

**STATE OF INDIANA
Board of Tax Review**

FOAMEX, LP,)	On Appeal from the Elkhart County
)	Property Tax Assessment Board
Petitioner,)	of Appeals
)	
v.)	Petition for Review of Assessment, Form 131
)	Petition No. 20-012-99-1-3-00014
ELKHART COUNTY PROPERTY TAX)	Parcel No. 25-060345-1005
ASSESSMENT BOARD OF APPEALS)	
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:

Issue

1. Whether functional obsolescence depreciation is warranted.
2. Whether Petitioner may introduce additional evidence at the State hearing.

Findings of Fact

1. If appropriate, any finding of fact made herein shall also be considered a conclusion of law. Also, if appropriate, any conclusion of law made herein shall also be considered a finding of fact.

2. Pursuant to Ind. Code § 6-1.1-15-3, Mr. Anthony Sokol, on behalf of Foamex, L.P., (Petitioner) filed a Form 131 petition requesting a review by the State. The Form 131 was filed on June 24, 2000. The Elkhart County Property Tax Assessment Board of Appeals (PTABOA) issued a final determination on the underlying Form 130 on May 26, 2000. The assessment year under appeal is 1999.

3. Pursuant to Ind. Code § 6-1.1-15-4, a hearing was held on May 2, 2001 before Hearing Officer Patti Kindler. Testimony and exhibits were received into evidence. Mr. Scott Carlson of Valu Tec, represented the Petitioner. Ms. Cathy Searcy represented the Elkhart County PTABOA. Mr. Richard Schlueter, Ms. Barbara Werich, and Ms. Kristin Rowe represented Concord Township.

4. At the hearing, the subject Form 131 petition was made part of the record and labeled Board Exhibit A. The original Notice of Hearing on Petition is labeled Board Exhibit B. The hearing was scheduled for December 19, 2000, but was cancelled due to inclement weather and was rescheduled for January 2, 2001. The rescheduled Notice of Hearing on Petition is labeled Board Exhibit C. The Petitioner requested a continuance and the January hearing was rescheduled for May 2, 2001. The second rescheduled Notice of Hearing on Petition is labeled Board Exhibit D. In addition, the following items were received into evidence: Petitioner's Exhibit 1 – An Assessment analysis, containing: (a) the Petitioner's contentions, (b) definition of obsolescence, (c) obsolescence inherent in the subject property, (d) request for 10% obsolescence, (e) photographs, (d) property record card before obsolescence removed, and (f) property record card after obsolescence removed

Petitioner's Exhibit 2 – A copy of State Form 23631, Power of Attorney

Petitioner's Exhibit 3 – An aerial map of the subject property

Petitioner's Exhibit 4 - A diagram of the subject's interior

Respondent's Exhibit 1 – Elkhart PTABOA exhibits including: (a) Form 115 for the subject property, (b) Findings and Conclusions of the Elkhart County PTABOA, (c) Form 130 petition filed by the taxpayer, (d) exhibits submitted by the Petitioner to the PTABOA, (e) exhibits submitted by Concord Township to the PTABOA, and (f) evidence from the PTABOA (summaries of *Loveless v. State Board of Tax Commissioners* and *Clark v. State Board of Tax Commissioners*).

5. The property is assessed as a light manufacturing facility and is located at 603 Industrial Parkway, Elkhart, Concord Township, and Elkhart County.
6. The hearing officer did not view the property.
7. The assessed values under appeal for 1999 are:
Land: \$ 35,930 Improvements: \$ 532,430.

