STATE OF INDIANA
Board of Tax Review

WARREN W. SPURLING a/k/a BILL SPURLING and SSS DEVELOPMENT, LLC,	)	On Appeal from the Vanderburgh County Property Tax Assessment Board of Appeals
Petitioner,	)	
v.	)	Petition for Review of Assessment, Form 131 Petition No. See Attachment A Parcel No. See Attachment A
VANDERBURGH COUNTY PROPERTY TAX ASSESSMENT BOARD OF APPEALS,	)	
Respondents.	)	

Findings of Fact and Conclusions of Law

On January 1, 2002, pursuant to Public Law 198-2001, the Indiana Board of Tax Review (IBTR) assumed jurisdiction of all appeals then pending with the State Board of Tax Commissioners (SBTC), or the Appeals Division of the State Board of Tax Commissioners (Appeals Division). For convenience of reference, each entity (the IBTR, SBTC, and Appeals Division) is hereafter, without distinction, referred to as "State". The State having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

Issues

1. Whether the action taken by the PTABOA with respect to each property is void abinitio due to the board's acting with four rather than five members.
2. Whether the actions of the PTABOA were arbitrary and capricious.
3. Whether any of the members of the PTABOA acted on the basis of bias or prejudice stemming from an extra-judicial source which resulted in an opinion on

the merits on some basis other than what was learned through participation in the case.

4. Whether the PTABOA is bound by the doctrine of legislative acquiescence such that the assessed value given to the properties at issue must remain at the assessed value given to them during the March 1, 1995 reassessment.
5. Whether the use classification of each of the structures in the complexes known as Parke I, Parke II, Vogel Business Park, Center Pointe, Bradford Park, and The Crossing was correctly assigned by the PTABOA.
6. Whether the assigned grade factor of each of the structures in the complexes known as Parke I, Parke II, Vogel Business Park, Center Pointe, Bradford Park and The Crossing is excessive.
7. Whether the assigned grade factor of each of the structures known as Woodland I, Woodland II, and Woodland III is excessive.
8. Whether the assigned grade factor of the structure known as Eastland North is excessive.
9. With respect to Center Pointe, Vogel Business Park, and Parke I, whether a sign was properly assessed as “utility storage”.
10. Whether economic obsolescence depreciation should be applied to the structures located in the complexes known as Center Pointe, The Crossing, and Bradford Park.
11. Whether the condition rating assigned the structures located in the complex known as Bradford Park is overstated.

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. The Vanderburgh County Property Tax Assessment Board of Appeals (PTABOA) opened for review the assessments that are the subject of this appeal. The Vanderburgh County PTABOA, after proper notice, held hearings and issued its

determinations on February 17, 2000. Pursuant to Ind. Code § 6-1.1-15-3, Kahn, Dees, Donovan & Kahn, on behalf of Warren W. "Bill" Spurling and SSS Development, LLC (Spurling), filed a petition requesting a review by the State. The Form 131 petitions were filed on March 17, 2000.

3. Pursuant to Ind. Code § 6-1.1-15-4, a hearing was held on September 15, 2000, before Hearing Officer Betsy Brand. At the hearing, G. Michael Schopmeyer with Kahn, Dees, Donovan & Kahn, LLP represented Spurling. The Petitioner, William Spurling, was present at the hearing. Also present at the hearing were witnesses on behalf of Spurling: Ms. Lisa Daugherty, Spurling Property Manager; Mr. Randy J. "Duke" Coudret, B 4 U Buy Home Inspection Company; Al Folz, Knight Township Assessor; and Joe Gries, Knight Township Deputy Assessor. Representing the PTABOA at the hearing were Khris Seger, Vanderburgh County Hearing Officer; Tammy Elkins, Chief Deputy, Vanderburgh County Assessor; and Rebecca T. Kasha, Legal Counsel, PTABOA.

