficial that I more fully address the arguments advanced by this taxpayer.

I.
OVERVIEW

The power to "assess" property (*i.e.* "to value; to make an valuation or official estimate . . . for purpose of taxation" (*Village of Park Forest v. Cullerton*, 13 Ill.2d 575, 578 (1958)) "imposes on the assessor the duty that is correlative to a right which inheres in every person in the county: the right to be informed of the value placed on his property by the County assessor in order that he who is aggrieved may appeal to the Board." *Goodfriend v. Board of Appeals*, 18 Ill.App.3d 412, 423-424 (1st Dist. 1973). Our Supreme Court has held that taxpayer should not be put into a position in which he or she is unaware that "property is illegally assessed until it is too late to apply to the board of supervisors for relief". *People ex rel. Harding v. Bender*, 330 Ill. 446, 454 (1928). Further, the taxpayer may rely on not "doing any affirmative act and [is] not constructively charged with knowledge of an illegal assessment". *Id.* "[W]hether such increase be attempted by raising the valuation of the property already listed, or by adding other property to the list and valuing that", notice is required. *People ex rel. Johnson v. Ward*, 105 Ill. 2d 620, 625 (1883). *See also*, *People ex rel. Ohio and Mississippi Railroad Company*, 96 Ill. 411, 414 (1880) (holding that "the valuation was wrongfully doubled . . . and hence illegal"); *Glassford v. Dorsey*, 2 Ill.App. 521, 524, 526-527) (finding fraudulent an assessment made "without notice, and in a secret manner").

II.
NOTICE

For 130 years, it has been unquestionably established that, as a matter of both due process of law and statutory right, that the Assessor may not change an assessment, add buildings, or increase valuation in a non-reassessment year without notice to the taxpayer. It is that notice which triggers a right to object to the assessment. *People v. Ohio & M. R. Company*, 96 Ill. 411, 413 (1880); *People ex rel. Johnson v. Ward*, 105 Ill. 620, 625 (1883); *People v. Sheridan-Brompton & Annex Building Corporation*, 331 Ill. 495 (1928); *People ex rel. Nelson v. Jenkins*, 347 Ill. 278 (1932); *First Lien Co. v. Markle*, 31 Ill. 2d 431, 436 (1965). Absent *any* notice, the assessment would be void. The issue here is whether the 2009 notice is so incomplete, deceptive, unclear, and unintelligible—because of its failure to disclose prior and current levels of assessment and the 2009 "fair cash value" of the property—as to render it legally and factually meaningless.

A. Purpose of Notice

The statutes pertaining to "form and mode of assessments, as to tax lists . . . are,

according to the highest authority, designed for the benefit of the taxpayers and the protection of their property from sacrifice," *Lyon v. Alley*, 130 U.S. 177, 185 (1889), cited in *People v. Jennings*, 3 Ill.2d125 (1954). "[P]ublication of the assessment roll . . . is to afford the taxpayer information and an opportunity to ascertain whether the assessment is *excessive or disproportionate*." *Jennings, supra,* 3 Ill. 2d at 128, cited in *Andrews v. Foxworthy,* 71 Ill.2d 13, 20 (1978) (emphasis supplied). Notice is a prerequisite to the protection of taxpayer rights. "[I]n order to determine if his assessment is disproportionate or excessive, he must be able to compare his assessment with other taxpayers." *People v. Holmes*, 98 Ill.App.2d 11, 17 (1968), quoted in *Andrews, supra,* 71 Ill.2d at 21, 22.

B. Reasonableness of Notice

The taxpayer argues that a "reasonable person" would have no way of knowing that the "fair market value" of his or her property had, in fact, been raised *in non-triennial townships* by virtue of the 2009 notice provided (Transcript at pp. 15-16, 23, 30-31, 35, 36, 40, 51, 53, 55, 56). The Assessor's General Counsel counters that there is no "reasonable man standard" (Transcript at p. 71).

