STATE OF INDIANA
Board of Tax Review

MILLER VILLAGE PROPERTIES CO., LLP	)	On Appeal from the Lake County Property Tax Assessment Board of Appeals
	)	
Petitioner,	)	
	)	Petition for Review of Assessment, Form 131
v.	)	Petition No. 45-004-95-1-4-00143
	)	Parcel No. 001-25-45-0266-00001
LAKE COUNTY PROPERTY TAX ASSESSMENT BOARD OF APPEALS And CALUMET 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 assessment fails to adequately recognize functional and economic obsolescence.
2. Whether the land valuation is arbitrarily assigned without consideration of relevant factors.
3. Whether the assessment violates Article 10, Section 1of the Indiana Constitution by not using market value as a measure of uniformity and equality.

4. Whether the assessment is so high as to be unconstitutionally confiscatory and patently unlawful.
5. Whether the Lake County Board's decision was arbitrary and capricious in assigning obsolescence lower than the 1989 State Board determination.

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, Timothy R. Sendak of Sendak, Rominger & Stanko filed a Form 131 petition on behalf of Miller Village Properties Co., LLP (the Petitioner) requesting a review by the State. The Form 131 petition was filed on September 3, 1999. The Lake County Property Tax Assessment Board of Appeals' (PTABOA) Final Determination on the underlying Form 130 was issued on August 6,1999.

3. Pursuant to Ind. Code § 6-1.1-15-4, a hearing was held on December 6, 2000 before Hearing Officer Ellen Yuhan. Testimony and exhibits were received into evidence. Timothy R. Sendak represented the Petitioner. Richard A. Adomaitis was a witness for the Petitioner. Donald Griffin represented Calumet Township. No one was present to represent the County.

4. At the hearing, the Form 131 petition was made part of the record and labeled Board Exhibit A.

5. Mr. Sendak noted for the record that the previous hearing with the PTABOA Hearing Officer had not been recorded. Mr. Sendak was concerned with the fact that part of the original evidence might be missing, specifically a spreadsheet analysis prepared by Mr. Adomaitis.

6. The Hearing Officer listed the Petitioner's documentation included with the petition. The following documents were submitted to the State:

Petitioner's Exhibit 1-the 1995 PTABOA decision for the subject property
Petitioner's Exhibit 2-copy of the Form 130 petition
Petitioner's Exhibit 3-the Form 11s for the subject property
Petitioner's Exhibit 4-three power-of-attorney forms
Petitioner's Exhibit 5-transfer record for the subject property
Petitioner's Exhibit 6-duplicates of the PTABOA decision, the Form 130, the Form 11s, and a power-of-attorney
Petitioner's Exhibit 7-the appraisal report of Richard Adomaitis (25 pages plus addenda)
Petitioner's Exhibit 8-letter from Thomas Corson
Petitioner's Exhibit 9-letter from Mr. Sendak to the Lake County PTABOA with additional documentation including the 1989 State Board determination with the property record card (PRC) for the subject
Petitioner's Exhibit 10- the 1995 PTABOA PRC for the subject

7. It was determined the additional spreadsheet analysis had not been included with the petition.

8. Mr. Adomaitis testified that the spreadsheet analysis was a more extensive analysis of the information shown on page 4 of his appraisal. There was a detailed analysis of each of the projects shown as well as the subject property; the size, land assessments, unit sizes, unit assessments, age of the project, number of units in the project, the type of construction, and typical rents were all included. This analysis easily showed the disparity; page 4 just summarizes the assessed values.

9. Mr. Sendak stated, as did Mr. Adomaitis, that they had not been able to find the duplicate of the abovementioned analysis. Mr. Sendak requested a reasonable opportunity to supplement the record with the information contained in the analysis. The Hearing Officer requested the additional information be submitted by December 15, 2000. The additional information was to include property record

cards for the similar projects, the spreadsheet with the detailed information for the projects shown on page 4 of the appraisal, and industry reports substantiating a capitalization rate. The information was received in a timely fashion and labeled Petitioner's Exhibit 11.

10. The Respondent submitted the following documents into evidence:
    Respondent's Exhibit 1-copy of the Form 130
    Respondent's Exhibit 2-the 1989 State Board determination for the subject property, dated October 9, 1997
    Respondent's Exhibit 3-the 1989 State Board determination for the subject property, dated July 26, 1996

11. The property is an apartment complex located at 860 N. Wells, Gary, Calumet Township, Lake County.

12. The Hearing Officer did not view the property.

Issue 1-Obsolescence

13. Mr. Sendak noted for the record that in June 1996 the assessment was $51,800 for land and $1,139,199 for improvements for a total of $1,183,790; this assessment included an obsolescence factor of zero. In August 1999, the PTABOA changed the assessment to $51,160 for land and $862,480 for a total of $913,640, recognizing obsolescence of 25%. There is nothing in the modifying order of the PTABOA explaining how they divined that figure. There is nothing in the 1996 assessment showing why the obsolescence went from 40% to 0%. The reason Mr. Sendak states 40% obsolescence because in 1997 the State assigned a 40% obsolescence factor to this property; this stemmed from a 1989 appeal of the assessment. To go from 40% obsolescence to 0% obsolescence to 25% obsolescence with no changes to the property, he finds to be incredible on the record.

