

REPRESENTATIVES FOR PETITIONER:
Doug Fenn, President – Tellco Properties, LLC
Steve Folz, Tax Representative

REPRESENTATIVES FOR RESPONDENT:
Mendy Ward, Perry County Assessor
Debra Elder, Perry County Auditor
Kirk Reller, Perry County and Township Representative

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

In the matter of:

TELLCO PROPERTIES, LLC.,)
)
)
)
Petitioner)
)
v.)
)
TROY TOWNSHIP,)
)
)
)
Respondents)
)

Petition No.: 62-009-01-1-3-00004
County: Perry
Township: Troy
Parcel No.: 0090264824
Assessment Year: 2001

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

March 10, 2004

FINAL DETERMINATION

The Indiana Board of Tax Review (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 additional functional and economic obsolescence should be applied to the subject property.

Procedural History

2. Pursuant to Ind. Code § 6-1.1-15-3, Douglas M. Fenn, President of Tellco Properties, LLC (d/b/a Tell City Chair)(Petitioner), filed a Form 131 petitioning the Board to conduct an administrative review of the above petition. The Form 131 was filed on December 14, 2003. The Perry County Property Tax Assessment Board of Appeals (PTABOA) Notification of Final Assessment Determination was mailed on November 14, 2001.

Hearing Facts and Other Matters of Record

3. Pursuant to Ind. Code § 6-1.1-15-4 a hearing was held on December 17, 2003, in Tell City, Indiana before Jennifer Bippus, 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:

Doug Fenn, President – Tellco Properties, LLC
Steve Folz, Tax Representative for Petitioner

For the Respondent:

Mendy Ward, Perry County Assessor
Debra Eeder, Perry County Auditor

Kirk Reller, Perry County and Township Representative

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

For the Petitioner:

Doug Fenn

Steve Folz

For the Respondent:

Mendy Ward

Debra Eeder

Kirk Reller

6. The following exhibits were presented:

For the Petitioner:

Petitioner's Exhibit A – A Sales Disclosure citing \$49,900 as the total sale price of the subject property

Petitioner's Exhibit B – A letter from Kurtz Auction and Realty Company stating that no appraisal is offered of an individual tract, but that block #36 was sold for nine tenths of one percent over the highest individual bid made by Fenn Investments of \$45,000

Petitioner's Exhibit C – A copy from the Voges Appraisal Service stating the property is worth \$49,500

Petitioner's Exhibit D – A letter stating that the Petitioner was not able to contract with an appraisal company for the additional appraisal requested to submit as additional evidence (timelines could not be met)

Petitioner's Exhibit E – The Power of Attorney for Steve Folz, representing Doug Fenn

For the Respondent:

Respondent's Exhibit A – A copy of the property record card (PRC)) for the subject property

7. The following additional items are officially recognized as part of the record of proceedings:
 - Board's Exhibit A - Form 131 petition
 - Board's Exhibit B - Notice of Hearing on Petition
 - Board's Exhibit C - Request for Additional Evidence given to the Petitioner

8. Per the Form 131 petition under review, the assessment in question is as of March 1, 2001. The assessed values under review are as follows:

Land	\$ 44,300
Improvements	<u>513,500</u>
Total	\$558,800

9. The subject structure is located at 602 Sixth Street, Tell City, Troy Township, Perry County.

10. The ALJ did not conduct an on-site inspection of the subject property.

Property Background

11. The Fenn family owned all the property within Block #36 since the 1950's and some of the property as early as 1865. Tell City Chair Company disposed of its real estate and assets, at which time Mr. Fenn purchased the equipment to run the operation on his own. Mr. Fenn kept his operation locally rather than move due to economics. Kurtz Auction and Realty Company was retained by the Directors of Tell City Chair Company to conduct an auction of all their Tell City real estate on October 26, 2000. The highest individual bidder for the subject tract (#6) under review in this appeal was Fenn Investments Company. Following the individual bidding for Tracts 1 thru 7, the tracts were then offered for a single aggregate bid. The City of Tell City/Economic Development Commission made a successful bid for all the property at \$153,500. This bid exceeded the sum of the bids for the individual tracts. The City of Tell City (City)

then sold the subject tract to Mr. Fenn for \$49,900 since Mr. Fenn was already located there and had expressed an interest in the property by bidding on it.