Whether functional obsolescence is warranted

8. Petitioner testified that the Township Assessor removed the obsolescence that was previously applied to the subject property in 1999. The removal of the obsolescence in 1999 by the Township was an inappropriate use of the assessment manual. Obsolescence is obvious due to inefficient layout, nonconforming land to building ratio, difficult loading operations, limited parking, and the lack of outside storage. *Carlson Testimony. Petitioner's Exhibit 1, page 1.*
9. Petitioner testified that obsolescence is present in the subject property due to the multiple additions to the property. It was originally designed for uses other than

the current use. A pictorial chronology of the construction over a period of time shows four major additions to the building that now manifest a degree of functional obsolescence. Photographs submitted of the exterior of the subject taken in 1971, 1974, 1977, 1981, and 1999 indicate the additions to the subject property. A floor plan of the subject property details the functional problems within the property due to numerous additions. The functional problems limit the use of the whole facility to current and future users. The property is currently at absolute maximum lot coverage, and there is literally no employee parking. *Carlson Testimony. Petitioner's Exhibit 1, pages 5-7. Petitioner's Exhibits 3 and 4.*

10. Petitioner testified that the subject property has “painted itself into a corner” with respect to alterations and future use. The building is operating under a nonconforming use relative to the M-1 manufacturing zoning district in which it exists. The M-1 zoning district mandates that maximum lot coverage for a facility be no more than sixty (60%) percent. The subject facility, with sixty-five (65%) percent lot coverage, is in excess of the zoning requirements. The limitations imposed by the M-1 district on nonconforming uses make future alterations, or curing the functional obsolescence within the subject property impossible. Thus, a curable obsolescence calculation is literally nonexistent. A review of the limitations on a nonconforming property within the M-1 zoning shows clearly that a ten (10%) percent request for obsolescence is fully appropriate and is a conservative estimate. One of the benefits of the M-1 zoning district is that it allows for outside storage of materials. Because the property is a nonconforming use that benefit is lost to Foamex. Outdoor storage is a primary motivating factor for most industrial buyers. The idea that some of the materials can be stored outside is a benefit of interest to a user or prospective purchaser. *Carlson Testimony. Petitioner's Exhibit 1, page 3.*
11. Petitioner argued that a minimum of ten (10%) percent obsolescence is inherent in the subject property. The calculations for the requested obsolescence are based on the current true tax value less ten (10%) percent. The Petitioner's

calculations are as follows: current true tax improvement value (\$1,597,300) times ninety (90%) percent equals the proposed true tax value (\$1,437,470) or, (\$1,597,300 x 90% = \$1,437,470). *Carlson Testimony. Petitioner's Exhibit 1, page 4.*

12. The Elkhart County PTABOA objected to Mr. Carlson's testimony on behalf of Petitioner because Mr. Carlson was not present at the County PTABOA hearing and did not offer testimony at the hearing. In addition, the PTABOA objected to the evidence presented by Mr. Carlson because it was not presented at the PTABOA hearing. The Petitioner's former representative, Mr. Miller from Valu Tec, failed to support the claim of substantial and quantifiable evidence, and for that reason the PTABOA ruled no change to the assessment. The majority of the evidence supplied by Mr. Miller was pertinent to environmental contamination instead of the building to land ratio. Therefore, the evidence submitted before the State is new and the PTABOA did not have the opportunity to rebut it. *Searcy Testimony. Respondent's Exhibit 1(a); Respondent's 1(d).*
13. Mr. Carlson testified that he had submitted a valid power of attorney document to the State on behalf of Valu Tec for Foamex. He has thoroughly inspected the property and has been assigned to the case for months. The former representative from Valu Tec is no longer with the company and the case has been turned over to him. *Carlson Testimony. Petitioner's Exhibit 2.*
14. Petitioner argued that the Form 118 states that any additional evidence may be presented at the State hearing if it is deemed pertinent. *Carlson Testimony.*
15. Respondent argued that the Petitioner has thirty (30) days from the PTABOA hearing to request the approval of additional evidence or testimony before the State and Valu Tech did not comply with this ruling. *Searcy Testimony.*
16. Petitioner argued that the nonconforming status of the subject and the limitations on its structural alterations make the obsolescence issues incurable and it is a

moot point to try to back in to a calculation that would arrive at ten (10%) percent. He did not believe there was a requirement that calculations be displayed to arrive at an obsolescence determination. *Carlson Testimony*.

