

REPRESENTATIVES FOR PETITIONER: Denise Praul, Integrity Tax Consultants

REPRESENTATIVES FOR RESPONDENT: R. Eugene Inbody and Cathy Searcy, Elkhart County Property Tax Assessment Board Of Appeals

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

In the matter of:

PLAZA SQUARE, LLC,)	
)	Petition No.: 20-012-01-1-4-00047
Petitioner)	
)	County: Elkhart
v.)	
)	Township: Concord
ELKHART COUNTY PROPERTY)	
TAX ASSESSMENT BOARD OF)	Parcel No.: 250605410025
APPEALS, AND THE CONCORD)	
TOWNSHIP ASSESSOR,)	Assessment Year: 2001
)	
Respondents.)	
)	

Appeal from the Final Determination of the
Elkhart County Property Tax Assessment Board of Appeals

September 24, 2002

FINAL DETERMINATION

The Indiana Board of Tax Review assumed jurisdiction of this matter as the successor entity to the State Board of Tax Commissioners, and the Appeals Division of the State Board of Tax Commissioners. For convenience of reference, each entity is without distinction hereafter referred to as the "Board".

The Board having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issue

1. The issue presented for consideration by the Board was:
Whether ten percent (10%) obsolescence depreciation should be applied.

Procedural History

2. Pursuant to Ind. Code § 6-1.1-15-3 Denise Praul of Integrity Tax Consulting, filed a Form 131 on behalf of Plaza Square, LLC (Petitioner) petitioning the Board to conduct an administrative review of the above petition. The Form 131 was filed on September 21, 2001. The Form 115 determination of the Elkhart County Property Tax Assessment Board of Appeals (PTABOA) was issued on August 14, 2001.¹

Hearing Facts and Other Matters of Record

3. Pursuant to Ind. Code § 6-1.1-15-4 a hearing was held on August 1, 2002 in Goshen, Indiana before Patti Kindler, the duly designated Administrative Law Judge (ALJ) authorized by the Board under Ind. Code § 6-1.5-5-2.

4. The following persons were present at the hearing:

For the Petitioner: Denise Praul, Integrity Tax Consulting

For the Respondent: R Eugene Inbody, and Cathy Searcy, Elkhart County
PTABOA

5. The following persons were sworn in as witnesses and presented testimony:

For the Petitioner: Denise Praul

¹ The subject Form 131 was postmarked September 6, 2001, but was forwarded to the wrong county. At the State's request, the Petitioner submitted a copy of the postmarked envelope and the Form 131 petition was accepted as timely by the State.

For the Respondent: R Eugene Inbody, and Cathy Searcy

6. The following exhibits were presented:

For the Petitioner:

Petitioner's Exhibit 1 – Brief of contentions, tenant information, interior map of leased area, subject lease agreements, and financial statements;

Petitioner's Exhibit 2 – A copy of the calculations for potential income based on 100% occupancy;

Petitioner's Exhibit 3 – Comparable downtown Elkhart rental information;

Petitioner's Exhibit 4 – A copy of a letter from Steve Pettit, owner of the property, regarding repairs;

Petitioner's Exhibit 5 – A copy of a facsimile from Elkhart PTABOA regarding a possible continuance; and

Petitioner's Exhibit 6 – A facsimile copy of the Tax Representative Disclosure Statement, dated 8/9/02.

For the Respondent:

Respondent's Exhibit 1 – Subject Form 115;

Respondent's Exhibit 2 – PTABOA's Findings and Conclusions; and

Respondent's Exhibit 3 – Subject Form 130 with attachments.

7. The following additional items are officially recognized as part of the record of proceedings:

Board Item A – Form 131 petition, with attachments;

Board Item B – Notice of Hearing on Petition, April 11, 2002;

Board Item C – Notice of Hearing on Petition, Re-Schedule, August 1, 2002; and

Board Item D – Request for Additional Evidence.

8. The subject property is a commercial office building located at 227 South Main Street in Elkhart, Indiana (Concord Township, Elkhart County).

9. The ALJ did not inspect the subject property.

Jurisdictional Framework

10. This matter is governed by the provisions of Ind. Code § 6-1.1-15, and all other laws relevant and applicable to appeals initiated under those provisions, including all case law pertaining to property tax assessment or matters of administrative law and process.
11. The Board is authorized to issue this final determination pursuant to Indiana Code § 6-1.1-15-3.