The law is clear. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice *reasonably calculated*, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) (emphasis supplied). Simply stated, "the most important criterion in the area of procedural due process is *'reasonableness'".* *Rosewell v. Chicago Title & Trust Co.,* 99 Ill. 2d 407, 414 (1984)(emphasis supplied).

The taxpayer concedes that there is no direct, precise or specific statutory requirement that the assessment notice *must* contain the "fair cash value" for the property (Transcript at pp. 20-21, 23-24, 33, 35, 37, 38-39, 55). Instead, the taxpayer maintains that given the context of the notice, the accompanying press releases, and the inclusion of only assessed valuations (which remain the same for all commercial properties for 2008 and 2009), the notice is misleading, deceptive and unfair (Transcript at pp. 35, 40, 51, 53, 55, 56, 99).

The Assessor who was summoned to the Board hearing (35 ILCS 200/16-10) found no legal deficiency in the notice. The Assessor was asked whether he would be "providing any material on the issue of . . . adequacy of notice." He replied, "We were not intending to provide any material", adding that he would rely on the State's Attorney opinion (Transcript at p. 62).

The Assessor did acknowledge that for 2009 "the entire county was reassessed" (Transcript at p. 64). He stated, "We believe the notice was sufficient and was effective. We believe that the assessment was accurate and uniform, and we believe it followed the directives of the County Board" (Transcript at p. 65).

The Assessor produced an Opinion from the Cook County State's Attorney, dated April 5, 2010. That opinion concluded that the 2009 notices met the minimum requirements of both

the Property Tax Code and constitutional due process. The State's Attorney relies, *inter alia*, on (a) decisions of the Oklahoma Supreme Court and the Federal District Court in Pennsylvania; (b) the fact the Illinois Property Tax Code requires greater specificity for notices in counties of less than three million in population than it does in Cook County (*cf.* 10 ILCS 200/ 12-30 with 12-55), (c) the observation that the 2009 notices contained more information than at issue in the *Bulk Terminals* case, and (d) the additional supplemental information available on the Assessor's website. And so, it may be that the Assessor has done the absolute bare minimum required by law to pass constitutional muster.

Yet, despite the Assessor's constant clarion call for "openness and transparency", the notice is anything but transparent. It obfuscates, misleads, and deceives. It intentionally neglects to provide the single most important fact which would most likely compel any reasonable and prudent taxpayer to seek an appeal: disclosure that his or her home had increased in "fair cash value" by approximately 30%, more or less (depending upon its location in the County) or that his or her commercial property had increased by a uniform 52% (regardless of location within the county). These were all unanticipated increases in a *non-reassessment year* in which a taxpayer normally had every reason to assume that the underlying market valuation would have remained the same. Once again, the taxpayer cannot be "constructively charged with knowledge of an illegal assessment". *Bender, supra*, 330 Ill. at 454, or as in this case an assessment that is something other than meets the eye.

It would appear to be self-evident that what is the "fair cash value" of a property is of critical importance to a taxpayer. "[T]he language authorizing revisions of assessments as shall appear 'just' contemplates making adjustments which are in harmony with *the requirements of uniformity and relation to fair cash value of property* within the class of property." *Chicago Title & Trust v. Tully*, 76 Ill.app.3d 336, 343 (lst Dist. 1979) (emphasis supplied). Further, how market value is determined and what ratio is applied to that value lie at the heart of any uniformity claim. *See Kankakee County Board of Review v. Property Tax Appeal Board*, 131 Ill.2d 1 (1989) (valuing subject property "at a certain proportion to its true value" as opposed to "the same kind of property in the same district at a substantially lesser or greater proportion of its true value").

Yet, the Assessor disagrees. He testified that "their market value increasing significantly is *not* the most important thing that the notice is communicating" (Transcript at pp. 82-83). Further when asked by the Board whether the presence of a "market value" on the notice would have made the notice "more understandable or less understandable", he replied: "I think that's something you are going to have to determine" (Transcript at p. 84). Finally, this short exchange took place at the hearing.

