

**STATE OF INDIANA
Board of Tax Review**

ONE INDIANA SQUARE ASSOCIATES)	On Appeal from the Marion County Property
)	Tax Assessment Board of Appeals
)	
Petitioner,)	
)	Petition for Review of Assessment, Form 131
v.)	Petition No. 49-101-95-1-4-00764
)	Parcel No. 1090349
MARION COUNTY PROPERTY TAX)	
ASSESSMENT BOARD OF APPEALS)	
And CENTER 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 the building should receive additional obsolescence depreciation.

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 IC 6-1.1-15-3, Baker & Daniels, on behalf of One Indiana Square Associates (One Indiana Square), filed a petition requesting a review by the State Board. One Indiana Square received the County Board of Review's (BOR) Final Determination on January 30, 1998. The Form 131 petition was filed on February 26, 1998.

3. Pursuant to IC 6-1.1-15-4, a hearing was held on November 4, 1998 before Hearing Officer Gary Smith. Testimony and exhibits were received into evidence. The following persons represented the Petitioner:
 1. Stephen Paul of Baker & Daniels.
 2. Janet Charles of Baker & Daniels.
 3. Mark Nightingale of Tishman-Speyer Properties.
 4. Richard Hardin of Tishman-Speyer Properties.
 5. Paul Sapoff of ACM & Environmental Services, Inc.
 6. Robert Byrd of Specialty Systems of IN.
 7. James Bremner of Bremner & Wiley, Inc.
 8. Michael Lady of Michael C. Lady Appraisal Co., Inc.
 9. Leslie Weisenbach of Michael C. Lady Appraisal Co., Inc.

4. The Center Township Assessor's Office for Marion County did not attend the November 4, 1998, hearing. The hearing officer called and talked directly to the Assessor's representative before the start of the administrative hearing. The representative from the Assessor's office declined to attend the hearing, stating this hearing had been rescheduled five times; consequently, the hearing could proceed without the Respondent's presence, as long as the issue had not changed.

5. At the hearing, the subject Form 131 petition was made part of the record and labeled Board's Ex. A. In addition, the following exhibits were submitted to the State:
Petitioner's Exhibit 1 – Brief.
Petitioner's Exhibit 2 – Appraisal Report for March 1, 1995 assessment.

Respondent's Exhibit 1 – Property record card for the 1995 BOR Determination.
Respondent's Exhibit 2 – Property record card for unimproved parcel (same tract of land).
6. The hearing officer formally requested that Ms. Charles submit documentation of the remediation costs incurred by the Petitioner. Ms. Charles submitted the additional evidence in a timely manner and the evidence was labeled Petitioner's Exhibit 3.
7. The office building is located at One Indiana Square, Indianapolis, Center Township, Marion County.
8. The hearing officer did not view the property.

**Issue No.1 - Whether the building should
receive additional obsolescence depreciation.**

9. The BOR determined that the property should receive a total of 15% obsolescence depreciation due to vacancy and the presence of asbestos. The Petitioner claimed that obsolescence should total 60% as a result of these factors.
10. Ms. Charles stated the subject suffered from a 23% vacancy on the March 1, 1995 assessment date, including six entire floors. The vacancy problem persisted over 3½ years later, due in large part to the loss of First Chicago NBD

Corp. (NBD), which is the building's major tenant.