Indiana's Property Tax System

12. The Indiana Constitution requires Indiana to create a uniform, equal, and just system of assessment. See Ind. Const. Article 10, §1.
13. Indiana has established a mass assessment system through statutes and regulations designed to assess property according to what is termed "True Tax Value." See Ind. Code § 6-1.1-31, and 50 Ind. Admin. Code 2.2.
14. True Tax Value does not precisely equate to fair market value. See Ind. Code § 6-1.1-31-6(c).
15. An appeal cannot succeed based solely on the fact that the assessed value does not equal the property's market value. See *State Board of Tax Commissioners v. Town of St. John*, 702 N.E. 2d 1034, 1038 (Ind. 1998) (*Town of St. John V*).
16. The Indiana Supreme Court has said that the Indiana Constitution "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", nor does it "mandate the consideration of whatever evidence of property wealth any given

taxpayer deems relevant”, but that the proper inquiry in tax appeals is “whether the system prescribed by statute and regulations was properly applied to individual assessments.” See *Town of St. John V*, 702 N.E. 2d at 1039 – 40.

17. Although the Supreme Court in the *St. John* case did declare the cost tables and certain subjective elements of the State’s regulations constitutionally infirm, it went on to make clear that assessment and appeals must continue to be determined under the existing rules until new regulations are in effect.
18. New assessment regulations have been promulgated, but are not effective for assessments established prior to March 1, 2002. See 50 Ind. Admin. Code 2.3.

State Review and Petitioner’s Burden

19. The State does not undertake to reassess property, or to make the case for the petitioner. The State’s decision is based upon the evidence presented and issues raised during the hearing. See *Whitley Products, Inc. v. State Bd. of Tax Comm’rs*, 704 N.E. 2d 1113 (Ind. Tax 1998).
20. The petitioner must submit ‘probative evidence’ that adequately demonstrates all alleged errors in the assessment. Mere allegations, unsupported by factual evidence, will not be considered sufficient to establish an alleged error. See *Whitley Products, Inc. v. State Bd. of Tax Comm’rs*, 704 N.E. 2d 1113 (Ind. Tax 1998), and *Herb v. State Bd. of Tax Comm’rs*, 656 N.E. 2d 1230 (Ind. Tax 1998). [‘Probative evidence’ is evidence that serves to prove or disprove a fact.]
21. The petitioner has a burden to present more than just ‘de minimis’ evidence in its effort to prove its position. See *Hoogenboom-Nofzinger v. State Bd. of Tax Comm’rs*, 715 N.E. 2d 1018 (Ind. Tax 1999). [‘De minimis’ means only a minimal amount.]
22. The petitioner must sufficiently explain the connection between the evidence and petitioner’s assertions in order for it to be considered material to the facts. ‘Conclusory

statements' are of no value to the State in its evaluation of the evidence. See *Heart City Chrysler v. State Bd. of Tax Comm'rs*, 714 N.E. 2d 329 (Ind. Tax 1999). [‘Conclusory statements’ are statements, allegations, or assertions that are unsupported by any detailed factual evidence.]

23. Essentially, the petitioner must do two things: (1) prove that the assessment is incorrect; and (2) prove that the specific assessment he seeks, is correct. In addition to demonstrating that the assessment is invalid, the petitioner also bears the burden of presenting sufficient probative evidence to show what assessment is correct. See *State Bd. of Tax Comm'rs v. Indianapolis Racquet Club, Inc.*, 743 N.E.2d 247, 253 (Ind., 2001), and *Blackbird Farms Apartments, LP v. DLGF* 765 N.E.2d 711 (Ind. Tax, 2002).
24. The State will not change the determination of the County Property Tax Assessment Board of Appeals unless the petitioner has established a ‘prima facie case’ and, by a ‘preponderance of the evidence’ proven, both the alleged error(s) in the assessment, and specifically what assessment is correct. See *Clark v. State Bd. of Tax Comm'rs*, 694 N.E. 2d 1230 (Ind. Tax 1998), and *North Park Cinemas, Inc. v. State Bd. of Tax Comm'rs*, 689 N.E. 2d 765 (Ind. Tax 1997). [A ‘prima facie case’ is established when the petitioner has presented enough probative and material (i.e. relevant) evidence for the State (as the fact-finder) to conclude that the petitioner’s position is correct. The petitioner has proven his position by a ‘preponderance of the evidence’ when the petitioner’s evidence is sufficiently persuasive to convince the State that it outweighs all evidence, and matters officially noticed in the proceeding, that is contrary to the petitioner’s position.]