> "Chairman Rogers: But we have had discussions here about the need to provide more understandable notices, more information, and transparency. And is that getting at transparency more understandable notices if significant increases in market values are not readily identifiable by reviewing the notice? That's in part the argument, and I understand your answer that you have complied. Is that an issue that you wish to address?"

"Mr. Houlihan: No."

(Transcript at p. 96).

Earlier, in response to inquires whether the notice "would provide a reasonable everyday homeowner or taxpayer with notice that their market value has increased", the Assessor's General Counsel stated: "I'm advising him not to answer" (Transcript at pp. 71-73).

It is hardly uncommon for there to be a public outcry during a general re-assessment. The 2003 municipal re-assessment in Newark, New Jersey—some 40 years in the making and brought about by a combination of actions by the State Attorney General, the courts, and the city council—produced widespread dissatisfaction. *See Essex County Board of Taxation v. City of Newark*, 340 N.J.Super. 432 (App. Div. 2001); Jeffery C. Mays, "Newark Residents Protest Property Tax Revaluation", *Star- Ledger* (October 31, 2003), *http://nj.com/news/ledger/essex/index.ssf?/base/news-4/1067583118209460.xml*. Chaos reigned in Indiana as a result of protracted litigation over the past ten years which has caused a state-wide revaluation employing a different valuation technique more akin to market value than the previously cost-based system. *See Town of St. John v. Indiana State Board of Tax Commissioners*, 704 N.E.2d 1034 (Ind. 1998), and its progeny; John P. Fitzgerald, "2002 Indiana Property Tax Reassessment", *Journal of Property Valuation and Taxation* 32 (Fall 2002); Drew Rutz, "How the Case of Town of St. John v. Indiana State Board of Tax Commissioners has Impacted Property Owner's Ability to Appeal the 2002 Reassessment," (Feb. 2002), *http://wwkddk.com/newsletters/2002/feb03.pdf*. It is obvious that notices involving over 1,800,000 parcels of Cook County real estate indicating that virtually all of their "fair cash values" had been "significantly increased" (especially in all of the suburban *non-reassessment* townships) would have attracted similar public attention and dismay.

Nevertheless, given the serious national and local economic downturn in the real estate market over the past two years, it is unconscionable that the Assessor would institute such broad-based dramatic across-the-board increases in value without giving taxpayers a notice that was plain, clear, direct, and understandable. This is especially true since the implementation of the so called "10/25 Ordinance" (Cook County Ordinance 08-0-51, Chapter 74, "Taxation", Article II, Division 2, Section 74-64 (Sept. 17, 2009)) is perhaps the most significant change in the property tax system in Cook County since the advent of the "market value" concept in the late 1970s. Such an approach—to provide the barest minimum required by law, and no more - could be considered by most persons to be shockingly unfair, unjust, and an affront to one's sense of justice, decency and reasonableness. For market values to go up during economic decline is counter-intuitive.

III.
AN OPPORTUNITY TO BE HEARD

Even with proper notice, the taxpayer must be afforded the "opportunity to be heard" at some time, or at some stage, before the liability to pay a tax becomes conclusive. *Deitman v. Hunter*, 5 Ill.2d 486 (1955); *Little Sister Corporation v. Dawson*, 45 Ill. 2d 342 (1970); *Chicago Title and Trust v. Tully*, 76 Ill.App.3d 336 (1979), *cert. den.* 445 U.S. 964 (1979). Everyone has the right to a "reasonable opportunity to know what claims must be defended and what

consequences are proposed". *Department of Revenue v. Jamb Discount*, 13 Ill.app.3d 430 (1973), or in Justice Frankfurter's words: "notice of the case against him and the opportunity to meet it". *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-172 (1950). That "opportunity" must be at a meaningful time and in a meaningful manner. *Linwood v. Board of Education of the City of Peoria*, School District No, 150, 453 F.2d 163 (7th Cir. 1972).