14. Mr. Sendak asked Mr. Adomaitis to testify to his professional experience and qualifications. (See the addenda to the appraisal for the complete resume.)

15. Mr. Adomaitis testified to the following concerning his experience:
    (a) He has a college degree and two Masters degrees.
    (b) He has done extensive appraisal work since 1958.
    (c) He has had offices in Bloomington, Indianapolis, and Valparaiso, IN.
    (d) He has been an MAI, member of the Appraisal Institute, for many years; he completed his requirements in 1967.
    (e) He taught for the Appraisal Institute at major universities throughout the country for 18 years.
    (f) He served on peer review for the Appraisal Institute for 19 years.
    (g) He is a Level II Certified Indiana Assessor-Appraiser.
    (h) His appraisal background is extensive, from appraisals of vacant lots to Bethlehem Steel in Porter County.
    (i) He has been an expert witness in Court over 300 times.
    (j) He has represented government agencies and private owners.
    (k) He is compensated on an hourly basis.

16. Mr. Adomaitis testified to the following concerning obsolescence:
    (a) Obsolescence could change if there were a major renovation; there has been no major renovation to the subject.
    (b) This particular project has built into its design one-bedroom units so small they are almost like an efficiency. The number of these units (90 out of 264 units) goes beyond what the market demands. This is why the project has a Federal subsidy.
    (c) The building is a high-rise with a limited number of elevators. Low-income tenants are not going to care for the elevators and so the maintenance cost goes up. That is the largest, single design discrepancy in the project.
    (d) In the intervening six-year period between the 1989 and the 1995 assessment, there was no major rehabilitation. He has visited the property many times.

(e) The obsolescence should go up not down as the maintenance is continually increasing over and above the increase in rents.

(f) There is also an economic loss. Included in the report is MLS data that makes a comparison across a broad number of properties. Statistically, this is valid.

(g) In response to the hearing officer's observation that the MLS data was for single-family residential properties, Mr. Adomaitis stated that whatever affects single-family properties will affect the multi-family properties because you still have the basic family income concept. The sales in the various zones in Lake County show that the Gary sales are considerably lower. This can be seen elsewhere in the report; the section on land values (page 13) shows the range of land values across Lake County. Obviously, you would have to discard the Munster property, which is extremely high, as is to be expected. Hobart is far more stable in value than many of the other parts of Calumet Township.

(h) The study of comparable projects was done in 1989 and updated in 1995. It is summarized on page 4 and shows that the subject is over-assessed at $4,812.15 per unit. Woodlake, which is approximately ¾ mile from the subject, is assessed at $1,288.80 per unit. Woodlake is a property built the same year as the subject, is partially subsidized, has better parking ratios and landscaping and is superior in construction and amenities to the subject. The subject is reinforced concrete and has an institutional appearance.

(i) He does not know how Lake County allows such disparity to exist.

(j) Miller Village is all subsidized; Woodlake is partially subsidized. The rest of the projects are not subsidized, but this fact should have no influence on the assessment.

(k) For the owner to receive the subsidy he had to spend a half-million dollars for renovations, the roofs, elevators, and other items.

(l) The Institute of Real Estate Management income and expense analysis (See the Addenda.) shows what the ratios are for different types of projects. This includes the ratio of real estate taxes to gross income, which

is a very important factor. The subject property has 22% of gross income going to taxes, while the national and the state norm is in the range of 10% to 12%. This makes a strong point for economic obsolescence.

(m)The tax rate in Calumet Township is one of three highest in the state.

(n) If the property is over assessed, this means the owner is not making the same return as other apartment projects.

(o) Based on his study the obsolescence factor should be 40% for the buildings and 22% for the land.

(p) He did not make any adjustments to the sales because he did not feel that it was necessary or that it would make that much difference.

(q) The vacancy rate is going up, but the effective gross is not.

17. Mr. Griffin testified to the following:

(a) The State determination dated October 9, 1997 applied 40% obsolescence to the office; the apartments received 30% obsolescence.

(b) The original State determination applied 25% obsolescence.

(c) You have to look at the size of the apartments being assessed. Some of the apartments are 1,043 square feet; the comparable apartments may be smaller units.

(d) The township based the obsolescence on vacancy.

(e) Obsolescence can change; just because there was obsolescence in 1989 does not mean that it is the same today.

Issue 2-Land

18. Mr. Sendak stated that Mr. Adomaitis arrived at an acreage value quite different from the land order value.

19. Mr. Adomaitis testified that $9,000 per acreage is the indicated value according to the report. The land order does not have a lot of bearing on this because he served on the land commission for Porter County for the 1989 assessment; he knows people that served on the Lake County Commission and there were not

good strong statistics and analyses made of the land value types in various areas. The land order is wrong; $30,000 per acre is ridiculous. The Munster property sold for $26,000 per acre sale; no one who knows the real estate market would consider a Munster sale comparable to a Gary sale.