Discussion of the Issue

ISSUE: Whether ten percent (10%) obsolescence depreciation should be applied.

25. The issue concerns obsolescence depreciation.
26. The Petitioner contends the subject building had been partially vacant for over a year on the March 1, 2001 assessment date. The building has been for sale and has received no

viable offers. The Petitioner contends that ten percent (10%) economic obsolescence is warranted for the property. *Praul Testimony*; Petitioner's Exhibit 1.

27. The Respondents contend that no calculations were submitted to show how the 10% obsolescence request was determined. *Searcy Testimony*.

28. The applicable rules governing this Issue are:

50 IAC 2.2-10-7

“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 extend of it in improvements being valued.

50 IAC 2.2-10-5(d)16

“Obsolescence depreciation” is the percentage of reduction of value due to functional and economic causes. Obsolescence depreciation is determined independently from the physical depreciation allowance.

50 IAC 2.2-10-7(e)(1)

Functional obsolescence may be caused by, but is not limited to, the following:

- (A) Limited use or excessive material and product handling costs cause 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)(2)

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.

Burden Regarding Obsolescence Claims

- 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).
- 31. Obsolescence may be quantified using generally recognized appraisal principles. *Canal Square Limited Partners v. State Board of Tax Commissioners*, 694 N.E. 2d 806, 807 (Ind. Tax 1998).
- 32. Evidence and testimony considered particularly relevant to this determination include the following:
 - a. The subject building represents a one-story 1,088 square foot commercial office building located in downtown Elkhart on leased land.
 - b. At the time of assessment, two tenants occupied six percent (6%) of the overall available tenant space, the rest of the building was vacant. *Praul Testimony*; Petitioner's Exhibit 1, Pg 2.
 - c. The building is for sale on the market but the owner has had no serious offers to purchase. The building is situated on leased land and has a high vacancy rate,

which hinders consumer and lessee interest in the property. *Praul Testimony*; Petitioner's Exhibit 1, Pg 1.

- d. The structure rents for about \$4.14 per square foot, which is below market rent. The lowest comparable rent located in the area was \$6.00 per square foot. *Praul Testimony*; Petitioner's Exhibit 3.
- e. The Petitioner contends that on the assessment date, the lessor was receiving only thirty six percent (36%) of the potential rent and the building was operating at a loss. *Praul Testimony*; Petitioner's Exhibit 2.
- f. The structure has had and will continue to need expensive maintenance repairs. If the building were completely occupied, it would still be operating at a loss. *Praul Testimony*; Petitioner's Exhibit 1 & 4.
- g. The Petitioner asserts the building deserves ten percent (10%) economic obsolescence because the rent is well below comparable market rents and the owner is still unable to lease most of the space in the building. *Praul Testimony*.
- h. The Respondents contend that the problems with the building may be a result of deferred maintenance, not obsolescence. *Inbody Testimony*.
- i. The Respondent's argue that no calculations to quantify the Petitioner's request for obsolescence were submitted at the hearing. *Searcy Testimony*.

Analysis of ISSUE 1

- 33. To prevail in obsolescence appeals, the Petitioner must first show that obsolescence does exist, and then quantify their request for the obsolescence using recognized appraisal methodology.
- 34. The Petitioner claims that vacancy and below market rents are the cause of obsolescence in the subject property. The Petitioner testified that only 6% of the subject property is occupied and it is only recognizing 36% of its potential income. The Petitioner also testified that the subject is renting space at \$4.14 per square foot, and the market rate is \$6.00 per square foot.

