ATTORNEYS FOR PETITIONER:
BENJAMIN A. BLAIR
DAVID A. SUESS
DANIEL R. ROY
FAEGRE DRINKER BIDDLE & REATH LLP
Indianapolis, IN

ATTORNEYS FOR RESPONDENT:
JESSICA R. GASTINEAU
SPECIAL COUNSEL - TAX LITIGATION
ANNE C. HARRIGAN
CHIEF LITIGATION COUNSEL
OFFICE OF CORPORATION COUNSEL
Indianapolis, IN

RAYMOND J. BIEDERMAN
SEAN P. BURKE
HAMISH S. COHEN
MATTINGLY BURKE COHEN & BIEDERMAN LLP
Indianapolis, IN

IN THE INDIANA TAX COURT

CONVENTION HEADQUARTERS HOTELS, LLC,	)	
Petitioner,	)	
v.	)	Cause No. 19T-TA-00021
MARION COUNTY ASSESSOR,	)	
Respondent.	)	

ORDER ON THE PARTIES' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

FOR PUBLICATION
August 5, 2021

WENTWORTH, J.

Convention Headquarters Hotels, LLC ("Convention HQ") has filed a direct appeal challenging the 2010 assessment of its real property. The matter is currently before the Court on the parties' motions for partial summary judgment. Upon review, the Court

denies both motions.

FACTS

The following facts are not in dispute.[1] Convention HQ owns a 4.382-acre parcel of land in the central business district of Indianapolis (the "CBD"), Marion County, Indiana. (See Pet'r Pet. ¶¶ 6, 15; Resp't Ans. at 1.) On May 29, 2008, Convention HQ broke ground on the hotel that came to be known as the JW Marriott Indianapolis. (See Pet'r Pet. ¶¶ 15-16; Resp't Ans. at 1.)

In March of 2010, the hotel building was under construction and only partially-complete. (See Pet'r Pet. ¶ 18; Resp't Ans. at 1.) For purposes of the 2010 assessment, therefore, the Assessor used a "percentage complete" factor to value the partially-complete improvements (i.e., the hotel building and enclosed skyway) at $71,716,700, and he assigned an assessed value of $15,270,400 to the 4.382-acres of land. (See Pet'r Pet. ¶¶ 20-21; Resp't Ans. at 1; Pet'r Ex. 3 at 3.) Additional facts will be supplied as necessary.

PROCEDURAL HISTORY

In October of 2010, Convention HQ received notice of its 2010 assessment. (See Pet'r Pet. ¶ 20.) The following month, Convention HQ protested its assessment. (Pet'r Pet. ¶ 22; Resp't Ex. R-1 at 1.) More than six years later, after the Marion County Property Tax Assessment Board of Appeals failed to act on its protest, Convention HQ sought review with the Indiana Board of Tax Review pursuant to Indiana Code § 6-1.1-15-1(o).

[1] Convention HQ submitted a five-volume appendix that contains its designated evidence. (App. Pet'r Br. Supp. Mot. Partial Summ. J., Vols. I-V.) The Court will refer to that evidence as follows: "Pet'r Pet." (the petition for judicial review), "Resp't Ans." (the answer), "Resp't Disc. Resp." (the Assessor's written discovery responses), "Pet'r Ex. 3" (the property record cards), "Pet'r Ex. 4" (the aerial photographs), "Buckles Aff." (the affidavit of Benjamin Buckles), and "2011 Manual" (the 2011 Indiana Real Property Assessment Manual).

(See Pet'r Pet. ¶¶ 23-24; Resp't Ans. at 1.)

After approximately eleven months, the Indiana Board still had not issued its final determination. See Convention Headquarters Hotels, LLC v. Marion Cnty. Assessor (CHH I), 119 N.E.3d 245, 246-47 (Ind. Tax Ct. 2019). As a result, Convention HQ tried to transition its appeal to this Court on two separate occasions, claiming each time that the Court had the authority to hear the appeal under Indiana Code § 6-1.1-15-5(g) because the maximum time had elapsed within which the Indiana Board was required to issue its final determination. See id.; Convention Headquarters Hotels, LLC v. Marion Cnty. Assessor (CHH II), 126 N.E.3d 80, 81-82 (Ind. Tax Ct. 2019). The Court, however, determined that it could not hear either one of Convention HQ's appeals because they were prematurely filed. CHH I, 119 N.E.3d at 248-50; CHH II, 126 N.E.3d at 83-84. On June 28, 2019, after the maximum time had actually elapsed, Convention HQ initiated this appeal. See, e.g., Convention Headquarters Hotels, LLC v. Marion Cnty. Assessor (CHH III), 132 N.E.3d 77, 80 (Ind. Tax Ct. 2019) (order denying the Assessor's motion to dismiss).

In its appeal, Convention HQ has alleged that the 2010 assessment of its partially-complete hotel violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution, its civil rights pursuant to 42 U.S.C. § 1983 (the "1983 Claim"), and the Property Taxation and Equal Privileges and Immunities Clauses of the Indiana Constitution. (Pet'r Pet. ¶¶ 25-90.) Convention HQ has also alleged that its land assessment contravened Indiana's market value-in-use standard. (Pet'r Pet. ¶¶ 91-96.)