IV.
NOTICE AND AN OPPORTUNITY TO BE HEARD ARE JURISDICTIONAL

Notice and an opportunity to be heard are jurisdictional. They *must* precede the final assessment. *Lindheimer v. Nelson*, 369 Ill. 312, 316 (1938); *People ex rel. Rea v. Nokomis Coal Co*., 308 Ill. 45, 50 (1923). Failure to afford both deprives the Assessor of the authority to increase the assessment. *M.S. Kaplan Company v. Cullerton*, 49 Ill.App.3d 374, 376-377, 378 (1977); *Exchange National Band v. Cullerton*, 20 Ill.App.3d 370 (1974); *Goodfriend v. Board of Appeals*, 18 Ill.App.3d 412, 420-421, 424 (lst Dist. 1973). "The assessor's failure to grant a hearing does not merely 'approach' a violation of the plaintiff's constitutional right of due process. Such action clearly and emphatically denies the plaintiff that right." *Exchange National Bank of Chicago v. Cullerton*, 20 Ill.app.3d 370, 373-374, 376 (lst Dist. 1974). The Chief Deputy Assessor testified that "[t]he process within the Assessor's Office [*i.e* the "opportunity to be heard"] is to provide a chance to be heard through the Taxpayer's Advocate department as well as the chief industrial commercial hearing officer" (Transcript at pp. 85-86).

V.
NATURE OF THE HEARING

The proceeding may be "informal" (*Goss v. Lopez*, 419 U.S. 565, 583-584 (1975)) and "something less" than a full evidentiary proceeding, as long as one has an opportunity to contest potentially adverse determinations (*Mathews v. Eldridge*, 424 U.S. 319, 343 (1976)). It need not be bound by all the trappings of a judicial hearing. *Pipe Trades, Inc. v. Rauch*, 2 Ill. 2d 278 (1954). The rights at stake, surrounding circumstances, and administrative burden all determine "how much process is due" (*Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)). In short, where personal and property rights are involved, due process requires "some kind of [a] hearing". *Board of Regents v. Roth*, 409 U.S. 564, 569-570 (1972). A "hearing" "contemplates a listening to facts and evidence for the sake of adjudication" and suggests that one would "give audience to" and "determine an issue of fact" based upon argument and evidence. *Goodfriend, supra*, 18 Ill.App.3d at 424.

Taxpayer's counsel filed written objections and repeatedly requested a hearing to obtain an explanation of the notice and to present argument on the legal issues raised (Transcript at pp. 37, 44, 45, 47; *see Letters to Michael Stone*, dated October 15, 2009, December 24, 2009, and February 23, 2010 and *Letter to Dan Benoit*, dated October 19, 2009, all contained in Group Exhibit J). No formal response was ever received.

There is no dispute that the taxpayer requested a hearing. The taxpayer denies that any form of a hearing ever took place (Transcript at pp. 45-47). The Chief Deputy Assessor testified that the chief industrial commercial hearing officer "did not remember talking on this specific

property, but throughout the 2009 hearing process, Mr. Millner has had numerous conversations with [him] in which [Millner] raised the issues he is talking about here" (Transcript at p. 86). At best, there appears to have been a generalized conversation about the issues raised.

On this point, *In re Application of Rosewell v. Bulk Terminals Company*, 73 Ill.App.3d 224, 228, 235 (1979), is illustrative. There, taxpayer's counsel personally met with the Chief Deputy Assessor to contest both an alleged defective notice and the actual method of assessment. While the Court concluded that the statute "does not require that any particular details be included in the notice", the disputed issues "were raised or could have been raised at any of the several meetings between" parties' attorneys and the assessor's representatives" concerning the particular property. Here, the record is far more ambiguous.

Yet, it is not for this Board to judge whether there was "enough of a conversation" on the point (*see* Transcript at pp. 86-87). The Assessor's Office has a "process" to afford such an exchange of ideas that was made available. Further, the receipt of the notice of final action implies that a ruling adverse to the taxpayer was made on the legal issues. Once again, this notice and the disposition of the taxpayer's case appear to meet the minimum legally permissible requirements to pass constitutional muster. Wide deference is given to decisions (based upon particularized experience, expertise, and informed judgment) made by an agency such as the Assessor charged with the interpretation and administration of a statute. *Bonaguro v. County Officers Electoral Board*, 158 Ill. 391, 398 (1994); *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 97-98 (1992); *Monahan v. Village of Hinsdale*, 210 Ill. App. 3d 985, 994 (1991).