20. Mr. Griffin testified that the State did make a change to the land in 1989.

Issues 3, 4 & 5-Uniformity & Unconstitutionality Confiscatory/Unlawful/ PTABOA Determination

21. These issues were alluded to during the obsolescence testimony.

22. In closing, Mr. Sendak stated that what the Township has done and what the PTABOA has done has to be arbitrary based upon the history of these assessments and their adjustments by the ultimate administrative authority, the State. He does not understand the reasoning and there is nothing in the record to show the reasoning about this economic obsolescence and about the structural obsolescence and how it jumps from 0% to 40%. The testimony shows it should properly be 62% combined. This is unjust and unfair and leads to a confiscatory effect. These are compelling factors.

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. Issue 1-Obsolescence

1. The concept of depreciation and obsolescence

18. 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. The elements of functional and economic obsolescence can be documented using recognized appraisal techniques. *Canal Square Limited Partnership v. State Board of Tax Commissioners*, 694 N.E. 2d 801 (Ind. Tax 1998). These standardized techniques enable a knowledgeable person to associate cause and effect to value pertaining to a specific property. *Id*.

20. Recognition of obsolescence beyond physical depreciation is a profession that requires supportable evidence. This recognition of cause and effect may be supported by use of some of the following techniques and methods: (1) the paired data analysis, (2) a capitalization of rent loss, (3) the breakdown method, (4) the market extraction method, and (5) the age-life method. Even when fully prepared to the requirements acceptable in professional appraisal standards and ethics, these techniques and methods are considered support approaches in justifying and documenting obsolescence.

21. The use of any singular technique or method identified above without the use of other approaches to value would be considered unethical and incomplete.

22. As stated in an excerpt from *The Appraisal of Real Estate*, Eleventh Edition, published by the Appraisal Institute of America: The breakdown method is the most comprehensive and detailed way to measure depreciation. When used in conjunction with market extraction and age-life methods, the breakdown method desegregates a total depreciation estimate into its component parts. Furthermore, there are five primary techniques used to calculate the different

types of depreciation in the breakdown method. These include estimation of cost to cure, application of an age-life ratio, application of the functional obsolescence procedure, analysis of paired data, and capitalization of rent loss. Cost to cure is a measure of both curable physical deterioration and curable functional obsolescence. An age-life ratio is used to measure curable physical deterioration and incurable physical deterioration for both short-lived and long-lived components. The functional obsolescence procedure may be used to estimate all types of functional obsolescence. Analysis of paired data and capitalization of rent loss may be used to estimate incurable functional obsolescence caused by a deficiency as well as external obsolescence.

23. As also stated in *The Appraisal of Real Estate*, Eleventh Edition: External factors frequently affect both the land and building components of a property's value. In addition, when market data are studied to develop an estimate of external obsolescence, it is important to isolate the effect of the obsolescence on land value from the effect on the value of the improvements. The two primary methods of measuring external obsolescence are paired data analysis and the capitalization of rent loss. Paired data analysis is a useful technique when market evidence is available.

24. *The Appraisal of Real Estate*, Eleventh Edition, provides that physical deterioration is caused by wear and tear from regular use, the impact of the elements, and the effect of normal aging. Careful maintenance can slow the process of deterioration and neglect can accelerate it. Physical deterioration may be curable or incurable. The three main physical components of a building are items of deferred maintenance, short-lived components, and long-lived components. All physical components in a building fall into one of these three categories.

25. *The Appraisal of Real Estate*, Eleventh Edition, states that a flaw in the structure, materials, or design of the improvement causes functional obsolescence. It is attributable to defects within the property, as opposed to external obsolescence,

which is caused by external factors. Functional obsolescence may be curable or incurable. Functional obsolescence can be caused by a deficiency, which means that the subject property is below standard in respect to market norms. It can also be caused by a superadequacy, which means that the subject property exceeds market norms. There are five types of functional obsolescence: curable functional obsolescence caused by a deficiency requiring an addition (installation) of a new item, curable functional obsolescence caused by a deficiency requiring the substitution (replacement) of an existing item ("curable defect"), curable functional obsolescence caused by a superadequacy which is economically feasible to cure, incurable functional obsolescence caused by a deficiency, and incurable functional obsolescence caused by a superadequacy.

26. According to *The Appraisal of Real Estate*, Eleventh Edition, external obsolescence is a loss in value caused by factors outside of the subject property. This can be an economic factor, such as an oversupplied market or very expensive financing, or a locational factor, such as poor sitting or proximity to a negative environmental influence. External obsolescence is generally incurable on the date of the value estimate, but this does not mean that it is permanent. External influences can affect both the site and the improvements. When this is the case, the loss in value attributable to the externality may have to be allocated between the site and the improvements.

27. *The Appraisal of Real Estate*, Eighth Edition, provides that an appraiser can use either of two methods to measure external obsolescence, namely, (1) capitalizing the rent loss attributable to the negative influence, or (2) comparing sales of similar properties, some of which are subject to negative influence and some that are not. If pertinent sales data are abundant, the second method is preferable to the first.