11. The Petitioner stated One Indiana Square must compete for tenants in a downtown Indianapolis location with many office buildings; furthermore, it must compete with suburban office locations. The suburban locations offer many more conveniences, such as free parking. The Petitioner is requesting 15% economic obsolescence for vacancies.
12. Ms. Charles testified that the building has experienced asbestos contamination. The structure was built in the mid-1980's and asbestos was the preferred insulation material at that time. A survey of the building prepared by Law Engineering indicated friable asbestos-containing materials (ACM)¹ were present in the form of spray-on fireproofing on all steel support structures, the corrugated metal decking, and concrete decking. (Petitioner's Exhibit 1, tab 4). Vinyl asbestos floor tiles and asbestos-containing mastic were also discovered on Floors 6 through 35, the basement concourse and tenant areas, certain elevator lobbies, and bathrooms on Floor 1 through 5 (Petitioner's Exhibit 1). Although the taxpayer expects that it will ultimately have to remove all the asbestos in the subject, only 7.65% of the asbestos had been abated at the time of the administrative hearing. This would still leave approximately 92% of the structure requiring abatement. (Petitioner's Exhibit 1, page 8).
13. Ms. Charles contended that the asbestos contamination creates a stigma that attaches to the property; however, this stigma is hard to define in dollars. Consequently, Baker & Daniels commissioned Michael C. Lady Appraisal Company, Inc. to prepare an appraisal report measuring obsolescence as of the March 1, 1995 assessment date (Lady Report, Petitioner's Exhibit 2). The Lady Report defined market value from all three of the market approaches to value. The appraiser concluded that the building has experienced 43% obsolescence depreciation.

¹ Friable asbestos "is that which is easily crumbled or reduced to a powder by hand pressure when dry." (Petitioner's Exhibit 1, tab 4, section III).

14. Mr. Paul introduced the Final Assessment Determination for the Blue Cross/Blue Shield Service Center granting 95% obsolescence as a result of excessive office space and asbestos contamination. (Petitioner's Exhibit 1, tab 14).
15. Ms. Charles introduced a report prepared by ACM & Environmental Services, Inc., estimating that it will take 623 weeks to abate the remaining ACM in the building at a cost of \$25,595,000.00 (Petitioner's Exhibit 1, tab 13). Ms. Charles acknowledged that currently there is no abatement program in place; however, the taxpayer has incurred expenses related to abatement. In 1993, the taxpayer incurred \$155,462 additional costs for normal maintenance; this additional cost is specifically related to asbestos spot abatement removal before normal maintenance could be performed. In 1994, the cost was \$393,567 and in 1995 the cost was \$201,727. Again, these costs were incurred so routine and ordinary maintenance could be performed.
16. Mr. Mark Nightingale, Lease Manager for Tishman-Speyer Properties (the managing entity of One Indiana Square) testified that he did not try to market part of the leased space vacated by NBD, but in effect held the space to quantify future bank needs. Mr. Nightingale continued by testifying about problems facing his company when trying to lease the large space being vacated by NBD, including competition with downtown and suburban locations.
17. Mr. Richard Hardin from Tishman-Speyer Properties testified that on March 1, 1995, the structure was 23% vacant. NBD occupied six floors; however, they vacated almost 100,000 square feet of office space by March of 1995. The remaining 270,000 square feet of lease agreement is due to expire in December 1999 and December 2000; the merger of NBD and Bank One makes it very unlikely for a renewal agreement. One Indiana Square has 664,000 square feet, while NBD has a lease for 260,000 square feet at the present time. Mr. Hardin contended that it was unlikely a tenant could be found willing to occupy this amount of space in the near future considering the Indianapolis market.

18. Mr. Paul Sapoff, President of ACM & Environmental Services, Inc., testified the subject has asbestos on all 36 floors, plus the sub basement and the six floors of the parking garage. Mr. Sapoff indicated that at present, only 7.65% of the asbestos has been abated on site, including parts of the first floor, the 16th floor, the 19th floor and the entire 18th and 24th floors (except for core areas). None of the parking garage area has been abated at this time. The abatement was done by the previous owners under a maintenance program and no abatement has taken place since the March 1, 1995 assessment date. However, to finish the job, total asbestos remediation for the year ending 1994 is estimated to cost approximately \$25,595,000. The approximate time to abate the remaining ACM in this structure (based on the abatement of the 24th floor) is 623 weeks.
19. Mr. Robert Byrd, of Specialty Systems of Indiana, testified that the figure of \$24,594,768 for abatement would not be accurate today (1998) due to the large scale of such a project and the minimum number of certified workers in Indiana.
20. Mr. James Bremner, of Bremner & Willey, Inc., testified that there is an over abundance of office space available on the market, and that stigma has attached to One Indiana Square as a result of asbestos contamination.
21. Mr. Michael Lady testified that he is an independent fee real estate appraiser and holds the MAI and SRA designation awarded by the Appraisal Institute. He presently has his own firm (Michael C. Lady Appraisal Company, Inc.) located in downtown Indianapolis. Mr. Lady continued by stating the appraisal used three steps to quantify obsolescence as follows:
 1. Step one is to estimate the unimpaired hypothetical market value of the subject property as of March 1, 1995.
 2. Step two is to estimate the diminution in value due to asbestos contamination.
 3. Step three was to quantify this into a percent, or by dividing the diminution in value by the remainder value (the unimpaired market value minus land

value).