4. At the hearing, the Form 131s were entered as evidence and labeled Board Exhibit A. The Notice of Hearing was entered as evidence and labeled Board Exhibit B. In addition, the following exhibits were submitted to the State:

Petitioner's Exhibit 1 – The transcript from the Vanderburgh County PTABOA meeting held February 3, 2000 and February 10, 2000.
Petitioner's Exhibit 2 – A copy of architect's drawings for Crosse Pointe, prepared by Virgil G. Miller, AIA Architect.
Petitioner's Exhibit 3 – A copy of a list of Spurling tenants showing size and use of tenant area.
Petitioner's Exhibit 4 – An affidavit of Warren W. "Bill" Spurling, dated February 2, 2000.
Petitioner's Exhibit 5 – A copy of IRS Form 4562, Depreciation and Amortization, with attached square foot cost calculation. (Confidential information)
Petitioner's Exhibit 6 – A copy of the Petitioner's Brief that was submitted to

the PTABOA with attached exhibits identified as:

Exhibit 1: A copy of property record cards.

Exhibit 2: A copy of Rule 11, pages 92-93.

Exhibit 3: An affidavit of Raymond "Duke" Coudret dated January 10, 2000.

Exhibit 4: A copy of Rule 11, page 19 and 22

Exhibit 5: A copy of a list of Spurling's tenants.

Exhibit 6: An affidavit of Al Folz dated November 30, 1999.

Exhibit 7: A copy of property record card for Hebron Pointe North, 09-720-17-121-066.

Exhibit 8: Photographs of Hebron Pointe North.

Exhibit 9: A copy of property record card for Hebron Office Plaza, 09-720-17-121-065.

Exhibit 10: Photographs of Hebron Office Plaza.

Exhibit 11: An affidavit of Warren W. "Bill" Spurling dated February 2, 2000.

Respondent's Exhibit 1 – A Brief containing the statement of issues and response.

Respondent's Exhibit 2 – A copy of the transcript from the Vanderburgh County PTABOA hearing held February 3, 2000 and February 10, 2000.

Respondent's Exhibit 3 – A copy of the PTABOA final determinations, dated February 17, 2000.

Respondent's Exhibit 4 – A copy of the recommendation to the PTABOA dated February 3, 2000, which contains exhibits identified as:

Exhibit A: Photographs of the three (3) design types of buildings under review.

Exhibit B: Excerpt from *Peter Zakutansky v. State Board of Tax Commissioners*, 696 N.E.2d 494, 497 (Ind. Tax 1998).

Exhibit C: Excerpt from *Barth v. State Board of Tax Commissioners,* 699 N.E. 2d 800, 802 (Ind. Tax 1998).

Exhibit D: A copy of 50 IAC 2.2-11-1(25) (General Office model).

Exhibit E: A copy of 50 IAC 2.2-11-1(34) (General Retail model).

Exhibit F: A copy of 50 IAC 2.2-11-4.1, page 86.

Exhibit G: A copy of 50 IAC 2.2-11-4.1, page 87.

Exhibit H: A copy of 50 IAC 2.2-11-4.1, page 92.

Exhibit I: A copy of 50 IAC 2.2-11-4.1, page 93.

Exhibit J: A copy of 50 IAC 2.2-11-5, Schedule C, page 111.

Exhibit K: A copy of a Strip Retail schedule.

Exhibit L: A copy of 50 IAC 2.2-11-5, Schedule A.1, page 107.

Respondent's Exhibit 5 – Copies of 50 IAC 2.2-11-5, Rule 11, page 113 and 50 IAC 2.2-11-15 (12.05), Rule 15, page 28 Unit-In-Place.

Respondent's Exhibit 6 - A copy of 50 IAC 2.2-10-6.1(c)(1)(F), Rule 10, page 19.

Respondent's Exhibit 7 - A copy of a memo to the PTABOA regarding the Petitioner's reference to *Town of St. John.* Attached is a copy of the opinion offered by the PTABOA's legal counsel, Rebecca T. Kasha.

Respondent's Exhibit 8 – Exterior photographs of properties situated on parcels #09-650-17-013-031 and #09-630-16-082-008.

Respondent's Exhibit 9 – A copy of the property record card for parcel #16-82-000.