28. *The Appraisal of Real Estate*, Eighth Edition, provides that external influences can cause a loss in value to any property. In the cost approach, the total loss in value due to such influences is allocated between the land and the

improvements. Only the portion of the loss that is applicable to improvements is deducted from the current reproduction or replacement cost as external obsolescence. The effect of external influences on land value is calculated in the land valuation.

2. Burden regarding the obsolescence claim

29. 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).

30. 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).

3. The evidence submitted

31. In support of the claim for obsolescence, the Petitioner opined that the property suffers from various causes of functional and economic obsolescence. The causes of the functional obsolescence are the numerous small, one-bedroom apartments and the limited number of elevators. Economic obsolescence is caused by vacancy, high maintenance costs, location factors, and an above normal ratio of taxes to gross potential income.

32. The Petitioner introduced the testimony of an expert witness, Mr. Richard Adomaitis, an appraiser certified as a Member of the Appraisal Institute (MAI). Mr. Adomaitis presented an appraisal that showed the disparity in assessments between the subject and several similar properties. The appraisal contains three approaches to value and estimates the market value of the subject as of March

1, 1995. The appraisal includes land sales and apartment sales, on a per unit basis, outside of Gary. The testimony and supporting documentation in the addenda show the tax to income ratios for the subject and for other apartment complexes. (The appraisal is Petitioner's Ex. 7)

33. Mr. Adomaitis attributes 40% obsolescence to the improvements and 22% obsolescence to the land, for a total of 62%.

34. The Petitioner submitted a 1989 State Amended Final Determination dated October 9, 1997. The determination shows that 40% obsolescence was applied to the office and 30% obsolescence to the apartments as a result of a settlement of pending litigation.

4. The reliability and probity of the evidence

35. Before applying the evidence to reduce the contested assessment, the State must first analyze the reliability and probity of the evidence to determine what, if any, weight to accord it.

36. Under *GTE North, Inc., supra, and Thornton Telephone Company v. State Board of Tax Commissioners*, 629 N.E. 2d 962,965 (Ind. Tax 1994), the State may give due consideration to the reliability of studies presented by a taxpayer, but must provide a explanation if it finds the studies unreliable. Included in this requirement is the prescription by the Tax Court in *GTE North* that the State defines what standards it will use to define whether a study or mode of analysis is "recognized" or "accepted". *GTE North, Inc*., 629 N.E. 2d at 888.

37. The Unites States Supreme Court has defined how a study or analysis becomes recognized or accepted. In *Daubert v. Merrill Dow Pharmaceuticals*, 113 S. Ct. 2786 (1993), the Court addressed whether scientific evidence has sufficient indicia of reliability to allow its admission under the Federal Rules of Evidence. Although the State is accorded broad discretion to consider such evidence as it

deems pertinent (see IC 4-22-5-1), and therefore it is not expressly subject to formal rules of evidence, the State finds the analysis of relevancy presented in *Daubert*, which was cited with approval by the Indiana Supreme Court in *Steward v. State*, 652 N.E. 2d 490 (Ind. 1995), particularly instructive to the State in determining what relevancy to accord petitioner's calculations for purposes of weighing its evidentiary value.

38. In Daubert, the Court held that to be relevant, "[p]roposed testimony must be supported by appropriate validation - i.e. 'good grounds', based on what is known". 113 St. Ct at 2795. In order to determine whether scientific or technical evidence is based on good grounds, a court or administrative agency must determine "whether it can be (and has been) tested. 'Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry'." *Id*. At 2796 (citing Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 Nw. U. L. Rev. 643, 645 (1992). The Court went on to state the "[a]nother pertinent consideration is whether the theory or technique has been subjected to peer review and publication...submission to the scrutiny of the scientific community is a component of 'good science', in part because it increases the likelihood that substantive flaws in methodology will be detected." *Id.* at 2797. Furthermore, the general acceptance of a particular theory can be important in weighing its relevance. *Id*.

39. In addition to the general requirements for relevancy discussed above, both the United States Supreme Court and the Supreme Court of Indiana have recognized that scientific evidence can be reliable for one purpose and not another, and that to be relevant to a particular inquiry, the proponent of the evidence must establish a valid scientific connection between the theory and the specific facts of the case. *Daubert*, 113 S. Ct. at 2796; *Steward*, 652 N. E. 2d at 498.

40. The State believes that the Petitioner's evidence is meant to be offered as scientific evidence within the meaning of that term as defined by *Daubert* and *Steward*. Statistical analysis in the realms of finance and economics is a sophisticated inquiry and well-regarded studies satisfy the requirements of "good science" as described in *Daubert*. A number of federal courts, which have considered this issue since *Daubert*, have agreed. See *F.D.I.C. v. Suna Associates*, 80 F. 3d 681,687 (2nd Cir. 1996) (valuation of land); *Frymire-Brinati v. KPM Peat Marwick*, 2F. 3d 183, 186088 (7th Cir. 1993) (accounting and finance); *Joy v. Bell Helicopter Textron, Inc.*, 999 F. 2d 549, 569-70 (D.C. Cir. 1993) (economics); *Kurnez v. Honda North America, Inc.*, 166 F.R.D. 386,388 (D.C. Mich. 1996) (same).

