

**STATE OF INDIANA  
Board of Tax Review**

EVERGREEN/OMEGA/TURTLE CREEK LP	) On Appeal from the Elkhart County ) Board of Review
	)
Petitioner,	)
	) Petition for Review of Assessment, Form 131
v.	) Petition No. 20-025-95-1-4-00040
	) Parcel No. 25-06-07-235-001
ELKHART COUNTY BOARD OF REVIEW And CONCORD TOWNSHIP ASSESSOR	) ) )
	)
Respondents.	)

**Findings of Fact and Conclusions of Law**

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

**Issues**

1. Whether the depreciation is correct.
2. Whether functional and economic obsolescence is warranted.
3. Whether the grade and design factor is excessive.

## Findings of Fact

1. If appropriate, any finding of fact made herein shall also be considered a conclusion of law. Also, if appropriate, any conclusion of law herein shall also be considered a finding of fact.
  
2. Pursuant to Ind. Code § 6-1.1-15-3, Kropp & Associates filed a Form 131 petition on behalf of Evergreen/Omega/Turtle Creek LP (the Petitioner) requesting a review by the State Board. The Form 131 petition was filed on November 26, 1997. The Elkhart County Board of Review's Final Determination was issued on October 28, 1997.
  
3. Pursuant to Ind. Code § 6-1.1-15-4, a hearing was held on March 2, 2000 before Hearing Officer Ellen Yuhan. Testimony and exhibits were received into evidence. Paul Kropp represented the Petitioner. Cathy Searcy represented Elkhart County. Bonnie Spicher represented Concord Township.
  
4. At the hearing, the Form 131 petition with attachments was made part of the record and labeled Board Exhibit A. In addition, the following exhibits were submitted into evidence:
  - Petitioner's Exhibit 1 - property record card for a comparable nursing home in Elkhart County;
  - Petitioner's Exhibit 2 - copy of a page from 50 IAC 2.2-11-4.1, graded photographs;
  - Petitioner's Exhibits 3 to 8 - photographs of the subject property;
  - Petitioner's Exhibits 9 to 14 - photographs of the comparable nursing home;
  - Petitioner's Exhibit 15 - Licensed Beds vs. Actual Census Percentage, Chelsea Healthcare Center;
  - Petitioner's Exhibit 16 - justification for obsolescence;
  - Petitioner's Exhibit 17 - 1998 State Tax Board determination for a nursing home in Lafayette, IN;
  - Petitioner's Exhibit 18 - 1996 occupancy rates for the subject property;
  - Petitioner's Exhibit 19 - 1997 occupancy rates for the subject property;
  - Petitioner's Exhibit 20 - 1996 occupancy rate for Elkhart County;

Petitioner's Exhibit 21 - 1997 occupancy rate for Elkhart County;  
Petitioner's Exhibit 22 - income and expense statement for the period ending  
12/31/1996; and  
Petitioner's Exhibits 23 to 48 - photographs pertaining to the condition issue for a  
1998 appeal.

Respondent's Exhibit 1 - property record card for 1995; and  
Respondent's Exhibit 2 - property record card for 1998.

5. The property is a nursing home located at 1400 W. Franklin, Elkhart, IN 46516.
6. The Hearing Officer did not view the property.
7. The assessed value for 1995 is :  
Land: \$6,770 Improvements, \$322,470 Total, \$329,240.
8. Mr. Kropp testified that he was a Level II Certified Indiana Assessor-Appraiser. He is a member of the International Association of Assessing Officers (IAAO). Mr. Kropp testified that he prepared the analysis. Kropp & Associates is contracted on a one-year contingency basis, but the owner has declared bankruptcy. Mr. Kropp is the owner of Kropp & Associates.

### **Issue 1 - Depreciation**

9. Mr. Kropp testified to the following:
  - (a) The nursing home is wood joist construction and should be depreciated from the thirty-year life expectancy table.
  - (b) In 1998, the Elkhart County PTABOA determined the building was wood joist and changed the depreciation table.
  - (c) This was denied for the 1995 appeal; he is requesting the 1995 assessment be changed to agree with the 1998 assessment.
  - (d) The Concord Township Assessor, Mr. Price, verified the construction.

10. Ms. Spicher testified that she had inspected the nursing home and agreed that it was wood joist construction. The correction is shown on the Form 115 for the 1998 appeal.