22. Mr. Lady concluded that the obsolescence depreciation directly attributable to asbestos contamination is 43%.

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.

**Issue No.1 - Whether the building should
receive additional obsolescence depreciation.**

18. The BOR determined that the property should receive a total of 15% obsolescence depreciation due to vacancy and the presence of asbestos. One Indiana Square claimed that obsolescence should total 60% as a result of these factors. (The Petitioner claimed that the building experienced 15% economic obsolescence as a result of excessive vacancy and 45% functional and economic obsolescence as a result of asbestos contamination).
19. Economic obsolescence depreciation is defined as "obsolescence caused by factors extraneous to the property." 50 IAC 2.2-1-24.
20. "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).

21. Functional obsolescence depreciation is defined as “obsolescence caused by factors inherent in the property itself.” 50 IAC 2.2-1-29.
22. “Functional obsolescence may be caused by, but is not limited to, the following:
(A) Limited use or excessive material and product handling costs caused by an irregular or inefficient floor plan.
(B) Inadequate or unsuited utility space.
(C) Excessive or deficient load capacity.”
50 IAC 2.2-10-7(e)(1).
23. Depreciation is a concept in which an estimate must be predicated upon a comprehensive understanding of the nature, components, and theory of depreciation, as well as practical concepts for estimating the extent of it in improvements being valued. 50 IAC 2.2-10-7.
24. The elements of functional and economic obsolescence can be documented using recognized appraisal techniques. These standardized techniques enable a knowledgeable person to associate cause and effect to value pertaining to a specific property.
25. 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).
26. 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).

27. As discussed, the BOR applied fifteen percent obsolescence depreciation to the property as a result of both vacancy and the presence of asbestos. Because the parties agree that some level of obsolescence is present in the building, the first prong of the two-prong test articulated in *Clark* is satisfied.

28. “There are five methods used to measure accrued depreciation, two indirect and three direct. Each has advantages and disadvantages and has a different degree of reliability. Direct methods involve measuring the depreciation of the subject property, whereas indirect methods use sales of comparable properties and income loss from rental properties to measure depreciation. The methods are categorized as follows:

Indirect methods

1. sales comparison method
2. capitalization of income method

Direct methods

1. economic age-life method
2. modified economic age-life method
3. observed condition (breakdown) method”

International Association of Assessing Officers (IAAO) Property Assessment Valuation, 155-156 (2nd ed. 1996).

29. “The *sales comparison method*: estimates 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 at 183.

30. “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.
31. “The *economic age-life method*: is based on straight-line depreciation and is limited because depreciation of real property rarely occurs in a straight line. The method may be applicable for short-lived items.” Id at 184.
32. “The *modified economic age-life method*: recognizes the effect of curable items of both physical deterioration and functional obsolescence. Depreciation amounts for these items are deducted from cost new. The remaining amount is then depreciated using the age-life method. This is the indicated amount of depreciation for the subject property.” Id.
33. “The *observed condition (breakdown) method*: breaks down depreciation into all its components. Although it is the most complete method, it is rarely used because it is so labor-intensive.” Id.
34. The Petitioner claimed that the property has experienced 15% economic obsolescence as a result of excessive vacancy.
35. “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.” Id at 173.
36. The Petitioner did not use either of these two generally recognized methods to quantify the proposed 15% economic obsolescence. Indeed, One Indiana Square provided no calculation at all in support of its excess vacancy claim, merely concluding that “an economic obsolescence depreciation deduction of at

least 15% should be provided to account for the loss of value suffered by the property.” (Petitioner’s Exhibit 1, page 3).