In response, the Assessor has denied that the material allegations in Convention

HQ's petition were true and has filed a counterclaim seeking to increase Convention HQ's 2010 assessment. (Resp't Ans. at 1-2.) Subsequently, the Court bifurcated the parties' claims, staying all proceedings on their valuation claims until the constitutional claims were fully resolved. (Order Dec. 3, 2019.)

On June 17, 2020, Convention HQ moved for partial summary judgment on its federal and state constitutional claims. (See Pet'r Mot. Partial Summ. J. ¶ 3.) That same day, the Assessor moved for partial summary judgment on the Indiana constitutional claims and the 1983 Claim.[2] (See Resp't Br. Supp. Mot. Partial Summ. J. ("Resp't Br.") at 4-16.) On September 10, 2020, the Court held a hearing on the parties' motions.

STANDARD OF REVIEW

The Tax Court reviews direct appeals initiated pursuant to Indiana Code § 6-1.1-15-5(g) de novo. IND. CODE § 6-1.1-15-5(g) (2021). Accordingly, the Court is not bound by either the evidence that was presented or the issues that were raised during the administrative proceedings. See CHH III, 132 N.E.3d at 81, 84.

The Court will grant a motion for summary judgment only when the designated evidence demonstrates that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." Hughley v. State, 15 N.E.3d

[2] In July of 2020, Convention HQ moved to strike a portion of the Assessor's designated evidence. (See Pet'r Reply Br. Supp. Mot. Partial Summ. J. at 2-12; Pet'r Resp. Resp't Mot. Partial Summ. J. at 4 n.2.) The Court subsequently granted Convention HQ's motion to strike in part and denied it in part. Convention Headquarters Hotels, LLC v. Marion Cnty. Assessor (CHH IV), No. 19T-TA-00021, slip. op., 2021 WL 2817408, *2-6 (Ind. Tax Ct. May 21, 2021).

1000, 1003 (Ind. 2014).

LAW AND ANALYSIS

All real property in Indiana is subject to assessment and taxation on the statutorily prescribed assessment date. See IND. CODE §§ 6-1.1-2-1, -1.5(a) (2021). This applies to all improvements to real property, including those that are only partially-complete as of the assessment date. See, e.g., Jones v. Jefferson Cnty. Assessor, 51 N.E.3d 461, 463 (Ind. Tax Ct. 2016) (finding that Indiana law required the assessment of a partially-complete residence).

The parties' counter-motions for partial summary judgment implicate five separate state and federal claims. When, as here, the Court is faced with competing motions for summary judgment, it will consider the motions separately, construing all properly asserted facts and reasonable inferences drawn from the facts in favor of the non-moving party in each instance. See Meredith v. Pence, 984 N.E.2d 1213, 1218 (Ind. 2013). Accordingly, the Court will address the parties' counter-motions in turn.

Convention HQ's Motion for Partial Summary Judgment

In its motion for partial summary judgment, Convention HQ alleges that the Assessor violated its rights to equal protection and due process guaranteed under the Fourteenth Amendment of the United States Constitution as well as its rights under the Privileges and Immunities Clause and the Property Taxation Clause of the Indiana Constitution. (Pet'r Br. Supp. Mot. Partial Summ. J. ("Pet'r Br.") at 19-53.) Central to each of its four claims is Convention HQ's assertion that from at least 2006 through 2019, the Assessor has pursued a practice, custom, or policy of selectively assessing certain partially-complete commercial buildings, including its own, while not assessing other

partially-complete commercial buildings until they were fully constructed. (See Pet'r Br. at 1, 19-20, 28, 30-38, 49-52; Hr'g Tr. at 8-9, 17-18, 36.) As support, Convention HQ designated evidence that compared the Assessor's treatment of partially-complete commercial buildings throughout Marion County during at least one assessment year from 2006 through 2019. (See, e.g., Pet'r Br. at 2-18 (citing, e.g., Pet'r Ex. 3 at 3, 7, 13-14, 18-19).)

I. Equal Protection

Convention HQ claims the Assessor treated its partially-complete hotel differently than he treated similarly situated properties, violating its rights under the Equal Protection Clause of the Fourteenth Amendment that states "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." (See Pet'r Br. at 20-33.) See also U.S. CONST. amend. XIV, § 1. This clause '"protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.'" Allegheny Pittsburg Coal Co. v. County Comm'n of Webster Cnty., W. Va., 488 U.S. 336, 345 (1989) (citation omitted). "All equal protection claims, regardless of the size of the disadvantaged class, are based on the principle that, under 'like circumstances and conditions,' people must be treated alike, unless there is a rational reason for treating them differently." LaBella Winnetka, Inc. v. Vill. of Winnetka, 628 F.3d 937, 941-42 (7th Cir. 2010) (citation omitted). Therefore, to prevail on its claim that the Assessor violated its constitutionally guaranteed right to equal treatment, Convention HQ must show that the Assessor (1) intentionally treated it differently than others similarly situated and (2) had no rational basis for the difference in that treatment. See id. at 942.

Convention HQ claims that the Assessor treated it differently than other similarly

situated taxpayers by assessing its partially-complete hotel (as well as a few other similarly situated properties), but not assessing the rest of the similarly situated properties. (See, e.g., Pet'r Br. at 28.) As the summary judgment movant, Convention HQ has the initial evidentiary burden to show there is no genuine issue of material fact that the Assessor did not assess similarly situated properties for assessment dates from 2006 through 2019. See Hughley, 15 N.E.3d at 1003 (explaining that the party moving for summary judgment bears the initial evidentiary burden to "'demonstrate [] the absence of any genuine issue of fact as to a determinative issue'") (citation omitted).