35. The Petitioner attempted to establish market rate by presenting a document, from an Internet site called LoopNet. (Petitioner's Exhibit 4). Petitioner identifies three structures on this document. Petitioner does not attempt to show how these structures are comparable to the subject structure. In fact, one of the buildings on Petitioner's Exhibit 4 is a medical office building, which would not be comparable to a general office building.
36. Furthermore, a review of the Petitioner's Exhibit 4 indicates that the occupancy for all three buildings is 0% (zero percent). Petitioner's Exhibit 4 also has a disclaimer, which reads in part: "The information above has been obtained from sources believed reliable. While we do not doubt its accuracy we have not verified it and make no guarantee, warranty, or representation about it. It is your responsibility to independently confirm its accuracy and completeness. Any projections, opinions, assumptions, or estimates used are for example only and do not represent the current or future performance of the property."
37. The Petitioner did not present any evidence that the information, including alleged rental rates, contained in Petitioner's Exhibit 4 was verified. No other information was presented to attempt to establish the market rate for the area. Accordingly, the Petitioner failed to show the current market rate for office space in the subject building's area. The Petitioner failed to provide probative evidence that the subject is renting below the market rate for the area.
38. The Petitioner also claimed that the property deserves an obsolescence adjustment based on vacancy. "Vacancy by itself does not prove any obsolescence. Vacancy is merely a sign of possible obsolescence; a taxpayer seeking an obsolescence reduction because of building vacancy must still present probative evidence showing the reason *why* its building is vacant." *Deer Creek Developers, Ltd. v. Department of Local Government Finance*, 769 N.E.2d 259, 263 (Ind. Tax, 2002) (internal citations omitted).
39. Again, according to the directives of *Clark* (See Burden Regarding Obsolescence Claims in ¶ 28), the Petitioner must show that obsolescence does exist. The Petitioner failed in this case, to present evidence of a cause of obsolescence. Even if Petitioner did present a

prima facie case for the causes of obsolescence, the Petitioner would still need to quantify the amount requested using recognized appraisal methodology.

40. The Petitioner offered calculations for the subject's potential monthly rent and testified that only thirty six percent (36%) of the potential income was being realized on the property, as of March 1, 2001. (*See* Petitioner's Ex. 2). However, the Petitioner failed to quantify any of this information using recognized appraisal methods.
41. Petitioner presented federal tax returns to substantiate the income. However, the income and expenses used for federal tax purposes are not the same as those used for valuing property through an income capitalization approach. For instance, debt service, depreciation and property taxes are not included in expense sections when using an income approach. *See IAAO Property Assessment Valuation*, 217-219 (2nd ed. 1996).
42. Further, the Petitioner testified the request for ten percent (10%) obsolescence was determined by reviewing the high percentage of vacancies in downtown Elkhart and the subject's sixty percent (60%) monthly income loss. Without the support of any of the required quantification techniques, the Petitioner simply indicated that ten percent (10%) economic obsolescence was "reasonable".
43. *In Clark v. State Board of Tax Commissioners*, 694 N.E. 2d 1230 (Ind. Tax 1998), the court states, "It is important to keep in mind that the obsolescence of a given improvement must be tied to a loss of value. In the commercial context, that loss of value usually means the loss of income generated by the property." (Internal citations omitted). The Petitioner failed to capitalize a loss of income using a recognized appraisal technique.
44. The burden was on the Petitioner to present a prima facie case as to obsolescence. *See Miller Structures*, 748 N.E. 2d 943, 954 (Ind. Tax 2001). In consideration of the directive within *Clark, supra.*, and for all the reasons stated above, the Petitioner has failed to meet their burden in this appeal. Accordingly, no change is made to the assessment.

Other

45. Several objections were made to evidence and testimony presented that had not been presented at the PTABOA hearing. These objections concern evidentiary procedures discussed in 50 IAC 17-7-1. The State declines to conduct an in-depth analysis of the procedural rules as they pertain to this appeal as such an analysis would have no bearing on the outcome of this determination.

Summary of Final Determination

Determination of ISSUE 1: *Whether ten percent (10 %) obsolescence depreciation should be applied*

46. The Petitioner did not sufficiently establish the existence of obsolescence nor quantify the amount of obsolescence claimed. Accordingly, there is no change in the assessment as a result of this issue.

This Final Determination of the above captioned matter is issued this by the Indiana Board of Tax Review on the date first written above.

Chairman, Indiana Board of Tax Review

IMPORTANT NOTICE

- APPEAL RIGHTS -

You may petition for judicial review of this final determination pursuant to the provisions of Indiana Code § 6-1.1-15-5. The action shall be taken to the Indiana Tax Court under Indiana Code § 4-21.5-5. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice.