

STATE OF INDIANA
Board of Tax Review

In the matter of the Petition for Review)
of Assessment, Form 131) Petition Number: 49-901-95-1-4-00109

Parcel Number: 9001639

Assessment Year: 1995

Petitioner: Walter W. Kuhn III
7837 Windcombe Boulevard
Indianapolis, IN 46240

Petitioner Representative: McHale Cook & Welch
320 North Meridian, Suite 1100
Indianapolis, In 46204

Findings of Fact and Conclusions of Law

The Indiana Board of Tax Review (State Board), having reviewed the facts and evidence, and having considered the issues, now makes the following findings of fact and conclusions of law.

Issue

1. Whether economic obsolescence should be applied.

Findings of Fact

1. If appropriate, any finding of fact made herein shall also be considered a conclusion of law. Also if appropriate, any conclusion of law made herein shall also be considered a finding of fact.

2. Pursuant to Ind. Code § 6-1.1-15-3, Karla D Bishop of McHale, Cook & Welch, on behalf of Walter W. Kuhn III (the Petitioner), filed a Form 131 petition requesting a review by the State Board. The Form 131 petition was filed on July 13, 1998. The Marion County Board of Review's (County Board) Assessment Determination on the underlying Form 130 is dated June 26, 1998.
3. Pursuant to Ind. Code § 6-1.1-15-4, a hearing was held on August 4, 1999 before Hearing Officer Jennifer Yochum. Testimony and exhibits were received into evidence. Jeffery Bennett and Henry Hamilton IV represented the Petitioner. Jack Compton, Deputy Assessor represented Wayne Township. Although notice of the hearing was mailed to the County Assessor, no one was present to represent the County Assessor or the County Board.
4. At the hearing, the subject Form 131 petition was made a part of the record and labeled Board Exhibit A. Notice of Hearing on Petition is labeled Board Exhibit B. In addition, the following exhibits were submitted to the State Board:
Petitioner's Exhibit 1 – Includes the following: (a) summary of the issues; (b) photographs of the exterior of the subject; (c) a copy of the listing contract; (d) a copy of the purchase agreement and the seller's closing statement

Respondent's Exhibit 1 - 1995 property record card (PRC) of subject property
6. The property is located at 2307 Lafayette Rd., Indianapolis, Wayne Township, Marion County.
7. At the hearing, the Hearing Officer requested additional evidence from the Petitioner consisting of: three (3) years income/expense records/ Federal tax returns to prove the request for obsolescence, and the calculation used in support of the obsolescence request. The Petitioner was given until August 14, 1999 to respond. The Hearing Officer received the Petitioner's response in a

timely manner on August 6, 1999. The Hearing Officer's request and the Petitioner's response are entered into the record and are labeled Board Exhibit C and Petitioner's Exhibit 2 respectively.

8. On January 18, 2000 based on testimony presented at the hearing by Mr. Compton, Donna Cale of the State Board Appeals Division sent letters Mr. Hamilton of McHale Cook & Welch and to Mr. Compton. The letters asked the parties (Township in particular) if they agreed or disagreed with the application of obsolescence based on the submission of the additional evidence by the Petitioner. Mr. Compton's response was that he was not in agreement with the application of 35% obsolescence depreciation. The Petitioner was in agreement to apply the obsolescence factor.
9. The letters sent to the parties by Ms. Cale and the responses to the letters are entered into the record and labeled as Board Exhibit D and E respectively.
10. At the hearing, Mr. Bennett stated there were no trade secrets at issue in this hearing. However, Mr. Bennett indicated there was some "confidential" information to be submitted. This information is labeled "confidential" in Petitioner's Exhibit 1.
11. The Hearing Officer did not view the subject property.

Whether economic obsolescence should be applied.

12. The subject structure is a Nationwide Auto Parts/Service Center built in 1973. The appeal under review is for the assessment date as of March 1, 1995.
13. The subject structure suffers from economic obsolescence due to its location. The subject structure is not in a high retail traffic area. The subject structure and the surrounding buildings suffer from a high degree of vacancy. The subject was

listed for sale in March 1997 by CB Commercial Real Estate Group for \$220,000. The property had also been listed for sale a year and a half prior to the March 1997 listing. The owner received no calls on the property for 2 1/2 years. In February 1998 the owner received two (2) offers of \$150,000 each and sold the property in 1998 for \$150,000. The sale price of \$150,000 reflects the economic impact of the neighborhood. *Hamilton testimony & Petitioner's Exhibit 1.*

14. The present True Tax Value is substantially above the market value of the property. The market has not changed since 1995 to the time of the sale in 1998. The application of economic obsolescence depreciation of 35% would bring the true tax value closer to the actual value of the property. *Hamilton testimony & Petitioner's Exhibit 1.*
15. The neighborhood is deteriorating. If the Petitioner would submit financial statements or documentation, other than the sale, that quantified the amount of obsolescence requested, the Township would consider applying obsolescence. However, the amount of obsolescence requested is excessive. *Compton testimony.*
16. The requested 35% obsolescence was used to adjust the improvement true tax value to get to the market value. *Hamilton testimony.*

Conclusions of Law

1. The Petitioner is statutorily limited to the issues raised on the Form 130 petition filed with the County Board or issues that are raised as a result of the County Board's action on the Form 130 petition. Ind. Code §§ 6-1.1-15-1, -2.1, and -4. See also the Forms 130 and 131 petitions. In addition, Indiana courts have long recognized the principle of exhaustion of administrative remedies and have insisted that every designated administrative step of the review process be completed. *State v. Sproles*, 672 N.E. 2d 1353 (Ind. 1996); *County Board of*

Review of Assessments for Lake County v. Kranz (1964), 224 Ind. 358, 66 N.E. 2d 896. Regarding the Form 130/131 process, the levels of review are clearly outlined by statute. First, the Form 130 petition is filed with the County and acted upon by the County Board. Ind. Code §§ 6-1.1-15-1 and –2.1. If the taxpayer, township assessor, or certain members of the County Board disagree with the County Board’s decision on the Form 130, then a Form 131 petition may be filed with the State Board. 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 County Board and, thus, do not follow the prescribed statutory scheme required by the statutes and case law. Once an appeal is filed with the State Board, however, the State Board 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 exercise and the Petitioner is limited to the issues raised on the Form 131 petition filed with the State Board.

2. The State Board 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 Board’s decision.

B. Burden

7. Ind. Code § 6-1.1-15-3 requires the State Board to review the actions of the County Board, but does not require the State Board to review the initial assessment or undertake reassessment of the property. The State Board 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 County Board, the State Board is entitled to presume that its actions are correct. “Indeed, if administrative agencies were not entitled to presume that the actions of other administrative agencies were in accordance with Indiana law, there would be a wasteful duplication of effort in the work assigned to agencies.” *Bell v. State Board of Tax Commissioners*, 651 N.E. 2d 816, 820 (Ind. Tax 1995). The taxpayer must overcome that presumption of correctness to prevail in the appeal.

9. It is a fundamental principle of administrative law that the burden of proof is on the person petitioning the agency for relief. 2 Charles H. Koch, Jr., *Administrative Law and Practice*, § 5.51; 73 C.J.S. Public Administrative Law and Procedure, § 128. See also Ind. Code § 4-21.5-2-4(a)(10) (Though the State Board is exempted from the Indiana Administrative Orders & Procedures Act, it is cited for the proposition that Indiana follows the customary common law rule regarding burden).
10. Taxpayers are expected to make factual presentations to the State Board 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 Board is not required to give weight to evidence that is not probative of the errors the taxpayer alleges. *Whitley*, 704 N.E. 2d at 1119 (citing *Clark v. State Board of Tax Commissioners*, 694 N.E. 2d 1230, 1239, n. 13 (Ind. Tax 1998)).
11. The taxpayer's burden in the State Board's administrative proceedings is two-fold: (1) the taxpayer must identify properties that are similarly situated to the contested property, and (2) the taxpayer must establish disparate treatment between the contested property and other similarly situated properties. In this way, the taxpayer properly frames the inquiry as to "whether the system prescribed by statute and regulations was properly applied to individual assessments." *Town of St. John V*, 702 N.E. 2d at 1040.
12. The taxpayer is required to meet his burden of proof at the State administrative level for two reasons. First, the State Board is an impartial adjudicator, and relieving the taxpayer of his burden of proof would place the State Board 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 Board’s final determination even though the taxpayer demonstrates flaws in it).

C. Review of Assessments After *Town of St. John V*

15. Because true tax value is not necessarily identical to market value, any tax appeal that seeks a reduction in assessed value solely because the assessed value assigned to the property does not equal the property’s market value will fail.
16. Although the Courts have declared the cost tables and certain subjective elements of the State Board’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.

Whether economic obsolescence should be applied.

18. Depreciation is an essential element in the cost approach to valuing property. Depreciation is the loss in value from any cause except depletion, and includes physical depreciation and functional and external (economic) obsolescence. IAAO Property Assessment Valuation (Second Edition, 1996), 153 & 154; *Canal Square Limited Partnership v. State Board of Tax Commissioners*, 694 N.E. 2d 801, 806 (citing Am. Inst. Of Real Estate Appraisers, *The Appraisal of Real Estate*, 321 (Tenth Edition, 1992)).
19. 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.
20. Functional obsolescence is a loss in value resulting from changes in demand, design, and technology, and can take the form of deficiency, the need for modernization, or superadequacy. IAAO Property Assessment Valuation at 154 & 155.
21. External or economic obsolescence is the loss of value resulting from factors external to the property. IAAO Property Assessment Valuation at 154 & 155.
22. The elements of functional and economic obsolescence can be documented using recognized appraisal techniques. *Canal Square Limited Partnership v. State Board of Tax Commissioners*, 694 N. E. 2d 801 (Ind. Tax 1998). These

standardized techniques enable a knowledgeable person to associate cause and effect to value pertaining to a specific property.

23. There are five recognized methods to measure depreciation, including obsolescence; namely: (1) the sales comparison method, (2) the capitalization of income method, (3) the economic age-life method, (4) the modified economic age-life method, and (5) the observed condition (breakdown) method. IAAO Property Assessment Valuation at 156; IAAO Property Appraisal and Assessment Administration at 223.
24. It is incumbent on the taxpayer to establish a link between the evidence and the loss of value due to obsolescence. After all, the taxpayer is the one who best knows his business and it is the taxpayer who seeks to have the assessed value of his property reduced. *Rotation Products Corp. v. Department of State Revenue*, 690 N.E. 2d 795, 798 (Ind. Tax 1998).
25. In the case at bar, the issue under review is the application of economic obsolescence to the subject structure. "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) 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).
26. The Petitioner seeks the application of economic obsolescence depreciation for several reasons, however, the two (2) main reasons are exhibited in the Income and Expense Statements (Petitioner's Exhibit 2) for 1993 and 1994 and, in more

detail, in the documents regarding the sale of the subject property on February 13, 1998 for \$150,000 (Petitioner's Exhibit 1).

27. Before applying the evidence to reduce the contested assessment, the State Board must first analyze the reliability and probity of the evidence to determine what, if any, weight to accord it.
28. 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).
29. The first prong of the burden of proof requires the Petitioner to show that obsolescence exists. The mere fact that Mr. Hamilton made statements at the hearing about location, the lack of retail traffic (photographs from 1997) or vacancy (subject was occupied on March 1, 1995) and fails to present documentation in support of any of these statements is not representative of probative evidence. Mr. Hamilton made no analysis of these factors and how they would equate to the amount of obsolescence sought.
30. As stated in Conclusions of Law ¶10, "Taxpayers are expected to make factual presentations to the State Board regarding alleged errors in assessment." "These presentations should outline the alleged errors and support the allegations with evidence. Allegations, unsupported by factual evidence, remain mere allegations."
31. Assuming *arguendo* the Petitioner did document causes for obsolescence on the subject structure, the Petitioner would then be required to quantify the amount of obsolescence requested.