Convention HQ designated a variety of circumstantial evidence (e.g., property record cards,[3] aerial photographs, and construction data), to show the Assessor's disparate treatment. See Nichols v. State, 591 N.E.2d 134, 136 (Ind. 1992) (explaining that "circumstantial evidence immediately establishes collateral facts from which the main fact may be inferred") (citation omitted). The pages of the property record cards that it specifically designated reveal, generally in the "% Comp" column, that seven buildings in Marion County, ranging from 40% to 85% complete, were assigned assessed values between $411,200 and $80,165,500 on six separate assessment dates. (See Pet'r Br. at 3, 5-9, 11-15 (citing Pet'r Ex. 3 at 2-3, 68-71, 111, 157, 180-83, 247, 362).) See also Bambi's Roofing, Inc. v. Moriarty, 859 N.E.2d 347, 352 (Ind. Ct. App. 2006) (explaining that courts may not look beyond the specifically designated evidence in ruling on a motion for summary judgment). All the other designated property record cards that Convention

[3] Property record cards are "document[s] specially designated to record and process specified property data." REAL PROPERTY ASSESSMENT GUIDELINES FOR 2011 (incorporated by reference at 50 IND. ADMIN. CODE 2.4-1-2(c) (2011)), Bk. 2, Glossary at 18. The property record cards that Convention HQ designated as evidence contain information about sixty-two commercial properties in Marion County. (See Pet'r Br. Supp. Mot. Partial Summ. J. ("Pet'r Br.") at 2-18 (identifying each of the sixty-two properties' distinct parcel numbers).)

HQ alleged had partially-complete buildings, however, contained no indication in the "% Comp" column that the building was less than 100% complete, contained no sketches of any portion of a partially-complete building, and indicated a building value of zero.[4] (See Pet'r Br. at 2-18 (citing, e.g., Pet'r Ex. 3 at 2-3, 13-14, 18-19, 78-82, 90-91, 97-98, 191-92, 198-99, 203-04).)

Convention HQ also designated construction data that shows some partially-complete buildings had zero values on their property record cards, but then received certificates of completion within six months after the assessment date. (See, e.g., Pet'r Br. at 3, 6, 9 (citing Pet'r Ex. 3 at 13-14, 111, 191-92; Buckles Aff. at 003, 016, 030).) Convention HQ asserts that this evidence suggests that the Assessor did not assess these partially-complete buildings because they were completed for their intended purposes just a few months after the assessment date. (See, e.g., Pet'r Resp. Resp't Mot. Partial Summ. J. ("Pet'r Resp. Br.") at 24-25; Buckles Aff. at 030.)

Based on this evidence, one can reasonably infer (as Convention HQ did) that the Assessor only assessed seven partially-complete commercial buildings between 2006 and 2019, but not the other fifty-five partially-complete commercial buildings during that same period.[5] (See Hr'g Tr. at 37-43; Pet'r Resp. Br. at 21-22.) See also Prudential Ins. Co. of Am. v. Van Wey, 59 N.E.2d 721, 723 (Ind. 1945) (stating "facts may be established

[4] Some of the property record cards indicated an improvement value more than zero, but that value reflected the assessment of other pre-existing improvements, such as parking lots, utility sheds, or fences. (See, e.g., Pet'r Ex. 3 at 18-19, 33-35, 52-53.)

[5] Although Convention HQ claimed that the partially-complete buildings situated on eight parcels (i.e., Parcels 1055259, 1105814, 3023511, 7046028, 9011580, 1019816, 1071550, and 1083141) were assessed between the 2006 and 2019 tax years, the property record card for Parcel 1083141 indicates that the asphalt paving was assessed at $58,500, not the partially-complete building. (See Pet'r Br. at 3, 5-9, 13-15 (citing Pet'r Ex. 3 at 2-3, 68-71, 111, 157, 180-83, 247, 362, 417-18).)

by direct or circumstantial evidence and by inferences properly drawn from such evidence"); Hampton v. State, 961 N.E.2d 480, 489 (Ind. 2012) and State Farm Mut. Auto. Ins. Co. v. Shuman, 370 N.E.2d 941, 956 (Ind. Ct. App. 1977) (explaining that an inference, unlike conjecture, speculation, or guess, is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts). Consequently, Convention HQ's circumstantial case shifted the burden to the Assessor, as the non-movant, to designate evidence that raised a genuine issue of material fact.

The Assessor responds that Convention HQ's inference from its designated evidence does not prove he failed to assess any of the other fifty-five properties. (See, e.g., Hr'g Tr. at 73-74 (stating, for example, that as better proof, Convention HQ should have deposed someone from the Assessor's office or asked different questions during discovery), 91 (maintaining that Convention HQ "could have explained somehow that someone somewhere [did not] go and do what they should have done"); Resp't Resp. to Pet'r Br. ("Resp't Resp. Br.") at 12 (declaring that Convention HQ's evidence does not show "discrimination, much less any tradition of disfavor"), 13 (contending that "zero value assessments are specifically contemplated by Indiana law").) Moreover, the Assessor maintains that even if Convention HQ's inference from its evidence is reasonable, Convention HQ is not entitled to summary judgment because he has designated two affidavits by Jeff Hill, "a Level III Certified Assessor-Appraiser and a Commercial & Industrial Valuation Analyst, employed by the Marion County Assessor's Office[,]" that raise a genuine issue of material fact whether all the similarly situated properties were actually assessed. (See, e.g., Resp't Resp. Br. at 3-4 and Hr'g Tr. at 71 (stating that Hill's affidavits show that the properties were assessed and explaining why some were

assessed with zero-dollar values); Resp't Resp. Br. at 13 (claiming that "[a]ssessments were made[and t]ax bills were sent"); Aff. Hill ¶ 3.)