37. The Petitioner’s unsubstantiated conclusions do not constitute probative evidence. *Whitley*, 704 N.E. 2d at 1119.
38. Contrary to the assertion of the Petitioner, One Indiana Square’s own appraiser failed to find evidence that the building has experienced excessive vacancy.
39. For example, the Lady Report compared the vacancy rate at One Indiana Square to the vacancy rates at other business properties:

“Prior to December, 1994, the Property maintained an occupancy in excess of 90 percent and did not offer leasing concessions. Upon NBD Bank vacating a total of 93,192 square feet, the reported occupancy as of the effective date of valuation, was 76.68 percent.” (Petitioner’s Exhibit 2, page 146).

“In comparison to the subject’s occupancy, the appraisers have surveyed 14 multitenant office buildings located in the CBD [central business district] marketing area. These buildings indicated a range in occupancy of 72.9 to 96.7 percent. The overall mean occupancy indicator was 86.97 percent.” (Petitioner’s Exhibit 2, page 146).

“...the year end 1994 vacancy rate for downtown Class A office space in the 1995 Indianapolis Market Report compiled by C.B. Commercial was approximately 15.2 percent and Class B was 23 percent.” (Petitioner’s Exhibit 2, page 21).²

“The overall appeal of the subject as well as surrounding properties is good. This consideration combined with the subject’s location in close proximity to the

² The Lady Report indicated that the property under appeal is considered Class A office space (Petitioner’s Exhibit 2, page 158); see also the data concerning purported comparable properties (Id, pages 142-145).

City/County complex has a positive effect on the subject's marketability.”
(Petitioner's Exhibit 2, page 21).

“The market trend section of this analysis indicates a year end 1994 Class A downtown vacancy factor of 15.20 percent...As of March, 1995, a reasonable vacancy and collection loss is estimated to be 15 percent. Said vacancy/collection factor is relied upon within the Direct Capitalization analysis. However, the appraisers have been supplied with a history of occupancy for the Property from 1990 through 1995. Occupancy has ranged from in excess of 90 percent in 1991 [approximately five years after the discovery of asbestos], to 76 percent as of March 1995. The projections for the CBD office market is for an upswing with stable absorption activity and favorable economic conditions resulting in improved interest by real estate investors and REITs.

Considering the favorable CBD office market projections as of March, 1995, as well as the historical occupancy for the Property, within the Discounted Cash Flow Analysis, it is reasonable to estimate an overall vacancy and collection loss of 10 percent. Within the PRO-JECT³ analysis, a standard perpetual vacancy of 5.0 percent is applied. This is in addition to lag vacancy ranging from 5.0 to 8.0 percent as a result of an estimated down time of three to five months at renewal of expiring leases.” (Petitioner's Exhibit 2, page 149).

40. The Petitioner's own appraiser therefore determined that, on the assessment date, the vacancy rate at One Indiana Square [“an overall vacancy and collection loss of 10 percent...a standard perpetual vacancy of 5.0 percent”] was virtually identical to the Class A office space vacancy rate of 15.20%. The Lady Report further determined that lag vacancies at the time of expiring leases would be only three to five months.

³ PRO-JECT, Real Estate Investment and Leasehold Analysis System as published by Financial Automation Limited (Petitioner's Exhibit 2, page 49).

