

**STATE OF INDIANA  
Board of Tax Review**

GREENTREE WESTWOOD, LLC	)	On Appeal from the County Property
	)	Tax Assessment Board of Appeals
	)	
Petitioner,	)	
	)	Petition for Review of Assessment, Form 131
	)	Petition No. 03-019-01-1-3-00002
v.	)	
	)	
	)	Parcel No. 19952812102
BARTHOLOMEW COUNTY	)	
PROPERTY TAX ASSESSMENT	)	
BOARD OF APPEALS And	)	
COLUMBUS 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 economic obsolescence should be applied to the subject property.

## 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, Greentree Westwood, LLC (Greenwood) filed a petition requesting a review by the State. The Form 131 petition was filed on September 20, 2001, Duane Zishka, Uzelac & Associates, Inc. The Brown County Property Tax Assessment Board of Appeals' (PTABOA) determination was issued on August 24, 2001.
3. Pursuant to Ind. Code § 6-1.1-15-4, a hearing was held on February 12, 2001, before Hearing Officer Jennifer Bippus. Testimony and exhibits were received into evidence. Duane Zishka represented the Petitioner. Virginia Sprague, Philip Herr, and Mark Pratt were present as Witnesses. Robert Blessing represented the County. Linda Taylor and Diana Fear represented Columbus Township.
4. At the hearing, the Form 131 petition was made part of the record and labeled as Board Exhibit A. The Notice of Hearing was labeled as Board Exhibit B. The List of Witnesses and Exhibits presented by the Petitioner before the hearing is labeled at Board Exhibit C.
5. The Respondent did not present any list of witnesses or supplemental evidence prior to the hearing. Both parties are on the record consenting to waive the discovery filing deadlines.
6. At the hearing, the Petitioner submitted the following evidence:  
Petitioner's Exhibit A - A copy of a section of an article from "Assisted Living 2000" by Jim Moore.  
Petitioner's Exhibit B - A copy of an article entitled "AFLA releases 2000

'overview' " in *Advisor*.

Petitioner's Exhibit C - A copy of an article from "Assisted Living Development Monitor".

Petitioner's Exhibit D - A copy of the 1998 Market Study done for Greentree

Petitioner's Exhibit E - A copy of the present strategic market plan.

Petitioner's Exhibit F - A copy of the amount of leased units for Greentree and other assisted living facilities in the Columbus area.

Petitioner's Exhibit G - A copy of the residents and their original locality.

Petitioner's Exhibit H - A copy of the income and expense reports for Greentree.

Petitioner's Exhibit I - A copy of a competitive analysis for Greenwalt Corporation.

Petitioner's Exhibit J - A copy of a letter with the capitalization rate provided by Greenwalt Development, Inc.

Petitioner's Exhibit K - A copy of the Direct Capitalization of Income approach to Value prepared by and submitted by Mr. Zishka.

7. At the hearing, the Respondent presented the following exhibits:

Respondent's Exhibit A - A copy of 50 IAC 2.2-10-7.

Respondent's Exhibit B - A copy of 50 IAC 2.2-10-5.

Respondent's Exhibit C - A copy of the property record card for Baptist Homes & Hospital, Inc.

Respondent's Exhibit D - A copy of the property record card for Parkside Retirement Residence LLC.

Respondent's Exhibit E - A copy of the property record card for Als-Venture, Inc.

8. The subject property is an assisted living facility located at 4895 Pine Ridge Drive, Columbus, Indiana, Bartholomew County.

9. The Hearing Officer did not view the property.

10. The assessed value of the subject property as determined by the PTABOA is:

Land: \$137,300      Improvements: \$1,666,800      Total: \$1,804,100

11. Mr. Zishka testified that he is a Level I and Level II certified Assessor-Appraiser and that he is being paid on a contingency fee by GreenTree Westwood. *Zishka Testimony.*
12. The year under appeal is March 1, 2001.
13. The Petitioner testified that GreenTree opened in 1998 and has not been able to reach 50% of their occupancy as of 2001. The national trend for assisted living facilities is an occupancy rate of 93% after 18 months. After 27 months Greentree has only reached 43% occupancy. *Zishka Testimony. Petitioner's Ex.'s A,B,C,D,E,F, and G.*
14. The Petitioner testified that all of the GreenTree facilities are constructed with the same specifications and have 58 units. The market study predicted our clientele would come from a primary market with 7 mile radius, secondary market with 7-15 mile radius, and anything further away would be tertiary. The projections did not play out and 15 out of our current 25 clients come from outside the 15 mile radius. The Petitioner contends the location west of I-65 does not appear to be a wise choice and new competitors have located closer to town on the east side also competing for our clients. In various GreenTree facilities around the state, after using the norm of 18 months, the occupancy rates range from 36.81% to 50.29%. The subject property is only at an occupancy rate of 22.16%. *Philip Herr, Virginia Sprague, and Mark Pratt Testimony. Petitioner's Ex.'s D and F.*
15. Mr. Zishka submitted as evidence a Direct Capitalization of Income Approach to Value. 60% obsolescence was quantified and requested by the Petitioner. The capitalization rate used in the calculations was provided by the President of Greenwalt Development, Inc. The rate used was the same rate the company used when the seven facilities throughout the state were built. Mr. Zishka also stated that 25% obsolescence, as requested at the PTABOA hearing, would suffice. The 25% obsolescence requested is used by some counties as a rule of