In his first affidavit, Hill averred that all sixty-two properties, including their partially-complete buildings, were assessed every year:

> The subject property and all the parcels asked about in written discovery in the above-captioned case were assessed based on their market value[s]-in-use.

(Hill Aff. ¶ 11 (emphasis added).) This averment, as well as the related averments in his second affidavit, (see Second Hill Aff. ¶¶ 13-15), albeit thin on detail, directly contradict Convention HQ's inference that the Assessor did not assess all the commercial properties' partially-complete buildings for assessment dates from 2006 through 2019.

A non-movant's self-serving affidavit may preclude summary judgment when it establishes that material facts, not merely the legal issues, are in dispute. See AM Gen. LLC v. Armour, 46 N.E.3d 436, 441 (Ind. 2015). Moreover, "'[s]ummary judgment should not be granted when it is necessary to weigh the evidence.'" Hughley, 15 N.E.3d at 1005 (citation omitted). The Assessor designated competent evidence in response to Convention HQ's motion for partial summary judgment; consequently, weighing it – no matter how decisively the scales may seem to tip in a particular direction – is a matter for trial, not for summary judgment. See id. at 1005-06. Therefore, the Court finds that the Assessor has raised a genuine issue of material fact for trial on the equal protection claim: namely, whether he assessed all the commercial properties' partially-complete buildings for assessment dates from 2006 through 2019.

II. Due Process

The Due Process Clause of the Fourteenth Amendment to the United States

Constitution guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV, §1. Due process has both procedural and substantive guarantees. Spencer Cnty. Assessor v. AK Steel Corp., 61 N.E.3d 406, 419 (Ind. Tax Ct. 2016), review denied. See also McIntosh v. Melroe Co., a Div. of Clark Equip. Co., 729 N.E.2d 972, 975 (Ind. 2000) (discussing the procedural and substantive due process rights).

Convention HQ asserts that the Assessor violated its substantive due process rights. (See, e.g., Pet'r Br. at 34 (arguing that the "Assessor's arbitrary and unjust treatment of [Convention HQ] violate[d] the substantive protections of the Due Process Clause"); Hr'g Tr. at 29-35 (asserting that only its substantive due process rights were violated).) "Substantive due process ensures that state action is not arbitrary or capricious regardless of the procedures used." Leone v. Comm'r, Indiana Bureau of Motor Vehicles, 933 N.E.2d 1244, 1257 (Ind. 2010) (citation omitted); AK Steel Corp., 61 N.E.3d at 420 (explaining that "[s]ubstantive due process requires that taxation not be arbitrary, oppressive, or unjust").[6] To set forth a substantive due process "claim, a party must show either that the law infringes upon a fundamental right or liberties deeply rooted in our nation's history or that the law does not bear a substantial relation to legitimate state interests." Leone, 933 N.E.2d at 1257 (citation omitted and emphasis added).

Convention HQ does not contend that the Assessor infringed on its fundamental rights, but instead, claims that the 2010 assessment of its partially-complete hotel was

[6] In the context of taxation, substantive due process has not protected against erroneous tax assessments or required error-free public administration. Garwood v. State, 77 N.E.3d 204, 222 (Ind. Ct. App. 2017), aff'd in part, vacated in part, 84 N.E.3d 624 (Ind. 2017). See also Lee v. City of Chicago, 330 F.3d 456, 467 (7th Cir. 2003) (stating that "substantive due process is not 'a blanket protection against unjustifiable interferences with property'") (citation omitted).

arbitrary and unreasonable and was not substantially related to a legitimate state interest. (Pet'r Br. at 34-35; Hr'g Tr. at 30.) As the movant, therefore, Convention HQ again must initially show that there is no genuine issue of material fact that the Assessor's action was arbitrary, unreasonable, and not substantially related to a legitimate state interest. See Hughley, 15 N.E.3d at 1003.

To support its assertion that its 2010 assessment was arbitrary, Convention HQ has relied on the same designated evidence that the Court discussed in examining Convention HQ's equal protection claim. (See, e.g., Pet'r Br. at 1-18, 33-37.) Tying this evidence to its substantive due process claim, Convention HQ explains that "[t]he partially-complete properties selected for assessment vary considerably in size, use, ownership, location, and post-construction assessed value, and the partially-complete properties which were not assessed by the Assessor share common characteristics with those partially-complete properties that were assessed." (Pet'r Br. at 35.) Moreover, Convention HQ maintains that

> [t]he Assessor's selection of partially-complete properties for assessment appears [to be] based on random choice or the personal whim of the Assessor, rather than any consistent, sound rationale. At best, then, the Assessor's actions were arbitrary and irrational; at worst, the Assessor's pattern of exempting most partially-complete properties from assessment but not affording a minority of taxpayers the same treatment shows that [it] was invidiously targeted by the Assessor for discriminatory treatment.