41. Further, Mr. Nightingale testified that he did not even try to market part of the leased space vacated by NBD, but instead held the space to quantify future bank needs.
42. Additionally, the Petitioner offered no explanation as to the relevance to the assessment of mere speculation concerning additional vacancies that may occur as leases expire in subsequent years, specifically December 31, 1999, and December 31, 2000 (Petitioner's Exhibit 1, page 2). Again contradicting One Indiana Square's assertions, the Petitioner's appraiser found that "[t]he projections for the CBD office market is [sic] for an upswing with stable absorption activity and favorable economic conditions resulting in improved interest by real estate investors and REITs." (Petitioner's Exhibit 2, page 149).
43. Finally, even the Petitioner's own appraiser failed to find that the building has experienced 15% economic obsolescence as a result of purported excessive vacancies. Instead, the appraisal indicated that the obsolescence present was 43% rather than 60%, and resulted from asbestos contamination rather than excessive vacancies: "In summary, the Property suffers from estimated obsolescence totaling 43 percent. It is the appraisers' opinion that the total amount of obsolescence depreciation of the improvement assessment of One Indiana Square Tower and Parking Garage, as of March 1, 1995, should equal 43 percent, based on the asbestos contamination." (Petitioner's Exhibit 2, page 188).
44. Summarizing, the Petitioner's own evidence indicated that the building was actually occupied at a higher rate than surrounding properties prior to December 1994, approximately 90 days before the assessment date. The Petitioner cannot now be heard to complain of obsolescence resulting from excessive vacancy when, in fact, it had made no attempt to rent the newly vacant space. Indeed, as discussed, the Petitioner's own appraiser estimated a lag vacancy time of only "three to five months at renewal of expiring leases." (Petitioner's Exhibit 2, page

- 149). As noted, the Lady Report did not find 15% obsolescence present as a result of excessive vacancy.
45. For all the reasons above, One Indiana Square has failed to establish that it has experienced 15% economic obsolescence due to excessive vacancies.
 46. As discussed, the Petitioner also claimed that the building has suffered 45% economic obsolescence as a result of the presence of asbestos.
 47. In an attempt to quantify this contention, the Petitioner furnished a calculation contained in the Lady Report. (Petitioner's Exhibit 2, page 187). One Indiana Square contended, "The IAAO's recommended method for quantifying obsolescence loss of value was utilized in the March 1, 1995 obsolescence assessment analysis of One Indiana Square performed by Michael C. Lady Appraisal Co." (Petitioner's Exhibit 1, page 22). The standards describing the IAAO's recommended method were included in the Petitioner's brief. (Petitioner's Exhibit 1, tab 11). These standards note that when valuing contaminated property, "as in all other types of property valuation, three approaches to value [the sales comparison approach, cost approach, and income approach] are recognized and should be used." (Petitioner's Exhibit 1, tab 11, section 6, page 13).
 48. To quantify its claim of economic obsolescence, One Indiana Square (using the income approach) determined that the abstracted market value of the improvements was \$51,600,000. The present values of the proposed remediation costs, build-out costs, and loss of revenue were also calculated. These present values were then divided by the purported market value of the improvements to arrive at an estimation of obsolescence totaling 43% (Petitioner's Exhibit 2, page 187).

49. However, 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.
50. The State will first examine the proposed remediation costs utilized in the quantification calculation.
51. “The Lady Report included consideration of the estimated cost of asbestos removal as compiled by Mr. Paul Sapoff, a certified asbestos consultant. Mr. Sapoff’s cost compilations were based on the estimated cost of the asbestos removal effort as of the assessment date.” (Petitioner’s Exhibit 1, page 22).
52. Mr. Sapoff concluded that the total cost of remediation would be \$24,594,768. (Petitioner’s Exhibit 1, tab 13). The Lady Report determined the present value of these costs to be \$10,261,600. (Petitioner’s Exhibit 2, page 186).
53. The Petitioner described the remediation process in the following manner: “There are basically three ways to make a building safe after discovery of asbestos: (1) removal; (2) encapsulation; and (3) enclosure (walling off). Removal is the most common means of alleviating asbestos, and the only permanent solution available. Removal is also the most expensive method because it usually requires destruction of the interior finish to access the asbestos and additional safeguarding expenditures to seal and secure the abated area so the removed asbestos is not circulated throughout the structure. Additionally, there are specialized equipment costs and costs associated with relocating tenants.

A less favored method is encapsulation. Encapsulation involves spraying on certain materials that glue the asbestos in place and prevent it from becoming airborne. Encapsulation, however, has fallen into disuse because of questions of its permanency. There is a concern that the asbestos material may separate from the surface due to the weight of the encapsulating material. There is also

the concern that any encapsulating material may be violated by water intrusion or may rupture during remodeling and maintenance work.