VI.
THE BOARD OF REVIEW HEARING

The majority opinion at p. 1 outlines the written request from the Chief Deputy Commissioner of the Board of Review (January 12, 2010) and the Assessor's reply (February 26, 2010). In his written reply, the Assessor does argue that "the burden of proving the assessment . . . is on the objecting taxpayer. The proof must be by clear and convincing evidence." (*Kankakee County Board of Review v. Property Tax Appeal Board*, 131 Ill.2d 1, 22 (1989); *La Grange Bank # 1713 v. Du Page County Board of Review*, 79 Ill.App.3d 474, 480-481 (2nd Dist. 1979))." *Letter* (02-26-10), p. 12. This may be the standard for constitutional uniformity cases on appeal. However, market value appeals use a "preponderance of the evidence" standard. More importantly, it is clearly not applicable to adjudications by the Board of Review, as more fully discussed below.

But, assuming *arguendo* the Assessor's argument, "clear and convincing" evidence has been described as "that quantum of proof which leaves no reasonable doubt in the mind of the trier of fact (or fact finder) of the truth of the fact in issue." *Bazydlo v. Volant*, 64 Ill.2d 207, 213 (1995); *In re Estate of Weaver*, 75 Ill.App.2d 227, 229 (4th Dist. 1966). Such evidence either "leaves the mind well satisfied of the truth" and "strikes all minds as being reasonable" or "leads to but one conclusion" (*In re Estate of Ragen*, 79 Ill.App.3d 8, 13-14 (1st Dist. 1979)), because "no reasonable doubt" remains (*Galpeaux v. Orviller*, 4 Il1.2d 442, 446 (1954); *Williams v. Corcoran*, 346 Ill. 105, 106 (1931). It is indeed ironic that the Assessor would place this burden

before appellants when he has (a) failed to advise taxpayers of an increase in the market values of their properties, (b) refuses to disclose the market data upon which the 2009 values are based, (c) declines to defend these county-wide *non-triennial* re-assessments before the Board, and (d) ignores a lawful request for information made by the Board pursuant to statute. It would be implausible to assume that these new assessments "strike all minds as reasonable". In fact, a contrary assumption is more plausible: they are unreasonable and unsupportable.

VII.
VALUATIONS MUST BE MARKET-BASED

"Valuations must be the result of honest judgment and not mere will," (*State Board of Equalization v. People*, 191 Ill. 528, 538 (1901)), resting upon "readily ascertainable facts" (*People ex rel Harding v. Atwater*, 362 Ill. 546, 553 (1936)) and "recognized standards" (*People ex rel McGaughey v. Wilson*, 367 Ill. 494, 497 (1938)). Property valuation cannot be based upon "possible or imaginary uses, or probable future uses dependent upon circumstances" (*Chicago and Alton Railway Co., v. Staley*, 221 Ill. 405, 409 (1906); *Illinois Central Railroad Co. v. City of Chicago*, 169 Ill. 329, 338, 337, 339 (1897)), nor be "dependent upon vague or uncertain conditions or contingencies" (*Department of Public Works and Buildings v. Foreman State Trust and Savings Bank*, 363 Ill. 13 (1936)). In fact, 35 ILCS 200/9-155 directs the County Assessor to determine the "value of *each* property listed for taxation" (emphasis supplied). This implies the exercise of independent judgment and not a mechanical and formulaic approach.