17. Concord Township supports the PTABOA's determination in the Foamex case. *Werich Testimony*.

Conclusions of Law

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

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

A. Indiana's Property Tax System

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

B. Burden

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

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

8. In reviewing the actions of the PTABOA, the State is entitled to presume that its actions are correct. 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. Whether functional obsolescence depreciation is warranted

18. 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.¹ IAAO Property Assessment Valuation, 153 & 154 (2nd ed. 1996); *Canal Square*, 694 N.E. 2d at 806 (citing Am. Inst. Of Real Estate Appraisers, *The Appraisal of Real Estate*, 321 (10th ed. 1992)). 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.
19. 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 directly to that applied by professional appraisers under the cost approach.

¹ Depletion is the loss in value of property due to consumption of oil, gas, precious metals, and timber. IAAO Property Assessment Valuation, 153 (2nd ed. 1996).

Canal Square, 694 N.E. 2d at 806. Accordingly, depreciation can be documented by using recognized appraisal techniques. *Id.*

20. Functional obsolescence is a loss in value resulting from changes in demand, design, and technology, and can take the form of deficiency (for example, only one bedroom), the need for modernization (for example, an outdated kitchen), or superadequacy (for example, overly high ceilings. IAAO Property Assessment Valuation at 154 & 155.
21. External or economic obsolescence is the loss of value resulting from factors external to the property (for example, national economic conditions). IAAO Property Assessment Valuation at 155.
22. Under the cost approach, there are five recognized methods used to measure depreciation, including obsolescence; namely: (1) the sales comparison method, (2) the capitalization of income method, (3) the economic age-life method, (4) the modified economic age-life method, and (5) the observed condition (breakdown) method. IAAO Property Assessment Valuation at 156.
23. Regarding obsolescence, the taxpayer has two-prong burden of proof: (1) the taxpayer has to prove that obsolescence exists, and (2) the taxpayer must quantify it. *Clark v. State Board of Tax Commissioners*, 694 N.E. 2d 1230, 1233 (Ind. Tax 1998).
24. “[I]n advocating for an obsolescence adjustment, a taxpayer must first provide the State Board 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).
25. The Petitioner presented many characteristics of this property that may contribute to obsolescence, problems such as zoning restrictions, the land to building ratio, the multiple building additions, the loss of availability of outdoor

storage, and the building's interior layout. The photographs submitted corroborate much of the testimony.

26. 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.
27. "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).
28. "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).
29. The Petitioner has not shown how any of the alleged causes of obsolescence cause a loss in value. Accordingly, the Petitioner did not meet the first prong of the two-prong test. Therefore, there will be no obsolescence adjustment to the subject.
30. Even if the Petitioner had met the first prong, the Petitioner would still have to meet the second prong of the two-prong test. The second prong of the burden of proof is to quantify the amount of obsolescence. The Petitioner has fallen short of meeting this prong as well. The Petitioner suggests that 10% obsolescence is justified, but failed to submit a calculation, using a recognized appraisal technique that would show how the claimed percentage was determined.
31. More specifically, the Petitioner fails to establish a link between the evidence and a loss in value of the property. In a nutshell, the Petitioner did not employ any of the five recognized appraisal methods of quantifying obsolescence. Instead his

calculation was to deduct the 10% requested obsolescence from the true tax value of the subject property, which is not an approved method for quantifying obsolescence. *Canal Square v. State Board of Tax Commissioners*, 694 N.E. 2d 1230 (Ind. Tax Ct. 1998).

Other Conclusions

32. The Respondent objected to the testimony and evidence submitted by the Petitioner at the hearing. The Respondent claimed that the testimony and evidence had not been presented at the PTABOA hearing, and that the Petitioner did not file the evidence within 30 days of filing the appeal with the State, as required by 50 IAC 17-7-1. The State need not decide this issue in this appeal. Even if all the evidence is considered, the Petitioner failed to meet its burden.

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