The third method is walling-off, which involves the installation of sheet rock or other dry wall material over the asbestos, thus sealing it off from the circulating air. Like encapsulation, walling-off is not a permanent solution, and in many circumstances, such as insulation in ventilating systems, it may not be practical. Walling-off also may be violated by water intrusion or may rupture during remodeling and maintenance work.

It is important to note that with both walling-off and encapsulation, the hazardous asbestos-containing materials remain in the building.” (Petitioner’s Exhibit 1, pages 6-7).

54. The proposed quantification calculation was based on estimated costs of the complete removal of the asbestos. As the Petitioner acknowledged, this method is the most costly of the three possible remediation procedures.
55. The IAAO standards recognize the impact of the remediation costs in the valuation of the property. These standards, in fact, provide considerable guidance as to the procedures necessary to correctly measure the influence of these costs to cure on the property’s value. The IAAO standards emphasize that not all expenses are allowable in the calculation.
56. “Expenses that are allowable should include those that are documentable as actual, current, or provably anticipated. Expenses to be used should be based on current cleanup mandates, not ones that are invoked only upon the sale of property or change in use, as is sometimes the case. Documentation provided by the property owner should be verified through environmental regulatory agencies.” (Petitioner’s Exhibit 1, tab 11, page 15, section 6.3.2).

57. “Actual costs must be ascertained. Estimates provided by a property owner may be overstated. For example, regulatory agencies may grant permission to use less expensive alternatives, such as isolation rather than cleanup. Deferrals may be granted, and these allow more time for cleanup and reduce current costs.” (Petitioner’s Exhibit 1, tab 11, page 11, section 4.2.1).
58. “Some contaminants, such as asbestos, however, are often more easily treated than many initial estimates assume.” (Petitioner’s Exhibit 1, tab 11, page 15, section 6.3.2).
59. “Proof that less costly alternatives are not acceptable to the regulatory agency should also be provided.” (Petitioner’s Exhibit 1, tab 11, page 15, section 7.1.1).
60. “Whenever possible, costs should be determined from the market. It is often possible to obtain comparable costs for cleanup of similar situations. Files of cleanup cost information should be developed and maintained. Often, information outside the particular jurisdiction or region may be necessary.” (Petitioner’s Exhibit 1, tab 11, page 11, section 4.2).
61. “The income stream must be modified to account for the cost to cure the contamination problem and any loss of utility. Modification should be based on the amortized present worth of actual costs, recognizing that permissible alternatives may limit costs to those necessary to satisfy the regulatory agency, not necessarily the full cost to cure the problem.” (Petitioner’s Exhibit 1, tab 11, page 14, section 6.3.2).
62. “Less costly solutions or partial solutions are often available and may be acceptable to regulators. Often these involve isolating contamination with fencing or protective covering. Management, rather than complete remediation, may be permitted. Costs for a partial solution will be lower and should be reviewed to be sure that effect on value is not overstated.” (Petitioner’s Exhibit 1, tab 11, page 15, section 7.1.3).

63. Despite this guidance, the Petitioner failed to present any cleanup costs from comparable properties, as described by the IAAO standards. The Petitioner further failed to identify any professional authority in support of its position that it is appropriate to include the most expensive costs in its calculation. Indeed, the standards issued by the IAAO repeatedly emphasize that the most expensive costs of remediation are not necessarily appropriate and allowable in a calculation of value.
64. Additionally, the Petitioner failed to produce any evidence that State or Federal regulations require the complete removal of the asbestos. Indeed, the record indicated that less costly methods, such as encapsulation, have in fact been employed by One Indiana Square: “Renovations have been conducted in recent years on several floors in both the common areas and tenant spaces. Various methods have been utilized to control the asbestos-containing spray-on fireproofing applied to building structures. Control methods utilized include removal and encapsulation. **Encapsulation has been performed in portions of the lower concourse common areas (1987), perimeter areas of the 4th floor (1993) and the mechanical engineering rooms on the 17th (1988) and 18th floors (1988).**” (Petitioner’s Exhibit 1, tab 13, the second unnumbered page) (Emphasis added).
65. The State notes that One Indiana Square acknowledged these less costly remediation methods produced a building where “remediation efforts have gone well beyond existing federal and state environmental regulations, and tenants are safe from any health problems associated with asbestos.” (Petitioner’s Exhibit 1, page 19). The record does not indicate that the Petitioner is under any order from State or Federal authorities to conduct any further remediation activities.
66. The State also notes that, despite more than four years elapsing between the date of Mr. Sapoff’s remediation cost estimate and the administrative hearing, One Indiana Square did not even implement the proposed remediation program.