Respondent's Exhibit 10 - Photograph and property record card for parcel #12-230-34-278-016.

Respondent's Exhibit 11 - Photograph and property record card for parcel #04-021-04-134-005.

Respondent's Exhibit 12 - Photograph and property record card for parcel #12-230-34-278-005.

Respondent's Exhibit 13 - Photograph and property record card for parcel #09-251-12-148-002.

Respondent's Exhibit 14 - A copy of a Calculator Cost Form worksheet prepared by the PTABOA hearing officer.

5. At the hearing, the Petitioner, by his representative, entered into evidence a copy of the PTABOA hearing transcript. The Petitioner stipulated to this record and requested that it be incorporated into the State's proceeding. The Respondent affirmed this stipulation with reservations for rebuttal.

6. See Attachment A for location of the various properties. The structures under appeal are commercial buildings with interior areas leased to tenants for their use. The Hearing Officer did not view the properties.

7. During the hearing, the Hearing Officer requested that both the Petitioner and the Respondent submit post-hearing briefs and proposed Findings of Fact and Conclusions of Law (Findings). The Hearing Officer requested that this evidence be submitted by September 26, 2000.

8. On September 18, 2000, the Petitioner, by its representative, filed a request for an extension of time to submit post-hearing briefs. The Petitioner requested forty-five (45) days from the date of the hearing to submit the briefs. On October 11, 2000, the State granted the request. The State indicated that post-hearing briefs were to be due on October 31, 2000, and that both parties would then have ten (10) days to file reply briefs. The reply briefs were to be due on November 10, 2000. Additionally, both the Petitioner and the Respondent requested tapes of the September 15, 2000 hearing in order that specific testimony could be addressed in the post-hearing briefs. The State granted this request.

9. On October 20, 2000, the Petitioner's representative submitted a written request for additional time to submit post-hearing briefs and proposed Findings. This request was made because the tapes of the September 15, 2000 hearing were not received until Monday, October 16, 2000. The State granted this request on October 24, 2000. Post hearing briefs and proposed Findings were to be submitted on or before November 10, 2000, and reply briefs were to be submitted on or before November 20, 2000.

10. On November 10, 2000, the Petitioner's representative delivered by hand a Memorandum in Support of Petition for Review of Assessment. The memorandum was labeled Petitioner's Exhibit 7 and entered as evidence. The memorandum includes exhibits numbered as follows:

    1. Affidavit of Al Folz dated November 8, 2000.
    2. Transcript from the February 3, 2000 and February 10, 2000 meeting of the Vanderburgh County Property Tax Assessment Board of Appeals.
    3. Property Record Cards for the subject parcels prior to County Board action.
    4. Transcript from September 15, 2000 State Hearing.
    5. Affidavit of Raymond Coudret dated September 12, 2000.
    6. 1998 Form 4562 – Depreciation and Amortization Schedule for SSS Development, LLC.
    7. Transcript from December 2, 1999 meeting of the Vanderburgh County Property Tax Assessment Board of Appeals.
    8. Form 115 – Notification of Final Assessment Determination on 2110 Morgan Avenue dated December 8, 1999.
    9. Blueprints of the 125 North Weinbach property.
    10. 50 IAC 2.2-11-4 (Rule 11 pages 92-93).
    11. Affidavit of Raymond Coudret dated January 10, 2000.
    12. A list of Spurling tenants.
    13. Affidavit of Al Folz dated November 30, 1999.
    14. Hebron Pointe North property record card.
    15. Hebron Pointe North photographs.
    16. Hebron Office Plaza property record card.
    17. Hebron Office Plaza photographs.
    18. Expense Registers – Spurling Property Management – January 12, 1999 and February 7, 2000.
    19. Calculation of Vogel Business Park cost of construction.
    20. Affidavit of Bill Spurling dated November 8, 2000.
    21. Memorandum in Opposition to the Vanderburgh County Assessor's Petition for Re-determination before PTABOA with exhibits:

1. Property Record Cards.
2. Rule 11 pages 92-93.
3. Coudret Affidavit.
4. Regulations.
5. Spurling Tenants.
6. Folz Affidavit.
7. Property record card Hebron Pointe North.
8. Photographs Hebron Pointe North.
9. Property record card Hebron Office Plaza.
10. Photographs Hebron Office Plaza.
11. Spurling Affidavit.