## **Issue 2 - Obsolescence**

11. Mr. Kropp testified to the following:
  - (a) At the time of the 1995 Board of Review hearing Evergreen merged with GranCare and he was unable to produce occupancy records for the three previous years.
  - (b) He realizes that this is needed documentation, but he was unable to obtain the records then and they are still not available.
  - (c) Most of the documents submitted to support the request for obsolescence relate to the 1998 appeal; however, there are four months of 1995 on the report labeled as Petitioner's Ex. 18.
  - (d) The income and expense statement also includes 1995 and shows a loss for that year.
  - (e) The subject compares with another nursing home in Elkhart County, which receives 10% obsolescence.
  - (f) He will submit photographs of both properties when he presents the grade issue.
12. Ms. Searcy testified that the Board of Review voted "No change", agreeing with the township assessor.
13. Ms. Spicher stated that regarding the 1995 appeal, they had requested information for 1993 and 1994. The Petitioner was unable to obtain this. At the time it was the township's policy that they needed the prior year's information to correct the obsolescence. During the data collection inspection (September 1993) for the 1995 reassessment, it was noted that while the nursing home was licensed for 157 beds, they only had 133. The occupancy was 72% on that

date. No obsolescence is warranted.

### **Issue 3 – Grade**

14. Mr. Kropp testified to the following:
  - (a) The comparable nursing home in Osolo Township has a grade of C; the subject is graded C+1.
  - (b) The Petitioner requests a C grade.
  - (c) Regulation 17 has pictures of nursing homes (Petitioner's Exhibit 2); there is no C+1 grade illustrated in the manual.
  - (d) The photographs depicting grade were taken today.
  - (e) Petitioner's Exhibits 3-8 show the exterior of the subject property; Petitioner's Exhibits 9-14 show the comparable property in Osolo Township.
  - (f) Chelsea Manor, the subject property, is closed and has been since after the March 1, 1998 assessment date.
  
15. Ms. Searcy testified that the Board of Review determined the assessment to be correct.
  
16. Ms. Spicher testified that she could not agree with a C grade. The grade should remain at C+1.

### **Conclusions of Law**

1. The Petitioner is limited to the issues raised on the Form 130 petition filed with the County Board or issues that are raised as a result of the County Board's action on the Form 130 petition. 50 IAC 17-5-3. See also the Forms 130 and 131 petitions authorized under Ind. Code §§ 6-1.1-15-1, -2.1, and -4. In addition, Indiana courts have long recognized the principle of exhaustion of administrative remedies and have insisted that every designated administrative step of the review process be completed. *State v. Sproles*, 672 N.E. 2d 1353 (Ind. 1996); *County Board of Review of Assessments for Lake County v. Kranz* (1964), 224

Ind. 358, 66 N.E. 2d 896. Regarding the Form 130/131 process, the levels of review are clearly outlined by statute. First, the Form 130 petition is filed with the County and acted upon by the County Board. Ind. Code §§ 6-1.1-15-1 and –2.1. If the taxpayer, township assessor, or certain members of the County Board disagree with the County Board’s decision on the Form 130, then a Form 131 petition may be filed with the State. Ind. Code § 6-1.1-15-3. Form 131 petitioners who raise new issues at the State level of appeal circumvent review of the issues by the County Board and, thus, do not follow the prescribed statutory scheme required by the statutes and case law. Once an appeal is filed with the State, however, the State has the discretion to address issues not raised on the Form 131 petition. *Joyce Sportswear Co. v. State Board of Tax Commissioners*, 684 N.E. 2d 1189, 1191 (Ind. Tax 1997). In this appeal, such discretion will not be exercised and the Petitioner is limited to the issues raised on the Form 131 petition filed with the State.

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

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

3. Indiana’s real estate property tax system is a mass assessment system. Like all other mass assessment systems, issues of time and cost preclude the use of assessment-quality evidence in every case.
4. The true tax value assessed against the property is not exclusively or necessarily identical to fair market value. *State Board of Tax Commissioners v. Town of St. John*, 702 N.E. 2d 1034, 1038 (Ind. 1998)(*Town of St. John V*).
5. The Property Taxation Clause of the Indiana Constitution, Ind. Const. Art. X, § 1 (a), requires the State to create a uniform, equal, and just system of assessment. The Clause does not create a personal, substantive right of uniformity and equality and does not require absolute and precise exactitude as to the uniformity

and equality of each *individual* assessment. *Town of St. John V*, 702 N.E. 2d at 1039 – 40.

6. Individual taxpayers must have a reasonable opportunity to challenge their assessments. But the Property Taxation Clause does not mandate the consideration of whatever evidence of property wealth any given taxpayer deems relevant. *Id.* Rather, the proper inquiry in all tax appeals is “whether the system prescribed by statute and regulations was properly applied to individual assessments.” *Id.* at 1040. Only evidence relevant to this inquiry is pertinent to the State’s decision.