thumb in placing obsolescence to under-performing properties. *Zishka Testimony, Petitioner's Ex. K.*

16. The Respondent testified that the subject property is located where there is a lot of growth going on. Obsolescence has not been given in Bartholomew County for apartments, nursing homes, etc., but it has been given to commercial and industrial buildings when warranted. *Robert Blessing, Diana Fear, and Linda Taylor Testimony. Respondent's Ex.'s A,B,C,D, & E.*

### **Conclusions of Law**

1. The Petitioner is statutorily 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. Ind. Code §§ 6-1.1-15-1, -2.1, and -4. See also the Forms 130 and 131 petitions. 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. “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. See also Ind. Code § 4-21.5-2-4(a)(10) (Though the State is exempted from the Indiana Administrative Orders & Procedures Act, it is cited for the proposition that Indiana follows the customary common law rule regarding burden).
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. The taxpayer’s burden in the State’s administrative proceedings is two-fold: (1) the taxpayer must identify properties that are similarly situated to the contested property, and (2) the taxpayer must establish disparate treatment between the contested property and other similarly situated properties. 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 even though 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 economic depreciation should be applied to the subject property.**

#### 1. Definitions and Burden

18. The subject property is not currently receiving an obsolescence adjustment. The Petitioner attempts to support a 60% obsolescence adjustment for the subject property. At the hearing before the PTABOA, the Petitioner requested a 25% obsolescence adjustment. The Petitioner stated that a 25% obsolescence adjustment would still be acceptable.

19. The Petitioner's argument is for economic, or external, obsolescence. The Petitioner made no argument, or request for functional obsolescence.
20. Economic obsolescence depreciation is defined as "obsolescence caused by factors extraneous to the property." 50 IAC 2.2-1-24. 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.
21. "Economic obsolescence may be caused by, but is not limited to, the following:
  - (A) Location of the building is inappropriate for the neighborhood.
  - (B) Inoperative or inadequate zoning ordinances or deed restrictions.
  - (C) Noncompliance with current building code requirements.
  - (D) Decreased market acceptability of the product for which the property was constructed or is currently used.
  - (E) Termination of the need of the property due to actual or probable changes in economic or social conditions.
  - (F) Hazards, such as danger from floods, toxic waste, or other special hazards."50 IAC 2.2-10-7(e)(2).
22. 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.
23. 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. *Canal Square*, 694 N.E. 2d at 806. Accordingly, depreciation can be documented by using recognized appraisal techniques. *Id.*

24. 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).
25. Regarding obsolescence, the taxpayer has a 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).
26. “There are two methods of measuring external [economic] obsolescence: (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.” *IAAO Property Assessment Valuation*, 173 (2<sup>nd</sup> ed. 1996).
27. “The capitalization of income method: capitalizes the income of subject property into an estimate of value, with site value deducted; indicated improvement value is compared with estimated cost new to provide indication of improvement value remaining.” *Id.*, 183.
28. “The sales comparison method: estimates the cost new of subject property; comparable properties are found and site values deducted; contributory improvement values remain; contributory improvement values are deducted from cost for each sale property, yielding measure of accrued depreciation; accrued depreciation figure is converted to percentage and applied to subject property.” *Id.*

## 2. Causes of obsolescence

29. “[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).
30. “Where there is no cause of obsolescence, there is not obsolescence to quantify.” *Id.*, citing *Lake County Trust v. State Board of Tax Commissioners*, 694 N.E. 2d 1253, 1257 (Ind. Tax 1998).
31. 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.
32. “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).
33. “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).
34. The Petitioner presented evidence with the vacancy factors (by the month) of the various assisted living centers owned by the company. The subject property after operating for eighteen months only had a lease amount of 22.16 units, out of a total of 60 units. The Petitioner stated that the national trend for nursing facilities is to reach an occupancy rate of 93% after eighteen months. After eighteen months the subject property reached only 37% occupancy according to the evidence provided.