(Pet'r Br. at 35-36.) Accordingly, whether the Assessor assessed some, but not all of the commercial properties with partially-complete buildings forms the basis of Convention HQ's substantive due process claim and, as such, is a material fact. The Court, having analyzed this same question regarding Convention HQ's equal protection claim, finds now for purposes of its substantive due process claim that this material fact is indeed genuinely

at issue and must be resolved at trial.

III. Property Taxation Clause

The Property Taxation Clause of the Indiana Constitution states that "the General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal." IND. CONST. art. X, § 1(a). Accordingly, assessment and taxation require a "uniform, equal, and just system" wherein "'each taxpayer's property wealth bears its proportion of the overall property tax burden.'" See State Bd. of Tax Comm'rs v. Town of St. John, 702 N.E.2d 1034, 1039, 40 (Ind. 1998) (citation omitted); Boehm v. Town of St. John, 675 N.E.2d 318, 327 (Ind. 1996).

With respect to this claim, Convention HQ contends that the Assessor's failure to assess the partially-complete buildings of all similarly situated taxpayers caused it to bear a disproportionate share of the property tax burden in violation of the Property Taxation Clause. (See Pet'r Br. at 37-47.) "'Uniformity and equality in tax burden do not occur unless identical property is assessed at the same tax value.'" Meridian Hills Country Club v. State Bd. of Tax Comm'rs, 512 N.E.2d 911, 914 (Ind. Tax Ct. 1987) (citation omitted). Accordingly, to prevail on this claim, Convention HQ must demonstrate that its property was "assessed and taxed on a different basis as compared to taxpayers with similar property." Indianapolis Hist. Partners v. State Bd. of Tax Comm'rs, 694 N.E.2d 1224, 1229 (Ind. Tax Ct. 1998) (footnote omitted).

Convention HQ designated evidence to show that the Assessor assessed its partially-complete hotel building at its market value-in-use, but failed to assess several other Marion County commercial properties with partially-complete buildings at all on at

least one assessment date from 2006 through 2019. (See, e.g., Pet'r Br. at 1-18, 37-47.) Nonetheless, as explained in examining the equal protection claim, reasonable, conflicting inferences may be drawn from Convention HQ's designated evidence regarding whether the similarly situated properties actually were assessed. Accordingly, the Court finds that Convention HQ has not demonstrated that there is no genuine issue of material fact that the Assessor failed to assess all similarly situated properties within his jurisdiction for assessment dates from 2006 through 2019.

IV. Equal Privileges and Immunities Clause

Convention HQ finally claims that the Assessor has violated its protections under the Indiana Constitution's Privileges and Immunities Clause, which states that "[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." (Pet'r Br. at 47-53.) IND. CONST. art. 1, § 23. To prevail on its claim under this provision, Convention HQ must show that (1) the disparate treatment is reasonably related to inherent characteristics that distinguish the unequally treated classes, and (2) the preferential treatment is uniformly applicable and equally available to all persons similarly situated. See Paul Stieler Enters., Inc. v. City of Evansville, 2 N.E.3d 1269, 1273 (Ind. 2014) (citation omitted); J&J Vending v. Indiana Dep't of State Revenue, 673 N.E.2d 1203, 1207-08 (Ind. Tax Ct. 1996). These requirements "'govern not only state statutes, but also the enactments and actions of county, municipal, and other governmental agencies and their equivalents.'" Paul Stieler Enters., 2 N.E.3d at 1273 (citation omitted). Accordingly, the assessment of Convention HQ's property is decisive conduct by the Assessor that is sufficient state action to which the constitutional guarantee of equal

privileges applies. See, e.g., Palin v. Indiana State Pers. Dep't, 698 N.E.2d 347, 353-54 (Ind. Ct. App. 1998).

Convention HQ has alleged, for all its claims under its motion for partial summary judgment, that its designated evidence demonstrates the Assessor's disparate treatment of it by assessing its property, but not assessing the property of other similarly situated taxpayers. (See, e.g., Pet'r Br. at 1-53.) Nevertheless, as the Court has found for each of its other constitutional claims, there is a real dispute about whether Convention HQ's property was assessed and other similarly situated properties were not. Accordingly, without definitive disparate treatment, it is premature for the Court to consider whether there are inherent differences between Convention HQ's property and other similarly situated properties or whether preferential treatment is uniformly applicable and equally available to all those similarly situated. Consequently, the Court finds that Convention HQ has not demonstrated the absence of a genuine issue of material fact with this claim either. Therefore, the Court turns to the Assessor's motion for partial summary judgment.

The Assessor's Motion for Partial Summary Judgment

The Assessor's counter-motion claims that there is no genuine issue of material fact, and as the movant, he is entitled to judgment as a matter of law on three of the six claims Convention HQ raised in its petition for judicial review. (See, e.g., Resp't Br. at 4-16.) Specifically, the Assessor contends that he is entitled to summary judgment on Convention HQ's two Indiana constitutional claims under the Property Taxation Clause and the Equal Privileges and Immunities Clause and its federal 1983 Claim. (See, e.g., Resp't Br. at 5-16.)