Jurisdictional Framework

12. 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.
13. The Board is authorized to issue this final determination pursuant to Indiana Code § 6-1.1-15-3.

Indiana's Property Tax System

14. The Indiana Constitution requires Indiana to create a uniform, equal, and just system of assessment. See Ind. Const. Article 10, §1.
15. 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.
16. True Tax Value does not precisely equate to fair market value. See Ind. Code § 6-1.1-31-6(c).
17. An appeal cannot succeed based solely on the fact that the assessed value does not equal the property's market value. See *Town of St. John V*, 702 N.E. 2d.
18. 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.

19. 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.
20. 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

21. The State does not undertake to reassess property, or to make the case for the petitioner. The State 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).
22. 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 890 (Ind. Tax 1995). [‘Probative evidence’ is evidence that serves to prove or disprove a fact.]
23. 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.]
24. 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.]

25. 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).
26. 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 Issue

ISSUE: Whether additional functional and economic obsolescence should be applied to the subject property.

27. The Petitioner contends that the subject property should receive additional functional and

economic obsolescence because the purchase price was only \$49,900.

28. The Petitioner opines that the building has narrow passageways and that the upper floor is not being utilized. The Petitioner contends that 20% of the building is used and 80% of the building is vacant.
29. The Petitioner further states, that the 2002 assessment valued the total property (land and improvements) at \$199,700 and that this assessment shows that the 2001 assessment is too high.
30. The Respondent contends that the property is properly valued for the 2001 assessment year and that no additional obsolescence is warranted.
31. The applicable rules governing this Issue are:

50 IAC 2.2-10-7 – Commercial and industrial building depreciation

50 IAC 2.2-10-7(e)

In addition to physical depreciation, some buildings experience loss of value due to **obsolescence**. These effects are much less noticeable than physical depreciation and must be examined in depth.

50 IAC 2.2-1-24 “Economic obsolescence” defined

Obsolescence caused by factors extraneous to the property.

50 IAC 2.2-1-29 “Functional obsolescence” defined

Obsolescence caused by factors inherent in the property itself.

32. Evidence and testimony considered particularly relevant to this determination include the following:
 - a. When Tell City Chair Company was liquidated, Mr. Fenn purchased the equipment to run his own operation. The equipment was moved to the building the Petitioner now occupies which is the same building that is under review in this appeal. The Petitioner chose to stay in this location rather than move the operation elsewhere due to economics. *Fenn testimony*.

- b. The subject property was sold as part of a bankruptcy auction, authorized by the United States Bankruptcy Court, upon request by the Tell City Chair Company Board of Directors. *Petitioner's Exhibit C.*
- c. The City purchased all the property for \$153,500. *Fenn testimony.*
- d. The Petitioner occupied the piece of property under review at the time of the auction, and was the highest bidder on that piece of property. *Fenn testimony.*
- e. The City sold the subject piece of property to the Petitioner for \$49,900. *Fenn testimony.*
- f. Only 20% of the building is being used for manufacturing with 80% of the building used for storage of old equipment and records. *Fenn testimony.*
- g. There was no commercial appraisal done on the subject property since the cost of such an appraisal could not be justified. *Fenn testimony.*
- h. Obsolescence is a major consideration for the subject property due to the narrow passages, deterioration of the facility, difficulty in moving product on the upper floors, difficulty in using forklifts, excessive wall heights, and limited marketability. *Folz testimony.*
- i. The only appraisal done on the subject property was that done by Mr. Voges, an employee of the PTABOA and the City, which was based on the market approach only. In addition, there would be difficulty in finding comparables for the subject property. *Folz testimony & Petitioner's Exhibit C.*
- j. Petitioner asked to submit an independent appraisal. Request was granted by the ALJ, but the Petitioner could not comply within the time frame allotted. *Folz testimony, Board's Exhibit C & Petitioner's Exhibit D.*
- k. Reviewing the interior use classifications could also solve the obsolescence issue. Though not an issue on the 131, the interior use classifications could be addressed at this hearing. *Folz testimony.*
- l. Mr. Voges is a licensed appraiser but there is a conflict of interest since Mr. Voges works for the City and his appraisal was made strictly for the City. *Reller testimony.*
- m. Mr. Voges' appraisal is limited. He took the auction price plus expenses to place a value on the property. *Reller testimony.*