41. Because of the informality of the State's proceedings it would be impractical to require exhaustive determinations regarding the admissibility of evidence at the time of administrative hearings. Further, it would be unduly burdensome and time-consuming for the State to require taxpayers and local taxing officials alike to participate in such determinations at the hearings. Therefore, the State's general position is to admit the evidence proffered, and to consider the issue of relevancy in the weighing of the evidence.

42. In addition to the factors applied by the courts to establish reliability, the State will consider a number of additional factors to determine the relevancy of evidence regarding obsolescence. The first factor is whether the alleged maladies of the property actually lead to a loss of value as required by 50 IAC 2.2-10-7(e). Evidence of such loss of value may be based on the assessor's observations of the property, statistical evidence establishing a correlation between the faults of the property and its value, or from anecdotal evidence if sufficiently reliable. In many cases there will be causes of obsolescence that cannot be easily seen by the assessor. In these cases, it is incumbent on the taxpayer to establish a link between the evidence and the loss of value. For statistical evidence this may be established by providing sufficient evidence of correlation of the evidence to value. For anecdotal evidence establishing reliability is more difficult. Statements

by the taxpayer or consultant regarding the value of the property are inherently unreliable unless they can be confirmed either by other statements or by the opinions of impartial observers.

5. Evaluation of the evidence

43. Estimating the value loss from accrued depreciation is one of the most controversial aspects of the appraisal process. There are five methods used to measure accrued depreciation, two indirect and three direct.

44. The sales comparison method of estimating accrued depreciation (an indirect method) borrows from the sales comparison approach to value and is particularly useful in mass appraisal work. The accuracy of this method depends upon the availability of highly comparable sales of improved properties and vacant sites. *Property Assessment Valuation*, Second Edition, 1996.

45. On page 4 of the appraisal (Petitioner's Ex. 7), it states that the subject is over assessed compared with the assessed value per unit for six comparable complexes. The Petitioner submitted, as additional information, property record cards for five of the properties. The testimony stressed the appalling disparity between Woodlake and the subject because they are located in the same area; Woodlake's assessed value per unit is approximately one-fourth of the subject's.

46. Such disparity would indeed be appalling, however, none of the assessed values per unit are correct. The values are based on the 1995 values before the Board of Review made corrections; this is understandable since the appraisal was for the March 1, 1995 assessment date.

47. However, more serious errors involve the number of units that are included in the various assessments. As part of the additional information, Mr. Adomaitis charted how he arrived at the assessed value per unit; in matching the number of units on his chart with the property record cards, it is noted that there are errors for

four of the comparables. This completely changes the values. For instance, Woodlake's 1995 property record before the BOR changes shows $558,810 for the assessed value of the improvements; this card, however, is for 170 units, not 498. This means that Woodlake's assessed value per unit is $3,287, not $1,288.80. The Boardwalk property record card appears to be for 24 units, not 48; this changes their assessed value per unit to $6,020 ($144,490/24). The other errors are for the Brunswick and Victory complexes.

48. Page 9 of the appraisal (Petitioner's Ex. 7), which shows the summary of the sales comparison approach, puts the unit price at $10,000 based on the apartment sales shown on page 10. The range per unit is from $6,644 to $19,271; these sales have not been adjusted for time, location, size of units or amenities

49. In the Cost Approach for the Land Value (Petitioner's Ex. 7, page 12), Sales 1, 2, and 3 have all been adjusted by 50% without an explanation as to why 50% is the correct adjustment to make. Sale 3 was sold at public auction, which cannot be considered an arm's length transaction. Sales 4 and 5 apparently required even, offsetting adjustments but no percentage is given for the adjustments. The sales cover a three-year period, yet no adjustment is made for time; no documentation is included to show the other sales are arm's length transactions.

50. The report claims that the 90 units of high-rise bedroom units produces another 10% obsolescence due to lack of market demand as demonstrated by vacancy problems and that the community building also takes on a 10% functional loss due to the low income market not supporting such amenities. These are conclusory statements unsupported with factual information. Petitioner's Ex. 7, page 15.

51. The support for economic loss on page 16 of Petitioner's Ex. 7, concludes that the average sale in Gary compared to the average Northwest Indiana sale equals a 46% loss. These amounts are based on single-family residential sales, not on

multi-unit sales.

52. For the apartment sales outside of Gary (page 16 of Petitioner's Ex. 7) the appraiser used different properties than used for the sales comparison approach. Included in the additional information is an improved sales summary; these sales took place before the March 1, 1995 assessment date, so it is difficult to understand why the appraiser used two sets of alleged comparables (pages 10 and 16).

53. In the income approach, part of the calculation takes into account the termination of the HUD subsidy. This termination is not definite.