I. Indiana Constitutional Claims

In his counter-motion, the Assessor asserts that he is entitled to summary judgment on both of Convention HQ's Indiana constitutional claims because there is no genuine issue of material fact and, as a matter of law, "[t]here is no civil damage remedy available under the Indiana Constitution to give rise to claims beyond [the exclusive] statutory remed[y]" for appealing a property's market value-in-use assessment. (See Resp't Br. at 5-6 (citation omitted); Resp't Reply to Pet'r Resp. ("Resp't Reply Br.") at 4.) As a result, the Assessor urges the Court to reject Convention HQ's attempt to bypass the principle that each tax year stands alone, and to recoup "every penny it paid on the taxes of its [hotel] in 2010, by arguing its assessed value should be zero based only on constitutional arguments." (Resp't Br. at 6-7.)

The Assessor's entire argument hinges on his allegation that Convention HQ's constitutional claims are nothing more than run-of-the-mill market value-in-use assessment challenges in disguise. (See, e.g., Hr'g Tr. at 55-60.) The Assessor, however, has misconstrued Convention HQ's claims. As previously explained, the common thread to all of Convention HQ's claims is its contention that the Assessor has not regularly assessed Marion County commercial properties with partially-complete buildings since the 2006 general reassessment. Thus, the resolution of Convention HQ's Indiana constitutional claims, as well as its federal constitutional claims, does not depend on the market value-in-use of each similarly situated property or a finding that the assessment of each similarly situated property is correct. Rather, the resolution of Convention HQ's claims primarily depends on whether all the commercial properties' partially-complete buildings were assessed in the first instance.

Convention HQ has met all the requirements for initiating its direct appeal in the Tax Court pursuant to Indiana Code § 6-1.1-15-5(g). See CHH I, 119 N.E.3d at 247-50; CHH II, 126 N.E.3d at 82-84; CHH III, 132 N.E.2d at 80-84. See also, e.g., State Bd. of Tax Comm'rs v. Montgomery, 730 N.E.2d 680, 686 (Ind. 2000) (explaining that even those taxpayers who raise pure constitutional claims must first exhaust the administrative procedures and remedies established by the Legislature before appealing to the Tax Court); IND. CODE § 6-1.1-15-1.1(a)(6) (2021) (providing that an appeal brought under this section "may raise any claim of an error related to the . . . legality or constitutionality of a property tax or assessment"). Moreover, Convention HQ's petition unequivocally provides that it seeks declaratory and equitable relief, not civil damages. (See Pet'r Pet. at 14 (stating Convention HQ's prayer for relief).) See also, e.g., IND. CODE § 6-1.1-26-1.1 (2021) (providing that "[w]ith regard to a taxpayer filing an appeal under IC 6-1.1-15[-5,] the notice of appeal shall be treated as a claim for refund by the taxpayer filed as of the date of the final disposition of an appeal by . . . a court"). Contrary to the Assessor's claims, therefore, Convention HQ is not limited to challenging its 2010 assessment on the basis of its property's market value-in-use, and it has not attempted to bypass the principle that each tax year stands alone in raising its constitutional claims. Therefore, the Assessor has not shown that he is entitled to summary judgment as a matter of law on Convention HQ's two Indiana constitutional claims.

II. 1983 Claim

42 U.S.C. § 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]" 42 U.S.C. § 1983. In his counter-motion, the Assessor claims that he is entitled to judgment as a matter of law on Convention HQ's 1983 Claim because: 1) it was not timely filed, 2) he has absolute immunity, and 3) Convention HQ failed to meet the federal pleading requirements for bringing the 1983 Claim.[7] (See Resp't Reply Br. at 2; Resp't Br. at 10-16.)

A. Timely Filed

Nearly two years ago, the Assessor moved to dismiss Convention HQ's 1983 Claim on the basis that it was time-barred. See CHH III, 132 N.E.3d at 80-83. In that proceeding, the Assessor argued that because the 1983 Claim accrued when Convention HQ received its Form 11 on October 13, 2010, it should have been filed no later than October 13, 2012, consistent with the applicable two-year statute of limitations. See id. at 81-82. The Court rejected the Assessor's arguments stating that he did not persuasively dispute Convention HQ's "assertion that it did not know or have reason to know that its equal protection and due process rights were violated until it received [an] e-mail from the Assessor's office in May of 2017 that revealed new facts." Id. at 82.

Now, the Assessor endeavors to revive the issue making the following argument:

> Rather than considering and comparing all possible differences

[7] In addition, the Assessor argues that in moving for partial summary judgment, Convention HQ improperly separated the federal equal protection and substantive due process claims from its 1983 Claim. (See Hr'g Tr. at 82-84.) The Court will not address this argument because the Assessor failed to cite any supporting authority for his position. See, e.g., Crystal Flash Petroleum, LLC v. Indiana Dep't of State Revenue, 45 N.E.3d 882, 886 n.7 (Ind. Tax Ct. 2015) (indicating that the Court will not resolve an issue when its proponent fails to provide sufficient legal analysis); U.S. Fid. & Guar. Ins. Co. v. Hartson-Kennedy Cabinet Top Co., 857 N.E.2d 1033, 1038 (Ind. Ct. App. 2006) (stating that where a party presented no cogent argument to support its assertion, the assertion was waived).

> between the alleged comparable properties and the subject property that could affect value, [Convention HQ] merely lists different properties at every opportunity. Except for the Conrad, whose abatement it has asked about since March 24, 2010. Through the course of discovery, it is apparent in asking about the Conrad on March 24, 2010[,] and complaining about the Conrad in its Response Brief on July 17, 2020, [Convention HQ] knew or had reason to know about its constitutional complaints in March 2010[,] not May 2017 as it argued previously. For that reason alone, [Convention HQ's 1983 Claim] should fail for being untimely.