- n. The PTABOA made changes to portions of the subject's assessment after the PTABOA hearing with Mr. Fenn, which included additional obsolescence being applied. *Reller and Ward testimony & Respondent's Exhibit A.*

Analysis of the ISSUE

33. The Petitioner testified that he paid \$49,900 (Petitioner's Exhibit A) for the subject property. The Petitioner opined that additional obsolescence should be given to the property to reflect the sales price and the fact that only 20% of the building is being occupied and used. The Petitioner seeks both functional and economic obsolescence.
34. The Petitioner also provided a valuation of Block #36 (Former Tell City Chair Co. – Plant #2), an opinion of appraisal from Voges Appraisal Service (Petitioner's Exhibit C), stating that only the market approach to value can be used on the subject property, and that in the appraiser's opinion a fair market value for the structure is \$49,500.
35. The Respondent testified that changes to the assessment were made at the PTABOA hearing, which included additional obsolescence being applied to portions of the structure. However, the Respondent contends that no additional obsolescence is warranted.
36. The Respondent testified that the sale of the subject property was due to an auction authorized by the United States Bankruptcy Court, upon the request of the Tell City Chair Company Board of Directors (See Petitioner's Exhibit C) in order to liquidate their assets. The Respondent considered this a distressed sale. The City made a successful single aggregate bid on the property and in turn then sold the subject tract to the Petitioner. The sale to the Petitioner was based in part on the following facts:
- a. That the Petitioner already occupied said property with an ongoing business at the time of the sale to the City;
 - b. That the Petitioner preferred not to move due to economic reasons; and

- c. That the City recognized the Petitioner had shown interest in the subject tract by being the single highest bidder on the property at the auction.

Burden regarding the obsolescence claim

37. “[I]n advocating for an obsolescence adjustment, a taxpayer must first provide the State with probative evidence sufficient to establish a prima facie case as to the causes of obsolescence.” *Champlin Realty Company v. State Board of Tax Commissioners*, 745 N.E. 2d 928, 932 (Ind. Tax 2001).
38. The identification of causes of obsolescence requires more than randomly naming factors. “Rather, the taxpayer must explain how the purported causes of obsolescence cause the subject improvement to suffer losses in value.” *Champlin*, 745 N.E. 2d at 936.
39. It is incumbent on the taxpayer to establish a link between the evidence and the loss of value 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).
40. 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)(*Clark I*).

Evidence Submitted

41. The Regulation defines obsolescence as a functional and economic loss of value. 50 IAC 2.2-10-7(e).
42. Before applying the evidence to reduce the contested assessment, the Board must first analyze the reliability and probity of the evidence to determine what, if any, weight to accord it.

43. A review of the subject's PRC shows that the local assessing officials applied obsolescence to various sections of the subject structure. In doing so, the local officials recognized the existence of obsolescence. Because both parties agree that the building has experienced some level of obsolescence, the first prong of the two-prong burden articulated in *Clark* has been satisfied. However, the parties disagreed as to whether any additional obsolescence is justified.

44. In an attempt to satisfy the second prong of the obsolescence burden, the Petitioner submitted an appraisal from Voges Appraisal Service stating the property should be valued at \$49,500. The appraisal described the manner in which the property was valued, as follows:

“Since the buildings are in such poor condition, the cost approach will not be used as demolition would exceed the value of the site as vacant and would give a negative value. There is no market data available to support the income approach. Therefore only the market approach can be used.”

“Subject property sold at auction on October 26, 2000 for \$45,000. Other expenses have occurred such as legal and appraisal expenses, etc. estimated by us to be \$4,000 or a total cost of \$49,500.00”

“After careful consideration of all the information available to us, it is our opinion that the estimated fair market value of the subject property, in fee simple, free and clear, as of November 13, 2000 is FORTY NINE THOUSAND FIVE HUNDRED) \$49,500.00) DOLLARS.”