32. In an effort to support and quantify obsolescence issue, the Petitioner submitted what is purported to be Income and Expense statements for 1993 and 1994. The Petitioner also stated that there was no income for 1995 but presented no evidence to support this statement. However, a number of questions arise with the income/expense statements for 1993 and 1994:
- a. Neither of these statements is dated;
 - b. These statements are not audited statements from an independent third party;
 - c. The Petitioner did not use these income and expense statements to quantify the claimed obsolescence depreciation sought but submits them to show the subject property produced little or no income in those years; and
 - d. The Petitioner included “amortization” and “depreciation” expenses when calculating the net operating income (NOI). Neither “amortization” nor “depreciation” is an allowable expense when determining the NOI. Because depreciation will be considered in the income approach as recaptured and handled as part of the capitalization rate, it would be an improper charge. Debt service normally includes both the interest and the principal payments required to amortize the loan on the property. This item is considered in the capitalization rate as part of the discount rate component and again would be improper.
33. In addition, the Petitioner attempted to use the sale of the subject property in 1998 to quantify obsolescence for 1995. Again, the appeal under review is for the assessment date of March 1, 1995.
34. The Petitioner concluded the sale of the property in 1998 was an “indication of value” for 1995 and the 35% obsolescence requested was “necessary” to adjust the subject’s improvement value (\$133,500) to arrive at the sale price of \$150,000. $\$133,500 \times .65 = \$86,780 + \$60,900 \text{ (land)} = \$147,680$.

35. The Petitioner also used the following formula:

Sales Price - True Tax Value of land = Relative Improvement Value
Relative Improvement Value - Yard Improvements = Structural Value
Structural Value divided by Old Improvement Value = Obsolescence

36. The Petitioner attempts to use the *sales comparison method* to estimate accrued depreciation. The *sales comparison method* borrows from the sales comparison approach to value. The sales comparison approach compares the improved property with improved comparable properties that have recently sold. This method processes sales prices into indicators of value for the subject property by making adjustments to the sales price of the comparables for their differences from the subject. Adjustments are usually made for market conditions, (time of sale), location, and physical characteristics.

37. The accuracy of this method depends on the availability of highly comparable sales of improved properties and vacant sites. In this method, depreciation of the subject property is based on the amount of depreciation suffered by comparable sales in the market. Recently sold properties having improvements of similar age, condition, and desirability to the subject are found.

38. The Petitioner's use of a 1998 sale along with calculations used to support their request for obsolescence, are flawed for the following reasons:

- a. 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." True tax value assessed against the property is not exclusively or necessarily identical to fair market value. *Town of St. John V*, 702 N.E. 2d at 1038.

- b. The appeal under review is for the assessment date as of March 1, 1995 and not March 1998.
 - c. The subject property was listed for sale in 1997 at \$220,000 and sold for \$150,000 on March 16, 1998. Mr. Hamilton concluded the sale price of \$150,000 reflects the “economic impact of the neighborhood”. Mr. Hamilton added that the market had not changed since 1995 therefore the sale of the property in 1998 is “more indicative of the actual value of this parcel.” Mr. Hamilton’s conclusions are not supported by any documentation of the economics of the area or by appraisals of the subject property or by sales data as of the March 1, 1995 assessment date. Mr. Hamilton’s statements are conclusory and speculative at best. Unsubstantiated conclusions do not constitute probative evidence. *Whitley*, 704 N.E. 2d at 1119.
 - d. Using the sale price from March 1998, Mr. Hamilton applies an obsolescence factor to the true tax value “necessary” to come up with the value they seek which reflected the sale price in 1998. Mr. Hamilton determines an end (\$150,000) and then determines a means of getting to that end (35% obsolescence).
 - e. Mr. Hamilton failed to present any comparable sales data to be used in the formula described in Conclusions of Law ¶35. Mr. Hamilton failed to analyze the amount of depreciation suffered by comparable sales in the market, as they would relate to the subject.
39. For all the reasons set forth above, the State Board denies the request for 35% obsolescence. No change in the assessment is made as a result of this issue.

Issued this ____ day of _____, 2002
by the Indiana Board of Tax Review.