Assessments will be set aside where either actual value was not considered or "recognized standards" of determining it were not employed. *McGaughey, supra*, 367 Ill. at 497. Values cannot be sustained where assessing officials must have "reasonably known" them to be incorrect (*People ex rel. Dale v. Chicago LS & ER Company*, 286 Ill. 576, 579-580 (1919)) or set them with a "lack of knowledge" of, or "contrary to, known value" (*see People ex rel. Joseph v. Schoenborn*, 41 Ill.2d 302, 304 (1968)). Reliance on "a formula, not explained, and not shown to have any relation to market value" is not permitted. *People ex rel. Rhodes v. Turk*, 391 Ill. 424, 426 (1945). Also, neither is the use of an improper appraisal method which fails to consider available market sales data. *See United Airlines v. Pappas*, 348 Ill.App.3d at 572-573 (1st Dist .2004); *Board of Cook County v. Property Tax Appeal Board*, 295 Ill.App.3d 242, 247-248 (lst Dist. 1999).

The Assessor has failed to defend his wholesale unprecedented county-wide non-triennial increases in market values. He refuses to provide evidence that they were not the result of an artificial inverse arithmetic formula of merely "backing into" the 2009 "10/25" ratios by imputing increased market values from the 2008 "16/36-38" ratios. A reasonable person may only conclude that the new market values are not based upon "readily ascertainable facts" or "recognized standards" of valuation. The results demonstrate a "lack of knowledge" of, or are "contrary to", known values. What is abundantly clear is that they are driven by "a formula, not explained, and not shown to be having any relation to market value". Fair and correct market values are the key to proper assessed value and a fair allocation of the burden of taxation. These new and artificially contrived 2009 market values are entitled to little, if any, deference.

VIII.
THE POWERS AND DUTIES OF THE BOARD OF REVIEW

The Property Tax Code empowers the Board to either "confirm, revise, change, correct, alter or modify"; or "order the county assessor to correct any mistake or error" in an assessment as may "appear to the board to be just". 35 ILCS 200/5-5; 5-10; 6-55; 14-10; 16-95(1); 16-95(2); 16-100; 16-110; 16-140; 16-145; 16-150; *Parker v. Kirkland*, 298 Ill.App. 340, 347-352 (1939); *People ex rel. Wangelin v. City of St. Louis*, 367 Ill. 57, 66 (1937). It has authority to make all changes and do whatever may be necessary, "which in its opinion", will "make a just assessment". *People v. St. Louis Bridge Co*., 281 Ill. 462 (1917); OPS. ATTY. GEN. (Ill.) S-991 (1975)). The Board of Review may order the Assessor to increase or decrease any assessment based upon a finding that an assessment is not correct. *People ex rel. Munson v. Morningside Heights*, 45 Ill.2d 338, 341 (1970); *People ex rel. Toman v. Olympia Fields Country Club*, 374 Ill. 101, 104 (1940); *People ex rel. Gill v. Jastromb*, 367 Ill. 348, 357-359 (1937); *Concordia Fire Insurance Co. of Milwaukee v. People ex rel. Parker*, 350 Ill. 365, 375-378 (1932); 35 ILCS 200/16-120.

The Board of Review "may act upon information coming to it from other sources or upon its own knowledge. *Earl & Wilson v. Raymond, 188 Ill. 15, 18 (1900); American Express Co. v. Raymond*, 189 Ill. 232, 233 (1901); *In re Appeal of Maplewood Coal Co.*, 213 Ill. 283, 284 (1904); *Budberg v. County of Sangamon*, 4 Ill.2d 518, 522 (1954). It may consider "information acquired by [its] investigations and may compare the value of the property in question with that of other property of the same character so as to form an honest judgment" concerning its valuation. *People ex rel. Bracher v. Millard*, 307 Ill. 556, 562 (1923). Exercising judgment, the Board may use any available sources of information and may "ascertain and determine the value in such manner by such means as [are] available". *People ex rel. Little v. St. Louis Bridge Co.*, 291 Ill. 95, 103 (1919). The Board is free to proceed on the best evidence available and disclosures made to it are considered "judicial admissions" by agency. *Concordia Fire, supra*, 350 Ill. at 374-375, 378-380). Its decision-making is not confined to the material presented to it by the taxpayer, as it is not a body of record. *People ex rel. Murphy v. Devine*, 181 Ill. 2d 522, 535 fn. 2 (1997); *White v. Board of Appeals*, 45 Ill. 2d 378, 381 (1970).