### **B. Burden**

7. Ind. Code § 6-1.1-15-3 requires the State to review the actions of the County Board, but does not require the State to review the initial assessment or undertake reassessment of the property. The State has the ability to decide the administrative appeal based upon the evidence presented and to limit its review to the issues the taxpayer presents. *Whitley Products, Inc. v. State Board of Tax Commissioners*, 704 N.E. 2d 1113, 1118 (Ind. Tax 1998) (citing *North Park Cinemas, Inc. v. State Board of Tax Commissioners*, 689 N.E. 2d 765, 769 (Ind. Tax 1997)).
8. In reviewing the actions of the County Board, the State is entitled to presume that its actions are correct. See 50 IAC 17-6-3. “Indeed, if administrative agencies were not entitled to presume that the actions of other administrative agencies were in accordance with Indiana law, there would be a wasteful duplication of effort in the work assigned to agencies.” *Bell v. State Board of Tax Commissioners*, 651 N.E. 2d 816, 820 (Ind. Tax 1995). The taxpayer must overcome that presumption of correctness to prevail in the appeal.
9. It is a fundamental principle of administrative law that the burden of proof is on the person petitioning the agency for relief. 2 Charles H. Koch, Jr.,

*Administrative Law and Practice*, § 5.51; 73 C.J.S. Public Administrative Law and Procedure, § 128.

10. Taxpayers are expected to make factual presentations to the State regarding alleged errors in assessment. *Whitley*, 704 N.E. 2d at 1119. These presentations should both outline the alleged errors and support the allegations with evidence. "Allegations, unsupported by factual evidence, remain mere allegations." *Id* (citing *Herb v. State Board of Tax Commissioners*, 656 N.E. 2d. 890, 893 (Ind. Tax 1995)). The State is not required to give weight to evidence that is not probative of the errors the taxpayer alleges. *Whitley*, 704 N.E. 2d at 1119 (citing *Clark v. State Board of Tax Commissioners*, 694 N.E. 2d 1230, 1239, n. 13 (Ind. Tax 1998)).
11. One manner for the taxpayer to meet its burden in the State's administrative proceedings is to: (1) identify properties that are similarly situated to the contested property, and (2) establish disparate treatment between the contested property and other similarly situated properties. *Zakutansky v. State Board of Tax Commissioners*, 691 N.E. 2d 1365, 1370 (Ind. Tax 1998). In this way, the taxpayer properly frames the inquiry as to "whether the system prescribed by statute and regulations was properly applied to individual assessments." *Town of St. John V*, 702 N.E. 2d at 1040.
12. The taxpayer is required to meet his burden of proof at the State administrative level for two reasons. First, the State is an impartial adjudicator, and relieving the taxpayer of his burden of proof would place the State in the untenable position of making the taxpayer's case for him. Second, requiring the taxpayer to meet his burden in the administrative adjudication conserves resources.
13. To meet his burden, the taxpayer must present probative evidence in order to make a prima facie case. In order to establish a prima facie case, the taxpayer must introduce evidence "sufficient to establish a given fact and which if not



contradicted will remain sufficient.” *Clark*, 694 N.E. 2d at 1233; *GTE North, Inc. v. State Board of Tax Commissioners*, 634 N.E. 2d 882, 887 (Ind. Tax 1994).

14. In the event a taxpayer sustains his burden, the burden then shifts to the local taxing officials to rebut the taxpayer’s evidence and justify its decision with substantial evidence. 2 Charles H. Koch, Jr. at §5.1; 73 C.J.S. at § 128. See *Whitley*, 704 N.E. 2d at 1119 (The substantial evidence requirement for a taxpayer challenging a State Board determination at the Tax Court level is not “triggered” if the taxpayer does not present any probative evidence concerning the error raised. Accordingly, the Tax Court will not reverse the State’s final determination merely because the taxpayer demonstrates flaws in it).

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

15. Because true tax value is not necessarily identical to market value, any tax appeal that seeks a reduction in assessed value solely because the assessed value assigned to the property does not equal the property’s market value will fail.
16. Although the Courts have declared the cost tables and certain subjective elements of the State’s regulations constitutionally infirm, the assessment and appeals process continue under the existing rules until a new property tax system is operative. *Town of St. John V*, 702 N.E. 2d at 1043; *Whitley*, 704 N.E. 2d at 1121.
17. *Town of St. John V* does not permit individuals to base individual claims about their individual properties on the equality and uniformity provisions of the Indiana Constitution. *Town of St. John*, 702 N.E. 2d at 1040.