(Resp't Reply Br. at 2 (citations omitted).) The Assessor has offered no new evidence in his attempt to relitigate this issue, and the Court will not revisit this issue that has been previously decided. See CHH III, 132 N.E.3d at 80-83. Accordingly, as a matter of law, the Assessor is not entitled to judgment on this basis.

B. Absolute Immunity

A 1983 Claim provides a civil remedy against any person who, under the color of state law, deprives a person of any rights guaranteed by the United States Constitution. 42 U.S.C. § 1983. It is well-settled, however, that "officials acting in a judicial capacity are entitled to absolute immunity against [Section] 1983 actions, and this immunity acts as a complete shield to claims for money damages." Montero v. Travis, 171 F.3d 757, 760 (2d Cir. 1999) (citations omitted). This doctrine of judicial immunity was created to benefit the public by ensuring judges can exercise their functions with independence and without fear of consequences. Pierson v. Ray, 386 U.S. 547, 554 (1967). The same policies underlying judicial immunity similarly justify granting immunity to non-judicial officers who perform quasi-judicial functions. Cleavinger v. Saxner, 474 U.S. 193, 199-201 (1985). Nonetheless, the courts are "cautious in applying the judicial immunity doctrine to areas outside the traditional adversarial process[.]" McMillan v. Svetanoff, 793 F.2d 149, 151 (7th Cir. 1986).

The Assessor argues that the Court does not need to address Convention HQ's 1983 Claim because his act of determining the assessed value of real property is quasi-judicial, cloaking him with absolute immunity from liability in tax assessment matters. (See Resp't Br. at 10.) The Assessor explains that estimating a property's market value-in-use is quasi-judicial because county assessors must collect, analyze, and weigh the probative value of a variety of market data. (See Resp't Reply Br. at 5-6.) Consequently, the Assessor contends that the doctrine of absolute immunity must be applied in cases like this one to dissuade taxpayers from bringing these types of "vexatious and burdensome claims[.]" (See Resp't Br. at 10.) The Court does not find the Assessor's arguments persuasive.

First, "the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." Burns v. Reed, 500 U.S. 478, 486 (1991). Determining whether absolute immunity bars a Section 1983 action requires "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." Imbler v. Pachtman, 424 U.S. 409, 421 (1976). Here, the Assessor has not discussed the historical basis of immunity for county assessors; instead, he simply suggests that he is "judge-like" because he exercises some level of discretion and makes decisions that are subject to appeal when he determines the assessed value of real property. (See, e.g., Resp't Br. at 12; Hr'g Tr. at 82-83.) These bald assertions, however, are insufficient to establish that absolute immunity should be applied in this case. See Lowe's Home Ctrs., Inc. v. Monroe Cnty. Assessor, 160 N.E.3d 263, 273-74 (Ind. Tax Ct. 2020) (explaining that the onus of making cogent arguments rests with the parties, not the Court).

Second, when local governmental officials are sued for compensatory damages in their official capacities under Section 1983, the suits are in essence against their governmental employer. See Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658, 694 (1978). See also Hafer v. Melo, 502 U.S. 21, 25 (1991) and Owen v. City of Indep., Mo., 445 U.S. 622, 638 (1980) (indicating that the only immunities available to a respondent in an official-capacity action are those that the governmental entity possesses, and "there is no tradition of immunity for municipal corporations"). As a result, the defense of absolute immunity is not available to the Assessor in this instance because Convention HQ has sued the Assessor in his official capacity seeking only declaratory and equitable relief as well as attorney's fees, not compensatory damages. (See, e.g., Pet'r Pet. at 1 ¶ 2 (stating that this action is against the Assessor in his official capacity), 14 (stating Convention HQ's prayer for relief).) See also Pulliam v. Allen, 466 U.S. 522, 543-44 (1984) (explaining that judicial immunity does not bar awards of attorney's fees). Accordingly, the Assessor is not entitled to judgment as a matter of law on this basis.

C. Pleading Requirements

"[T]he touchstone of [a] § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of property rights protected by the Constitution[;] local governments, like every other § 1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." Monell, 436 U.S. at 690-91. A local government therefore may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Id. at 694. Rather, "it is when execution of a government's policy or custom,

whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Id.

The Assessor claims that he is entitled to judgment as a matter of law on the 1983 Claim because Convention HQ did not meet the Monell pleading requirements for bringing a 1983 Claim. (See, e.g., Resp't Br. at 10, 15.) The Assessor explains that to plead a viable 1983 Claim for relief under Monell, Convention HQ was required to allege in its petition that the constitutional violation was the result of:

> (1) an express policy that, when enforced, causes a constitutional deprivation;
>
> (2) a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a "custom or usage" with the force of law; or
>
> (3) an allegation that the constitutional injury was caused by a person with "final policymaking authority" [who "employed the deficient policy or custom with 'deliberate indifference.]'"

(Resp't Br. at 13 (citations omitted).) The Assessor further explains that Convention HQ's petition is deficient because it did not specifically identify the Monell element of deliberate indifference. (See Resp't Br. at 13-15.) Consequently, the Assessor argues that Convention HQ's allegations against him fail to state a claim upon which relief can be granted. (See Resp't Br. at 15-16.)