54. The Petitioner opines that the State determined the obsolescence for the subject to be 40% as shown on the Form 118 issued October 9, 1997. This amount is incorrect; the correct amounts are 40% applied to the office and 30% applied to the apartments.

55. The Form 118 was the result of an agreement to settle pending litigation. An agreement made between parties is not evidence probative of an error in the assessment. The Form 118, submitted as evidence of an erroneous assessment, was drafted pursuant to a settlement agreement mutually agreed upon by all parties and was done to avoid the expense of further litigation. As such, it cannot be used for any purpose that is evidentiary in nature. Therefore, the State will not consider the Form 118 submitted by the Petitioner in making this determination.

56. 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).

57. The Petitioner has offered unsubstantiated opinions and calculations regarding the issue of obsolescence.

58. The Petitioner has failed to present probative evidence to establish a prima facie case.

59. For the above reasons the State denies the request for obsolescence.

E. Issue 2-Land

60. For the reasons set forth below, the State determines that the Petitioner cannot challenge the Land Order values by way of the Form 130/131 appeal process. Alternatively, the State determines that the Petitioner's evidence failed to demonstrate that the value assigned to the property by way of the Land Order is incorrect.

1. General principles of land valuation in Indiana.

61. Indiana's approximately 3 million land properties are valued on a mass appraisal basis.

62. The General Assembly has recognized that assessing officials cannot provide a commercial-grade/fee appraisal for every parcel in the State, but must instead rely on mass appraisal techniques commonly used by tax assessors throughout the United States. Ind. Code § 6-1.1-31-3(4) permits the use of "generally accepted practices of appraisers, including generally accepted property assessment valuation and mass appraisal principles and practices."

63. The Tax Court has similarly recognized the necessity of mass appraisal practices (and some of their flaws). *See King Industrial Corp. v. State Board of Tax Commissioners*, 699 N.E. 2d 338, 343, n. 4 (Ind. Tax 1998)(The use of land classifications are commonly used to save time and money when assessing property).

64. Land valuation – through land order – is the one part of Indiana's assessment system that actually approximates fair market valuation through the use of sales data.

65. Ind. Code § 6-1.1-31-6(a)(1) states that land values shall be classified for assessment purposes based on acreage, lots, size, location, use, productivity or earning capacity, applicable zoning provisions, accessibility, and any other factor that the State determines by rule is just and proper.

66. For the 1995 reassessment, the county land valuation commission determined the value of non-agricultural land (i.e. commercial, industrial, and residential land) by using the rules, appraisal manuals and the like adopted by the State. 50 IAC 2.2-2-1. *See also* Ind. Code §§ 6-1.1-4-13.6 (West 1989) and –31-5 (West 1989). By rule, the State decided the principal that sales data could serve as a proxy for the statutory factors in Ind. Code § 6-1.1-31-6. Accordingly, each county land valuation commission collected sales data and land value estimates and, on the basis of that information, determined the value of land within the County. 50 IAC 2.2-4-4 and –5. The county land valuation committee then held a public hearing on the land order values. Ind. Code § 6-1.1-4-13.6(e)(West 1989); *See Mahan v. State Board of Tax Commissioners*, 622 N.E. 2d 1058, 1061 (Ind. Tax 1993).

67. The State reviewed the land orders established by the county land valuation committee, and could make any modifications deemed necessary for uniformity and equality purposes. Ind. Code § 6-1.1-4-13.6(f)(West 1989); *Mahan*, 622 N.E. 2d at 1061. After the State completed its review of the county land order, the State was required to give notice to the affected assessors. In turn, only county and township assessors could appeal the State's determination of values. *Id* at 4-13.6(g); *Poracky v. State Board of Tax Commissioners*, 635 N.E. 2d 235, 239 (Ind. Tax 1994)("An appeal of a land order, just as an appeal of a judgment or order, must follow the prescribed procedural mandates."). The final stage in the process provided for dissemination of the State's final decision on the land order:

"[t]he county assessor shall notify all township assessors in the county of the values as determined by the commission and as modified by the [State Board] on review or appeal. Township assessors shall use the values as determined by the commission and modified by the State Board in making assessments." Ind. Code § 6-1.1-4-13.6(h).

68. Agricultural land was valued at $495 per acre with adjustments permitted for such things as soil productivity and influence factors. 50 IAC 2.2-5-6 and –7.

2. Taxpayers must challenge Land Order values in a timely and appropriate manner; Namely: They must challenge the values at the local level before the State Board adopts the County Land Order.

69. The Tax Court has consistently held that taxpayers must follow the required appeals procedures when challenging property tax assessments. *The Kent Company v. State Board of Tax Commissioners*, 685 N.E. 2d 1156, 1158 (Ind. Tax 1997)("The law is well-settled that a taxpayer challenging a property tax assessment must use the appropriate means of doing so."); *Williams Industries v. State Board of Tax Commissioners*, 648 N.E. 2d 713, 718 (Ind. Tax 1995)(The legislature has created specific appeal procedures by which to challenge assessments, and taxpayers must comply with the statutory requirements by filing the proper petitions in a timely manner).