11. On November 14, 2000, the Hearing Officer received a Post Hearing Brief, Proposed Findings of Fact and Conclusions of Law, and audiotapes of the PTABOA hearing from the Respondent. The package was postmarked November 10, 2000. This information is labeled Respondent's Exhibit 15a, 15b, and 15c respectively and entered as evidence. Included with the Brief, Findings, and audiotapes were the following exhibits:

Respondent's Exhibit 16 - Memorandum to County Assessors and County Auditors from the State dated October 30, 1998.
Respondent's Exhibit 17 - Memorandum to County Assessors from the State dated May 11, 1999.
Respondent's Exhibit 18 - Affidavit of Khris Seger dated November 10, 2000, with attached survey of the composition of the PTABOA in thirty-five (35) counties.
Respondent's Exhibit 19 - Corrected property record card for parcel #09-660-17-036-018.
Respondent's Exhibit 20 - Corrected property record card for parcel #09-251-12-152-012.

12. On November 14, 2000, the Petitioner's representative requested that his proposed Findings be accepted if submitted with his reply brief on or before November 20, 2000. The State granted this request.

13. On November 14, 2000, the Respondent requested that the Brief and Proposed Findings be considered even though they were not actually received until after the due date. The County contends the documents were mailed and post marked on November 10, 2000, the due date. There was no objection from the Petitioner. The State will consider the evidence.

14. On November 14, 2000, both the Petitioner and Respondent asked if it was acceptable to overnight mail the reply briefs that were due on November 20, 2000. Because everyone was in agreement the State will accept the evidence postmarked on November 20, 2000.

14. On November 21, 2000, the Hearing Officer received from the Petitioner a reply to the post hearing brief submitted by the Vanderburgh County PTABOA, proposed Findings of Fact and Conclusions of Law, and Findings of Fact and Conclusions of Law for signature. The information was shipped via UPS on November 20, 2000. This information has been marked Petitioner's Exhibit 8a, 8b, and 8c respectively and entered as evidence.

15. On November 22, 2000, the Hearing Officer received a Reply Brief with Exhibits from the Respondent. The information was postmarked November 20, 2000. The Reply Brief was labeled Respondent's Exhibit 21 and entered as evidence. The Exhibits are identified as follows:

Exhibit A1 – A copy of the County Board minutes pertaining to Bradford Park dated March 5, 1991.

Exhibit A2/A3 – A copy of the assessment determination dated May 24, 1991.

Exhibit A4/A5 – A copy of the assessment determination dated August 21, 1991.

Exhibit A6 – A copy of the Board of Review Notice of Hearing dated October 4, 1990.

Exhibit A/7 – A copy of the Board of Review Notice of Hearing dated January 30, 1991.

Exhibit A/8 – A copy of the Form 130 C-I filed March 19, 1990.

Exhibit A/9 – A copy of the assessment determination dated August 21, 1991.

Exhibit A/10 – A copy of the assessment determination dated May 24, 1991.

Exhibit A/11 – A copy of the Property Record Card for parcel #17-27-8 reflecting the Board determination of August 20, 1991.

Exhibit A/12 – A copy of the Property Record Card for parcel 09-660-17-027-008 reflecting the valuation for January 10, 1990.

Testimony and Documents Regarding the Composition of the PTABOA

16. Spurling contends the County Board's composition violates Ind. Code § 6-1.1-28-1 and therefore, any action taken was void *abinitio* (from the beginning). At the time the Spurling Properties were opened for review, through and including the hearings, he contends, the County Board was comprised of only four (4) members.

17. Mr. Schopmeyer contends the plain language of Ind. Code § 6-1.1-28-1 provides that a County Property Tax Assessment Board of Appeals shall have five (5) members. Referencing Respondent's Exhibit 17, Mr. Schopmeyer contends the opinion of the Indiana Attorney General fails to address the issue before the State.