#### **D. Witness Compensation**

18. The State's position is that it has the right to make general inquiry regarding, and to consider, the method by which a witness is compensated. Information about the witness's fee can be relevant and necessary in order to evaluate the potential partiality of the witness. A contingent fee arrangement may be considered to inherently affect the objectivity of a witness. The State believes it appropriate to consider the potential of such an arrangement to improperly motivate the witness and adversely affect the reliability of the testimony. It is for these reasons that the State will consider the method of witness compensation in the process of determining the credibility and weight to be given to testimony of a witness whose fee is contingent on the outcome of the issues that he or she is testifying about. This position is supported by the discussion in the case of *Wirth v. State Board of Tax Commissioners*, 613 N.E. 2d 874 (Ind. Tax 1993).
19. At the hearing, Mr. Kropp testified that Kropp & Associates is paid on a contingent fee basis. Mr. Kropp is the owner of Kropp & Associates.

#### **E. Issue 1 - Depreciation**

20. Both parties agreed the structure was wood joist. Since both parties have agreed, a change in the assessment is made.
21. While the State Board accepts the parties' agreement, in doing so, the State Board does not decide the propriety of this agreement, either explicitly or implicitly.

#### **F. Issue 2 - Obsolescence**

##### **1. The concept of depreciation and obsolescence**

22. Depreciation is an essential element in the cost approach to valuing property. Depreciation is the loss in value from any cause except depletion, and includes physical depreciation and functional and external (economic) obsolescence.

*International Association of Assessing Officers (IAAO) Property Assessment Valuation*, 153 & 154 (2<sup>nd</sup> ed. 1996); *Canal Square Limited Partnership v. State Board of Tax Commissioners*, 694 N.E. 2d 801, 806 (Ind. Tax 1998) (citing *Am. Inst. Of Real Estate Appraisers, The Appraisal of Real Estate* (10<sup>th</sup> ed. 1992)).

23. Depreciation is a concept in which an estimate must be predicated upon a comprehensive understanding of the nature, components, and theory of depreciation, as well as practical concepts for estimating the extent of it in improvements being valued. 50 IAC 2.2-10-7.
24. Depreciation is a market value concept and the true measure of depreciation is the effect on marketability and sales price. *IAAO Property Assessment Valuation* at 153. The definition of obsolescence in the Regulation 50 IAC 2.2-10-7 is tied to the one applied by professional appraisers under the cost approach. *Canal Square*, 694 N.E. 2d at 806. Accordingly, depreciation can be documented by using recognized appraisal techniques. *Id.*
25. Economic obsolescence depreciation is defined as “obsolescence caused by factors extraneous to the property.” 50 IAC 2.2-1-24.
26. Functional obsolescence depreciation is defined as “obsolescence caused by factors inherent in the property itself.” 50 IAC 2.2-1-29.
27. The elements of functional and economic obsolescence can be documented using recognized appraisal techniques. These standardized techniques enable a knowledgeable person to associate cause and effect to value pertaining to a specific property. *Canal Square*, 694 N.E. 2d 801.
28. There are five methods used to measure accrued depreciation, two indirect and three direct. Each has advantages and disadvantages and has a different degree of reliability. Direct methods involve measuring the depreciation of the subject property, whereas indirect methods use sales of comparables properties

and income loss from rental properties to measure depreciation. The methods are categorized as follows: Indirect methods 1) Sales comparison method and 2) capitalization of income method; Direct methods 1) economic age-life method, 2) modified economic age-life method, and 3) the observed condition (breakdown) method. IAAO Property Assessment Valuation, 155-156 (2<sup>nd</sup> ed. 1996).