70. As previously stated, Ind. Code § 6-1.1-4-13.6(e)(West 1989) provided for a public hearing held by the local officials regarding values contained within the county land order. Once the public hearing was held, the only statutory means for requesting a change or challenging a land order was an administrative appeal to the State *by the county and township assessors*. Ind. Code § 6-1.1-4-13.6(g)(West 1989); *Poracky*, 635 N.E. 2d at 238 & 39.

71. Taxpayers did not have the right to challenge the values established by the county land orders after the county land commission made a determination on

them.

72. The State is aware of Tax Court decisions that go against limiting taxpayers' rights to challenge land order values at the State administrative level. *Zakutansky v. State Board of Tax Commissioners*, 691 N.E. 2d 1365 (Ind. Tax 1998).

73. Moreover, the Tax Court implicitly found that Ind. Code § 6-1.1-4-13.6 (West 1989) violated the requirements of due course of law (due process) because the statute did not provide for taxpayer hearings prior to the State Board's "final say" on land values. *Town of St. John III*, 690 N.E. 2d at 373, n. 2, & 384, n. 31. (It is believed that the Tax Court also found that the amended version of Ind. Code § 6-1.1-4-13.6, effective 1998 for the next general reassessment, remedied the Court's due process concerns. *Town of St. John III,* 690 N.E. 2d at 384, n. 31).

74. The State respectfully concludes that *Town of St. John V* changed the landscape regarding the issue of taxpayers' entitlement to challenge land order values.

75. Article X, § 1, of the Indiana Constitution was the basis of the Tax Court's ruling that a taxpayer may challenge his land order valuation in an individual appeal. *Zakutansky*, 691 N.E. 2d at 1368.

76. The Tax Court's basis for its finding was reversed by the Supreme Court in *Town of St. John V.* The Property Taxation Clause (Article X, § 1, of the Indiana Constitution) "[R]equires . . . a system of assessment and taxation characterized by uniformity, equality, and just valuation, but the Clause does not require absolute and precise exactitude as to the uniformity and equality of each individual assessment. *The tax system must also assure that individual taxpayers have a reasonable opportunity to challenge whether the system prescribed by the statute and regulations was properly applied to individual assessments, but the Clause does not create a personal, substantive right of uniformity and equality.*" *Town of St. John V*, 702 N.E. 2d at 1040. (Emphasis

added).

77. Further, the Tax Court's finding that the assessment system violated the Due Course of Law Clause in *Town of St. John III* was expressly nullified by the Supreme Court in *Town of St. John V,* 702 N.E. 2d at 1040, n. 8.

78. Accordingly, a taxpayer is not constitutionally entitled to file an appeal to the State challenging the values established by a promulgated land order on an individual appeal basis. Taxpayers may, however, administratively appeal the application of the land order to his assessment (i.e., the taxpayer's property should have been valued from one section of the land order rather than another).

79. Furthermore, the statutes do not give taxpayers the right to challenge land order valuation.

80. Indiana courts have consistently held that a statute does not require interpretation unless a statute is unclear and ambiguous. *Joyce Sportswear Co. v. State Board of Tax Commissioners*, 684 N.E. 2d 1189 (Ind. Tax 1997). Unambiguous language within a statute cannot be construed in a manner that expands or limits its function. *Cooper Industries, Inc. v. Indiana Department of State Revenue*, 673 N.E. 2d 1209 (Ind. Tax 1996). Words, unless statutorily defined, are to be given their plain, ordinary, and usual meaning given in the dictionary. *Knauf Fiber Glass, GmbH v. State Board of Tax Commissioners*, 629 N.E. 2d 959 (Ind. Tax 1994).

81. It is just as important to recognize what a statute does not say as it is to recognize what a statute does say. *Peele v. Gillespie*, 658 N.E. 2d 954 (Ind. App. 1995); *Million v. State*, 646 N.E. 2d 998 (Ind. App. 1995). Concerning land orders, the statute clearly said that county and township assessors could appeal to the State. The statute does not give taxpayers the right to challenge land order values after the public hearing at the county level.

82. Although statutory construction is a judicial task, it is also the task of the administrative agency charged with administering the statute. *Riley at Jackson Remonstrance Group v. State Board of Tax Commissioners*, 663 N.E. 2d 802 (Ind. Tax 1996); *Auburn Foundry, Inc. v. State Board of Tax Commissioners*, 628 N.E. 2d 1260 (Ind. Tax 1994).

83. Time after time, the General Assembly has shown that it knows how to enact legislation that gives taxpayers the right to review by the State. For example: (1) the State reviews applications for Enterprise Zone Inventory Credits and issues a determination regarding eligibility under Ind. Code § 6-1.1-20.8-3, (2) the State reviews the denial of property tax exemptions under Ind. Code § 6-1.1-11-8, (3) the State reviews the denial of a deduction for rehabilitated residential property under Ind. Code § 6-1.1-12-25.5, (4) the State reviews the denial of a deduction for resource recovery systems under Ind. Code § 6-1.1-12-28.5, and the State reviews the denial of a deduction for coal conversion systems, hydroelectric power devices, and geothermal energy heating/cooling devices under Ind. Code § 6-1.1-12-35.