Because the Board possesses these powers of a quasi-judicial nature", its official actions are "judicial in character". *Goodfriend v. Board of Appeals*, 18 Ill.App.3d 412, 418 , 421 (1973); *Parker v. Kirkland*, 298 Ill.App. 340, 347-350, 351-353, 358-359 (1939); *People v. Atwater*, 362 Ill. 546, 549 (1936); *Jarman v. Board of Review of Schuyler County*, 345 Ill. 248, 253 (1931); *McKeown v. Moore*, 303 Ill. 448, 453 (1922).

The Board has authority over assessments. That authority derives primarily from 35 ILCS 200/16-95 pertaining to complaints that properties are over-assessed or under-assessed. (Other powers regarding "omitted properties" and "certificates of error" and "certificates of correction" are not germane to this discussion.)

Any authority claimed by an agency must be derived from its enabling statute; otherwise its exercise of power is void. *See BioMedical Laboratories, Inc. v. Trainor*, 68 Ill. 2d 540, 551

(1977); *City of Chicago v. Fair Employment Practices Commission*, 65 Ill. 2d 108, 113 (1976); *Caldwell v. Nolan*, 167 Ill. App. 3d 1057, 1062 (1st Dist. 1988); *People ex rel. Huxley v. Graber*, 405 Ill. 331, 340-344, 346-348 (1950).

At the hearing, all members of this Board expressed serious misgivings concerning the notices employed for the 2009 session by the Cook County Assessor. Their deficiencies are obvious, as are the difficulties and confusion inevitably caused by them for taxpayers. Nonetheless, the Assessor has jurisdiction over his own office as well as the interpretation and application of those portions of the Property Tax Code over which he has administrative authority. In essence, the taxpayer requests that the Board of Review improperly reach beyond its enabling statute to create an additional power for itself. *See Fox v. Interstate Assurance Company*, 84 Ill.App.3d 512, 516 (lst Dist. 1980). Despite its discomfort and dissatisfaction with completeness of the notices, the Board properly has declined to engraft upon itself an additional power over the Assessor's actions.

In a similar situation some twenty years ago, this Board determined that it was not appropriate to interject itself into a dispute concerning whether the Assessor had properly filed objections to whether certain parcels were "railroad operating property" and whether procedures followed by the Illinois Department or Revenue were correct. Instead, this Board exercised its general jurisdiction under section 16-95 to adjudicate the complaints before it pertaining to "market value" and to make factual determinations of actual use. That approach was sanctioned by the Circuit Court. *See Belt Railway and Chicago and Northwestern Railway v. Sweet*, 88 L 50466 (Circuit Court, Cook County 1988), *Village of Berkeley v. Frost et al*, 91 CH 10746 (Circuit Court, Cook County 1991), and *Ace Car Pool, Inc. v. Hynes, et al*, 91 L 51249 (Circuit Court of Cook County 1991). *See also*, Transcripts of Hearings before the Board of Appeals Involving Various Railroad Properties (May 19, 1988, June 9, 1988, and June 28, 1988). It is therefore prudent that the Board should now adopt the same posture at this time in this case. Putting aside the sufficiency of the notice, the Board has every authority to determine what is the "fair cash value" of every property which has filed an appeal.

IX.
CONCLUSION

I am compelled to conclude that the notices employed by the Cook County Assessor for the 2009 assessment barely meet the minimum requirements of the law. They are not as meaningful, transparent, informative, clear, and intelligible as they could have been. They do not fairly and completely place all taxpayers on notice that the "fair cash values" of their properties had been significantly increased in *non-triennial* years. I further find that the Assessor has offered no market-based data whatsoever to explain, support or justify these increases of "fair cash value" in *non-triennial* townships. Consequently, the Board of Review has the legal authority and the duty to fairly consider each and every case brought before it by taxpayers. That power is supported by the Illinois Property Tax Code and the decisions of the Courts of this State. Consequently, the Board must consider every case filed and issue appropriate orders adjudicating the "fair cash value" of each property brought before it as "shall appear to be just".