35. The Petitioner presented a theory that the subject property, located west of I-65, is not as desirable as the other assisted living units east of I-65. At the time of the market study, there was only one other competitor in the Columbus area, but since that time three other competitors are now in the business and they are all east of I-65. The Petitioner contends the new bridge built in Columbus is a hazard and the elderly do not desire to travel out of town and venture west of I-65. Location appears to be the problem. The Petitioner testified that there were other assisted living communities on the other side of the bridge in Columbus. No evidence was presented on how long it took those communities to rent up. There was nothing more than speculation of the Petitioner presented that location appears to be the problem.
36. Mere speculation concerning the marketing period of the subject property does not constitute evidence that economic obsolescence depreciation exists. The Petitioner's argument for economic depreciation has therefore failed to meet the first prong of the two-prong burden articulated in *Clark*.
37. Assuming arguendo that the Petitioner identified causes of obsolescence for the subject property, the Petitioner must also quantify the amount of obsolescence sought.

### 3. Quantification of Obsolescence

38. The Petitioner prepared a quantification of the economic obsolescence requested, using the Direct Capitalization of Income Approach to Value. The Petitioner used a capitalization rate provided by the company of 9.5. This is the capitalization rate that was used when the subject property was built. The final result is 60% obsolescence requested by the Petitioner.

39. Quantifying economic depreciation using the Direct Capitalization of Income Approach is a correct methodology. However, there are flaws in the calculations used by the Petitioner.
40. First, "because the income approach relies on an accurate estimate of net operating income the property will produce, it is important to estimate accurately all expenses to be deducted from the effective gross income." *Property Assessment Valuation*, Second Edition, page 219.
41. The Current Income and Expense report does not reflect an accurate picture of the subject property. In order to arrive at net operating income before discount, recapture, and taxes, the following steps need to be taken:
1. Estimate potential gross income.
  2. Deduct for vacancy and collection loss.
  3. Add miscellaneous income to get the effective gross income.
  4. Determine operating expenses.
  5. Deduct operating expenses from the effective gross income to determine net operating income before discount, recapture, and taxes.
  6. Select the proper capitalization rate.
  7. Determine the appropriate capitalization procedure to be used.
  8. Capitalize the net operating income into an estimated property value.
- Property Assessment Valuation*, Second Edition, page 226.
42. The Petitioner strictly used the expenses listed on the income and expense report for 2001 and did not do a break down of the expenses. Further, the Petitioner did not develop operating expense ratios. "It is both necessary and desirable that ratios of expenses to income be developed." *Property Assessment Valuation*, 2<sup>nd</sup> edition.
43. Secondly, "the understanding and proper selection of capitalization rates used in the income approach are necessary if valid estimates of value are to be made. A small difference in the capitalization rate will result in estimates differing by

thousands of dollars." *Property Assessment Valuation*, Second Edition, page 233. The Petitioner presented as evidence a letter from the President of Greenwalt Development, Inc. with the capitalization rate of 9 1/2%. The letter states that this was the capitalization rate used when the subject property and seven similar facilities were built, but the letter also states that the company has "been able to achieve that rate at the majority of them." Since this is an overall rate used for several facilities and since the company cannot actually pin point the rate to the subject property and state that the rate has been achieved, it is merely a speculative rate. As stated above, any small difference in the rate will result in estimates differing by thousands of dollars.

44. Capitalization rates should never be talked about in generalities or averages. They are specific to the risk of investment, the duration of the income stream, and the shape of the income stream into the foreseeable future. Therefore, the Petitioner must submit a detailed documentation of the development of its capitalization rate, or, in the alternative, document and use the rate of return the company is receiving on its overall operations. The Petitioner did not provide evidence that the capitalization rate used was accurate. Therefore, the calculation is flawed.
45. Further, the Petitioner states he is quantifying the 60% economic obsolescence request, but is willing to accept the 25% economic obsolescence requested earlier at the PTABOA hearing. The Petitioner waives, questions his own request of 60% and is finally willing to accept 25% if it is offered.
46. Although the traditional rules of evidence are relaxed in an administrative hearing, the Petitioner remains obligated to establish a sufficient foundation to allow evaluation of the creditability of the proffered evidence. Without such foundation, the Board is under no obligation to give, and does not give, the evidence any weight.

47. The Petitioner has therefore also failed to quantify the amount of economic obsolescence depreciation sought, as required by the second prong of the two-prong burden articulated in *Clark*.
48. For all of the reasons stated above, the Petitioner failed to meet its burden in this appeal. Accordingly, there is no change to the assessment.

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 this by the Indiana Board of Tax Review this \_\_\_\_ day of \_\_\_\_\_, 2002.

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Chairman, Indiana Board of Tax Review