84. For matters concerning Enterprise Zone Inventory Credits, rehabilitated residential property, coal conversion systems, and the like, the General Assembly quite explicitly provided for an administrative review by the State. The General Assembly did not, however, provide for State review by taxpayers challenging land order valuations. Such silence is meaningful. To repeat, in construing a statute, it is just as important to recognize what the statute does not say as it is to recognize what the statute does say. The statutes regarding land orders do not provide for a taxpayer appeal to the State regarding land order values. If the General Assembly meant for such an appeal to be available to taxpayers, it could easily have said so in clear terms.

85. Further, it is absurd to conclude that the General Assembly somehow forgot to provide for a taxpayer's right to appeal land order values when it explicitly provided for such an appeal to the State by county and township assessors. It is

just as absurd to conclude that the General Assembly chose to implicitly and obliquely provide for a taxpayer's appeal to the State regarding land order valuation, when the General Assembly explicitly and clearly provided for such an appeal by the local assessors. Statutes are not construed in a manner that requires absurd results. *Matonovich v. State Board of Tax Commissioners*, 705 N.E. 2d 1093 (Ind. Tax 1999). Again, if the General Assembly meant for such an appeal to be available to taxpayers, it could have easily said so in clear terms. It did not.

86. The absence of explicit or plausible implicit appeal rights is easily explained. Once a land order is promulgated, every parcel of property in the county is assessed according to it. Such "across the board" application results in uniform land value. If individual taxpayers are able to question valuation on an individual appeal basis, uniformity ceases to exist. The State has an obligation to ensure uniform assessments on a *mass appraisal* basis.

87. The State recognizes the Form 130/131 petition process provided for by Ind. Code §§ 6-1.1-15-1 through –4, which is "triggered" by a local assessment. Though the General Assembly has provided for individual assessment appeals, neither the Constitution nor the statutes creates entitlement to make every challenge desired.

88. Prohibiting taxpayers from challenging certain aspects of the assessment system is not peculiar, and the Tax Court recognizes that taxpayers can not challenge every aspect of the assessment system in individual appeals, i.e., taxpayers can not challenge base rates provided by the cost schedules in the Regulation. *Town of St. John III,* 690 N. E. 2d at 374; *Dawkins v. State Board of Tax Commissioners,* 659 N.E. 2d 706, 709 (Ind. Tax 1995).

89. Instead, the challenges that can be made by way of the statutory Form 130/131 administrative appeal process are limited or qualified by Ind. Code § 6-1.1-4-13.6(g)(West 1989). Only by reading the statutes in such a way – taxpayers can

challenge the application of the land order to individual assessments, but cannot challenge the underlying values of the same – is a harmonious statutory scheme preserved.

3. Properties with peculiar attributes may receive land value adjustments by way of influence factors.

90. Though taxpayers are not entitled to challenge land order values, they are entitled to receive adjustments to land values if their properties posses peculiar attributes that do not allow them to be lumped with surrounding properties for land value purposes. Such adjustments, either upward or downward adjustments, can be made by way of influence factors applied to the property. *Phelps Dodge v. State Board of Tax Commissioners,* 705 N.E. 2d 1099, 1105 (Ind. Tax 1999).

4. The Petitioner failed to demonstrate that the value assigned to the property by way of the Land Order is incorrect.

91. Assuming *arguendo* that taxpayers are entitled to challenge land order values in individual appeals, they must present probative evidence to make a prima facie case that the assessment is incorrect. The Petitioner has failed to make such a case in this appeal.

92. The Petitioner presented evidence and testimony alleging that the land order is wrong and the proper value for the subject land is $9,000 per acre.

93. For the reasons stated above and for reasons given in Conclusion #64, this is not conclusive evidence and testimony.

94. The closest similar complex to the subject is assessed at the same value as the subject.

95. For all the above reasons, the State declines to change the land value.

F. Issues 3-5-Uniformity/Constitutionality/Confiscatory/Unlawful/PTABOA Determination

96. Though 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.

97. *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.

98. The Petitioner presented evidence that supposedly showed the disparity in the assessments of various apartment complexes. Copies of the tax bills were included with the property record cards (Petitioner's Exhibit 11).

99. Obviously, the tax bills are going to be of varying amounts due to number of units, size of units, land area, type of construction, etc. The tax rate is the same for all the complexes and while it may be high, the rate has been established to meet the needs of the local government and is not an issue for the State.

100. The PTABOA made their determination based on the recommendation of the Township officials. It was the Petitioner's position throughout the administrative hearing that the State applied 40% to the structures as a result of the 1989 appeal. Again the amount applied to the apartments by the State was 30% and this was a result of a settlement of pending litigation.

101. For the above reasons, the State makes no change in the assessment as a result of these issues.

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