45. The Petitioner argues that the disparity between the true tax value on the subject property and the price for which it purchased the property is evidence that the property is entitled to obsolescence (functional and economic). The Petitioner submitted evidence that the true tax value of the property was \$177,170 and the price for which it purchased the property was \$49,900. The Petitioner seems to assert that the price it paid for the subject property was the property's fair market value.

46. Ind. Code § 6-1.1-31-6(c) states, “With respect to the assessment of real property, true tax value does not mean fair market value. True tax value is the value determined under the rules of the state board of tax commissioners.”
47. Market value is defined as, “The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, assuming the price is not affected by undue stimulus. Property Assessment Valuation (2nd edition), page 18. Clearly, the subject tract was part of the property *liquidated* by Tell City Chair Company *at auction* and not an arms-length transaction. See ¶11 and ¶32.
48. Adjustments for conditions of sale usually reflect the motivations of the buyer and the seller. In many situations the conditions of the sale significantly affect transaction prices; these are not considered arm-length transactions. The circumstances of the sale must be thoroughly researched before an adjustment is made, and the conditions must be adequately disclosed in the appraisal.
49. In *Damon Corporation vs. Indiana State Board of Tax Commissioners*, 738 N.E. 2d 1102 (Ind. Tax 2000), the Tax Court determined that the difference between the true tax value and the price for which a property is purchased (market value) does not demonstrate a loss in value because the two numbers are not necessarily comparable. See *State Board of Tax Commissioners vs. Town of St. John*, 702 N.E. 2d 1034, 1038 (Ind. 1998) holding that “true tax value” is not exclusively or necessarily identical to fair market value.
50. Further, the Petitioner did not quantify the amount of obsolescence it sought nor distinguish between the types of obsolescence (functional or economic) in its testimony. The two (2) types of obsolescence are not synonymous.
51. “Taxpayers are required to specify whether they are seeking economic or functional obsolescence, or both. The Court will not accept creative ambiguity that leaves it to the taxing authorities or this Court to determine what type of obsolescence is being sought and whether the evidence identifies and quantifies it.” See *Davidson Industries v.*

Indiana State Board of Tax Commissioners, 744 N.E. 2d 1067, 1071 (Ind. Tax 2001)(holding that the Court will not make the taxpayer's case for it)(See also *Clark vs. State Board of Tax Commissioners*, 694 N.E. 2d at 1241 (Ind. Tax 1998)(*Clark I*)(holding that taxpayers must identify and quantify obsolescence to make a prima facie case).

52. The Respondent stated that Mr. Voges is an employee of the City and the appraisal was prepared specifically for Mr. Voges' employer.
53. Though the Petitioner is requesting additional obsolescence, neither the appraisal nor any of the statements made by the Petitioner indicated the amount of obsolescence being sought. There were no calculations submitted attempting to quantify the amount of obsolescence that should be applied to the subject property. The appraisal alone, with an opinion of value being similar to that of the sale value, is not a determination of the amount of obsolescence that should be applied. Conclusory statements do not constitute probative evidence. *Whitley*, 704 N.E. 2d at 119.
54. At the hearing, the Petitioner requested to submit an independent appraisal within fourteen (14) days of the hearing to prove that the subject property was valued too high and that additional obsolescence is warranted. In Petitioner's Exhibit D, the Petitioner stated that he would not be able to secure an appraisal in the allotted time and that no additional evidence would be submitted on the issue of obsolescence.
55. Though the first prong of the two-prong burden articulated in *Clark* was satisfied, the Petitioner failed to satisfy the second prong of its burden by quantifying the amount of obsolescence it was seeking.
56. For all of the reasons set forth above, the Petitioner failed to meet its burden in this appeal. Accordingly, no change in the assessment is made as a result of this issue.

Summary of Final Determination

57. The Petitioner failed to meet the second prong of its burden articulated in *Clark*, to quantify the amount of obsolescence it sought. In addition, the Petitioner failed to distinguish between the types of obsolescence it requested. No change in the assessment is made 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.

Commissioner, 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.