As a federal statutory provision, claims brought under § 1983 may be brought in either federal or state courts. See Love v. Rehfus, 946 N.E.2d 1, 19 n.21 (Ind. 2011) (acknowledging that state courts have concurrent jurisdiction with the federal courts to entertain § 1983 actions). Here, Convention HQ brought its 1983 Claim in an Indiana state court - the Indiana Tax Court. Federal procedural rules often differ from those

required by state courts. See, e.g., Westover Prods., Inc. v. Gateway Roofing Co., 380 S.E.2d 369, 373-74 (N.C. Ct. App. 1989) (discussing the difference in pleading requirements between certain Federal Rules of Civil Procedure and the North Carolina Rules of Civil Procedure). Consequently, while federal courts require certain pleading particularity by a litigant making a claim under § 1983, Indiana state courts merely require that the pleadings contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" See, e.g., Kuhns v. City of Allentown, 636 F.Supp.2d 418, 431 (E.D. Pa. 2009); Ind. Trial Rule 8(A)(1). Accordingly, Convention HQ's petition was not required to 1) satisfy the federal Monell pleading requirements, 2) detail the precise facts on which its 1983 Claim was based, or 3) delineate a specific legal theory of recovery to be adhered to throughout the case. See Trail v. Boys & Girls Clubs of NW Ind., 845 N.E.2d 130, 135 (Ind. 2006); Noblesville Redevelopment Comm'n v. Noblesville Assocs. Ltd. P'ship, 674 N.E.2d 558, 563 (Ind. 1996). Rather, Convention HQ's petition was required to plead the operative facts necessary to set forth an actionable claim. See Trail, 845 N.E.2d at 135.

The critical issue in evaluating whether Indiana's pleading rules have been met is whether the Assessor had sufficient notice of the 1983 Claim that has been alleged against him to be able to prepare his case. See Noblesville Redevelopment Comm'n, 674 N.E.2d at 563-64. Therefore, the allegations made in Convention HQ's petition are sufficiently plead if they put a reasonable person on notice about why Convention HQ sued. See id. at 564.

Convention HQ's petition states:

> 69. [Convention HQ] has liberty interests, property interests, and civil rights protected by the Fourteenth Amendment, including the right to

equal protection of the laws and due process of law.

70. The Assessor, in his official capacity, is a person within the meaning of 42 U.S.C. § 1983.

71. Acting under color of state law, the Assessor deprived [Convention HQ] of its constitutionally-guaranteed liberty interests, property interests, and civil rights by selectively and arbitrarily enforcing the assessment laws and regulations of Indiana against [Convention HQ] but not similarly situated property owners.

72. The Assessor maintains a policy, custom, or practice of intentionally and systematically failing to assess the substantial majority of partially-complete commercial properties and hotels in the [CBD] and Marion County, while selecting the Subject Property for assessment and taxation. The Assessor's policy, custom, or practice of intentionally and systematically failing to assess similarly situated properties is pervasive, long-standing, and on-going, dating back to at least the 2006 general reassessment and continuing to present day.

73. As a direct and proximate result of the Assessor's violation of [Convention HQ's] rights guaranteed by the Equal Protection Clause and Due Process Clause, as protected by 42 U.S.C. § 1983, [Convention HQ] has been injured.

(Pet'r Pet. ¶¶ 69-73.) In addition, the petition incorporates by reference all of its preceding paragraphs, (Pet'r Pet. ¶ 66), which in part allege:

25. Since the 2006 general reassessment, at least 53 commercial properties have been newly constructed in the [CBD]. Of those commercial properties, eight properties began construction after one assessment date and were completed before the next assessment date; the remaining 45 properties were under construction as of at least one assessment date.

26. Of those 45 commercial properties that were in fact partially[-]complete on an assessment date, only seven properties, including the Subject Property, had any building assessed as partially[-]complete during construction.

27. Excluding the Subject Property, 86.4% of partially-complete commercial properties in the [CBD] were granted de facto property tax exemptions by the Assessor, each being assessed as having no improvement value attributable to the property until after the building

had received its Certificate of Completion and Compliance.

(Pet'r Pet. ¶¶ 25-27.) The petition makes similar allegations with respect to other partially-complete commercial buildings in Marion County. (See Pet'r Pet. ¶¶ 31-33, 38-40.)

The Court finds that these allegations against the Assessor meet the notice pleading standard because they are sufficient to lead a reasonable person to conclude that the Assessor was being sued under § 1983. The Court further notes that even if the Monell pleading requirements were applicable here, those requirements have been met because the factual allegations in Convention HQ's petition are plausible, suggesting that Convention HQ is entitled to relief. See, e.g., McCauley v. City of Chicago, 671 F.3d 611, 615-16 (7th Cir. 2011) (discussing the federal "plausibility standard"). Accordingly, the Assessor is not entitled to summary judgment as a matter of law on this ground either.

CONCLUSION

In light of the disposition of the issues set forth above, the Court DENIES each party's motion for partial summary judgment. Under separate cover, the Court will schedule a case management conference with the parties to discuss the issues remaining for trial.

SO ORDERED this 5th day of August 2021.

Martha Blood Wentworth, Judge
Indiana Tax Court

Distribution:
Benjamin A. Blair, David A. Suess, Daniel R. Roy, Jessica R. Gastineau, Anne C. Harrigan, Raymond J. Biederman, Sean P. Burke, Hamish S. Cohen.