(Petitioner's Exhibit 2, page 167). As discussed, the IAAO defines allowable expenses as only "those that are documentable as actual, current, or provably anticipated." (Petitioner's Exhibit 1, tab 11, page 15, section 6.3.2). The Petitioner failed to establish that estimated remediation costs that were never implemented during a period of more than four years are "actual, current or provably anticipated."

67. Indeed, the evidence failed to support the Petitioner's claim that "the only method...acceptable to the public is removal." (Petitioner's Exhibit 1, page 7).
68. The Petitioner presented no evidence that any tenant has left as a result of the asbestos; in fact, as of December 1994, occupancy rates (without offering leasing concessions) exceeded the market rate, despite the disclosure of the presence of asbestos approximately 10 years prior to this time. (Petitioner's Exhibit 2, page 146). The Petitioner further presented no evidence that it has experienced, or expects to experience, any difficulty leasing vacant space as it becomes available. To the contrary, the Lady Report concluded that there would be only a period of three to five months for lag vacancy at the time of expiring leases. (Petitioner's Exhibit 2, page 155).
69. The Petitioner's unsubstantiated conclusions concerning the marketability of the property do not constitute probative evidence. *Whitley*, 704 N.E. 2d at 1119.
70. One Indiana Square further contended that its ability to obtain financing was negatively impacted by the presence of asbestos: "An inquiry to any of the commercial lenders in Indianapolis, including insurance companies and banks, would reveal that not one of them would consider making a loan for a building with One Indiana Square's level of asbestos contamination." (Petitioner's Exhibit 1, page 21). As discussed, the IAAO recognizes that the impact of atypical financing is indicative of the presence of obsolescence.

71. Although the ability to obtain financing is a valid consideration when determining the impact of environmental contamination on the value of a building, One Indiana Square's assertion is plainly contradicted by the Lady Report: "The appraisers surveyed three local lending institutions who are active in commercial real estate lending and two life insurance companies were surveyed.

The conversations indicated that if a property were completely remediated with a certificate provided by the environmental company, then most lenders would finance the acquisition. If the property were not remediated, but the ACM was being contained on a spot abatement basis, then the lender would require an extensive monitoring program and a complete environmental assessment.

These measures substantially increase the operating costs of a property which is contaminated. These additional operating expenses can not be passed through to the tenants. In the event of spray-on asbestos, which is contained within the Property, most of the lenders surveyed indicated that due to legal concerns over environmental contamination, that the lending institution would not be willing to finance the purchase of this type property." (Petitioner's Exhibit 2, page 166).

72. Despite the minimal sampling of only five financial institutions, the Lady Report indicated that financing was, in fact, available. For example, financing would be available if a spot abatement basis [the procedure previously used by the Petitioner] was used, although the lender would require an extensive monitoring program and a complete environmental assessment. Even in the event of spray-on asbestos, "most [but not all] of the lenders surveyed indicated...that the lending institution would not be willing to finance the purchase of this type property."

73. Summarizing, the Petitioner asserted that an "inquiry to any of the commercial lenders in Indianapolis" would produce no lender willing to provide financing. The record indicates that, in fact, only five institutions were queried. Rather than revealing "that not one of them would consider making a loan for a building with One Indiana Square's level of asbestos contamination" (Petitioner's Exhibit 1,

page 21), the survey concluded that, with additional monitoring, financing was indeed available.