18. Mr. Schopmeyer contends, based upon the bias and prejudice exhibited by the County Board, Spurling was entitled to have a fifth member who may have been

able to consider the evidence in a fair manner and to sway at least two of the other members.

19. The County contends the appointments to the Vanderburgh County PTABOA comply with Ind. Code § 6-1.1-28-1. At the time of the hearing it contends:
    a. The Fiscal Body had appointed Harold Elliot, a democrat, and Peggy Pfister, a republican and a level two assessor-appraiser.
    b. The Board of Commissioners had appointed George Koch, a republican.
    c. The Vanderburgh County Assessor, Cheryl Musgrave, a republican, was the fourth member of the PTABOA.
    d. No more than three of the members of the PTABOA are of the same political party.
    e. Only Peggy Pfister is not a resident of Vanderburgh County.

20. The County contends that even though the PTABOA did not have a full complement of members appointed to serve on the board, the PTABOA was not prevented from legally conducting business. The County contends:
    a. According to Ind. Code § 6-1.1-28-1, a majority of the board constitutes a quorum for the transaction of business.
    b. A majority of the board is three.
    c. On both hearing days all four members of the PTABOA were present.
    d. The statute requires nothing more than that a quorum be present at the meeting to properly transact business.
    e. There were four appointees on the board at the time of the hearing – one more than necessary to conduct business.
    f. All questions decided by the PTABOA in this matter were decided by agreement of at least three members of the PTABOA.

21. The County contends that Ind. Code § 6-1.1-28-1 states, “A question properly before the board may be decided by the agreement of a majority of the whole board.” The County opines:

a. The phrase “majority of the whole board” does not mean that the “whole board” must be appointed in order to properly transact business.
b. This caveat was inserted into the statute to distinguish the voting requirements for PTABOA’s from that of the common law.
c. The common law rule is that approval of the majority of the members present, assuming a quorum exists, is sufficient for binding official action.
d. The phrase “majority of the whole board” means only that a mere majority of the members present is not sufficient.
e. There must be a majority of the entire board, or at least three votes, to decide an issue before a PTABOA.

22. In support of its position the County presented Respondent’s Exhibits 16, 17, and 18. Respondent’s Exhibit 16 is a memorandum issued by the State regarding Appointments to the Property Tax Assessment Board of Appeals. Respondent’s Exhibit 17 is a memorandum issued by the State regarding Attorney General Opinion on Property Tax Assessment Board of Appeals. Respondent’s Exhibit 18 is the affidavit of Khris Seger. Referencing the attachment to Respondent’s 18, Mr. Seger attests he conducted a random survey of 35 counties in Indiana relative to the composition of the PTABOA in each of those counties.

23. Mr. Schopmeyer contends the County attempts to “skirt around” the issue of composition by references to rules involving quorums. He opines:
a. The State Board memorandum addresses the issue of certified level two assessor appointees.
b. The State Board memorandum does not address the issue of composition raised by Spurling.
c. The Attorney General’s Opinion fails to directly address the issue of composition.
d. Page 2 of the Opinion seems to presuppose that a PTABOA will have five members when it states “so that at least three of the five members of the Board”.

e. The Survey of the 35 Indiana counties provides no basis to justify a lack of five members.
f. The County is not justified in violating the statute because a majority of counties are in violation of the statute.

Testimony and Documents Regarding Arbitrary and Capricious Conduct

24. In changing the assessments, Spurling contends the actions of the Board are arbitrary and capricious. Spurling contends:
    a. Several members of the County Board expressed a bias at the PTABOA hearing.
    b. Contrary to 50 IAC 17-7-3(d), the actual cost of constructing the subject properties was ignored by the County Board.
    c. Previously, the cost of construction was the determining factor in the County Board's lowering the assessment of parcel 09-650-17-013-031.
    d. The County was the petitioner before the PTABOA and therefore bore the burden of proof at the local hearing.
    e. The County did not meet the burden of proof by presenting probative evidence at the local hearing.
    f. The County Board disregarded its own 1991 ruling, which assessed Bradford Park and the Crossing as retail structures.