## 2. Burden regarding the obsolescence claim

29. “[I]n advocating for an obsolescence adjustment, a taxpayer must first provide the State with probative evidence sufficient to establish a prima facie case as to the causes of obsolescence.” *Champlin Realty Company v. State Board of Tax Commissioners*, 745 N.E. 2d 928, 932 (Ind. Tax 2001).
30. The identification of causes of obsolescence requires more than randomly naming factors. “Rather, the taxpayer must explain how the purported causes of obsolescence cause the subject improvements to suffer losses in value.” *Champlin*, 745 N.E. 2d at 936.
31. “Without a loss of value, there can be no economic obsolescence.” *Pedcor v. State Board of Tax Commissioners*, 715 N.E. 2d 432, 438 (Ind. Tax 1999).
32. “In the commercial context, a loss of value usually represents a decrease in the improvement’s income generating ability.” *Loveless Construction v. State Board of Tax Commissioners*, 695 N.E. 2d 1045, 1047 (Ind. Tax 1998). See also *Damon Corp. v. State Board of Tax Commissioners*, 738 N.E. 2d 1108 (Ind. Tax 2000).
33. It is incumbent on the taxpayer to establish a link between the evidence and the loss of value due to obsolescence. After all, the taxpayer is the one who best knows his business and it is the taxpayer who seeks to have the assessed value of his property reduced. *Rotation Products Corp. v. Department of State Revenue*, 690 N.E. 2d 795, 798 (Ind. Tax 1998).

34. Regarding obsolescence, the petitioner has a two-prong burden of proof: (1) the petitioner has to prove that obsolescence exists, and (2) the petitioner must quantify it. *Clark v. State Board of Tax Commissioners*, 694 N.E. 2d 1230, 1233 (Ind. Tax 1998).

3. The evidence submitted

35. In support of the claim for obsolescence, the Petitioner presented documentation substantiating the vacancy rates for 1995 -1997 and Indiana Department of Health reports for 1996 and 1997 showing what the occupancy rate should be in Elkhart County. The Petitioner also submitted a 1998 State Board determination for a nursing home in Tippecanoe County and a property record card for a nursing home in Osolo Township.

4. Evaluation of the evidence

36. Occupancy rates, even if the subject's rates are lower than a documented local average, are not enough to prove or quantify obsolescence. Many other factors besides obsolescence can be responsible for low occupancy rates.
37. As stated above, obsolescence is a measure of a loss in value to the property. A loss in value cannot be measured solely by an analysis of occupancy rates. There are two recognized appraisal methods of measuring the type of external obsolescence claimed by the Petitioner: (1) capitalizing the income or rent loss attributable to the negative influence; and (2) comparing comparable sales of similar properties, some exposed to the negative influence and others not. *Property Assessment Valuation, Second Edition (International Association of Assessing Officers)* at 173.
38. The Petitioner submitted evidence that the State previously allowed the method of computing obsolescence that it has proposed. As previously stated, however, the Indiana Tax Court has ruled that recognized appraisal methods must be used

to compute obsolescence. The Petitioner's proposed method is not an accepted appraisal technique, and the State erred in previously allowing it. Administrative agencies should not be trapped in their mistakes and forced to continue their errors. See *State Board of Tax Commissioners v. Fraternal Order of Eagles, Lodge No. 255*, 521 N.E. 2d 678, 681 (Ind. Tax 1988).

39. Since the Petitioner failed to use a recognized appraisal technique to quantify its obsolescence request, it has failed to meet its burden of proof concerning this issue. Therefore, there is no change in the assessment as a result of this issue.

### **G. Issue 3 - Grade**

40. "Grade" means the classification of an improvement based on certain construction specifications and quality of materials and workmanship. 50 IAC 2.2-1-30.
41. Grade is used in the cost approach to account for the deviations from the norm or "C" grade. The quality and design of a building are the most significant variables in establishing grade.
42. Subjectivity is used in grading property. For assessing officials and taxpayers alike, however, the Manual provides indicators for establishing grade. The text of the Manual (see 50 IAC 2.2-10-3) and graded photographs (50 IAC 2.2-11-4.1) provide guides for establishing grade.
43. The Petitioner submitted photographs of the subject property and of a comparable nursing home in the same county. The Petitioner also submitted the graded photographs from 50 IAC 2.2-11-4.1 and the property record for the comparable.
44. The Township presented no evidence on this issue, but testified the grade should remain C+1.

45. The photographs show few differences in the exteriors of the two nursing homes. The photographs from 50 IAC 2.2-11-4.1, while not a determination of the actual grade of the structure shown, are indications of grade.
46. The Petitioner did present probative evidence to establish a given fact, which the local officials failed to rebut.
47. For the above reasons, the State will grant the Petitioner's request to change the grade from C+1 to C. A change is made as a result of this issue.

### **Summary of State Determinations**

#### **Issue No. 1 – Depreciation**

48. The parties agreed the nursing home is wood joist construction. The depreciation must be changed accordingly.

#### **Issue No. 2 – Obsolescence**

49. The Petitioner failed to meet his burden of proof. No change is made to the assessment as a result of this issue.

#### **Issue No. 3 – Grade**

50. The grade is changed to a C.

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

---

Chairman, Indiana Board of Tax Review