74. One Indiana Square has acknowledged that it is already performing some level of monitoring (Petitioner's Exhibit 1, page 18). No evidence was presented to demonstrate that monitoring procedures demanded by lending institutions would exceed those already in place. One Indiana Square provided no evidence that any adverse market terms, such as higher interest rates, would be required to secure the financing. The Petitioner has therefore failed to quantify any additional costs that would be incurred in obtaining financing for the property.
75. The Petitioner further asserted that "the IAAO also recognizes the stigma associated with contaminated property, and the assessed values should be adjusted to reflect the typical cost to lessen the stigma." (Petitioner's Exhibit 1, page 22).
76. The IAAO defines stigma as "An unfavorable perception, which may influence value, that continued contamination remains after cleanup has been effectuated." (Petitioner's Exhibit 1, tab 11, page 21, section 12 [Glossary]).
77. However, any effect of stigma has not been demonstrated. Stigma is a perception of the market to the contamination, and does not exist simply because the Petitioner asserted that stigma is present. "Where contamination problems are not obvious [such as buildings that pose no health hazards and are in compliance with federal and state environmental regulations (Petitioner's Exhibit 1, page 19)], the stigma is likely to be overstated, and value effects may be minimal." (Petitioner's Exhibit 1, tab 11, page 12, section 4.5).
78. The Petitioner offered no evidence that the market had determined that the remediation efforts implemented by One Indiana Square have been inadequate. As discussed, the presence of asbestos was realized at some point in time during the mid-1980's. Remediation activities began at approximately the same

time. However, despite the Petitioner's assertions of the dire effects of stigma, the building in fact maintained occupancy rates greater than the market average. (Petitioner's Exhibit 2, page 146). The Petitioner therefore failed to offer any evidence that it was losing tenants as a result of the presence of asbestos. It failed to demonstrate that new tenants were rejecting leasing space in the building as a result of asbestos contamination. (Petitioner's Exhibit 2, page 155). It failed to offer evidence that any special leasing concessions were being made to retain or attract tenants. (Petitioner's Exhibit 2, page 146). Its own assessor determined that financing was available to the Petitioner. (Petitioner's Exhibit 2, page 166).

79. Having failed to present any evidence to demonstrate that the market has "an unfavorable perception, which may influence value, that continued contamination remains after cleanup has been effectuated", the Petitioner has failed to establish that the building suffers from any stigma as a result of the asbestos contamination.

80. Summarizing, One Indiana Square contended that the amount of obsolescence awarded by the local officials was inadequate. However, the Petitioner acknowledged that the building poses no health problems for its tenants. One Indiana Square further acknowledged that past remediation efforts "have gone well beyond existing federal and state environmental regulations." (Petitioner's Exhibit 1, page 19). One Indiana Square also failed to present any evidence that the stigma of contamination has affected the value of the building. For example, the Petitioner presented no evidence that any tenant has left as a result of the asbestos; as of December 1994, occupancy rates actually exceeded the market rate, despite the disclosure of the presence of asbestos approximately 10 years prior to the assessment. The Petitioner presented no evidence that it has experienced, or expected to experience, any difficulty leasing vacant space as it becomes available; its own appraiser estimated a period of three to five months for lag vacancy. Rather than attempting to explain and quantify any unfavorable terms required to finance the property, the Petitioner claimed it could not obtain

financing. As discussed, the Petitioner's own appraiser again contradicted this claim. Finally, in its proposed quantification of obsolescence, the Petitioner utilized costs for the most expensive type of remediation, removal. The standards issued by the IAAO, on which the Petitioner relied, instructed that this procedure was incorrect. Indeed, despite IAAO admonitions to use only expenses "that are documentable as actual, current, or provably anticipated" in its calculation, the record indicated that the Petitioner never incurred these higher costs because the proposed remediation plan was never implemented. Instead, the Petitioner actually used less expensive means to remediate the contamination.

81. Because incorrect cost information was used in the Lady Report's calculation of obsolescence, the Petitioner has failed to quantify its claim for 43% obsolescence depreciation as a result of asbestos contamination.
82. Having failed to support its claim for an overall obsolescence adjustment of 60%, One Indiana Square has failed to satisfy the second prong of the two-prong test articulated in *Clark*.
83. For all the reasons above, the Petitioner failed to meet its burden in this appeal. Accordingly, no change is made to the assessment as a result of this issue.

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