25. Mr. Schopmeyer contends comments made shortly after his opening statement at the local hearing demonstrate the County Board members prejudged this case. Referencing Petitioner's Exhibit 7, he contends the evidence of prejudgment continues throughout the record.

26. Referencing Petitioner's Exhibit 5, Mr. Schopmeyer contends Spurling presented substantial evidence reflecting the cost to construct Vogel Business Park was $23.88 per square foot. He contends the evidence regarding the cost to construct Vogel Business Park was introduced because it was the most recently built "hip roof" style development. Referencing Petitioner's Exhibit 7, document

#8, Mr. Schopmeyer opines the PTABOA lowered the assessment of the Morgan property based on the cost to construct the improvements. By ignoring the evidence as to actual cost of construction of the subject properties, Mr. Schopmeyer contends, the PTABOA demonstrates a bias and prejudice that is proof of their arbitrary and capricious actions.

27. Further evidence of the arbitrary and capriciousness of the County Board's actions, contends Mr. Schopmeyer, is found in their disregard of a County Board determination in the 1991 review of Bradford Park and The Crossing properties. In his affidavit, Mr. Folz attests the County Board ordered him in 1991 to assess Bradford Park and The Crossing using the general retail cost schedules. (See Petitioner's Exhibit 7, document #1). Regarding the 1991 County Board determination, Mr. Schopmeyer contends:

    a. In the 1991 review the County Board found the properties should be priced using the general retail cost schedules.
    b. Center Pointe and Vogel Business Park properties are virtually identical hip roof properties.
    c. Consistent with the 1991 County Board determination the Knight Township Assessor applied the general retail cost schedule to Center Pointe and Vogel Business Park properties.
    d. Assessor Folz, Spurling and Duke Coudret testified that the properties were similar.
    e. The County did not refute the testimony.
    f. The decision as to the proper cost schedule in assessing the properties should not change.
    g. The Board decided the issue of whether the properties are retail or office in 1991.
    h. In 1999, the County Board ignored the 1991 ruling.
    i. Under the principles of collateral estoppel and res judicata, the County Board is prevented from attempting to reassess the Spurling properties from retail to office.

28. Mr. Schopmeyer cited *Spearman v. Delco Remy Div. Of GMC,* 717 F. Supp 1351 (S.D. Ind. 1989), "While res judicata precludes relitigation of entire legal claims, the doctrine of collateral estoppel operates to bar the relitigation of a factual issue that has been determined in a prior proceeding." Mr. Schopmeyer contends the basic standards for administrative collateral estoppel as enunciated in *Spearman* are:

    a. Whether the issues sought to be estopped were within the statutory jurisdiction of the agency;
    b. Whether the agency was acting in a judicial capacity;
    c. Whether both parties had a fair opportunity to litigate the issues;
    d. Whether the decision of the administrative tribunal could be appealed to a judicial tribunal;
    e. Whether the parties were the same; and
    f. Whether the issues sought to be barred were the same. *Id* at 1357.

    Mr. Schopmeyer contends that in 1991 the County Board possessed jurisdiction to decide the issues and was acting in a judicial capacity. He contends the parties were the same in 1991, each had a fair opportunity to litigate the issues, and ultimately the decision of the County Board could be appealed to a judicial tribunal. In addition, he contends the issues that Spurling now seeks to bar were the same, that being whether the properties should be assessed using the general retail or general office cost schedules.

29. Referencing Respondent's Exhibit 21, documents A1 through A12, the County contends the prior determination by the County Board in 1991 cannot be relied upon. The County contends:

    a. The Board of Review minutes show that in the Bradford Park appeal, the only change made was that Grade and Design would be 100%. (Exhibit A1)
    b. The determination is also reflected in the Form 115 dated May 24, 1991. (Exhibits A2/A3)

c. The County Board determination was noted on a document entitled "Notice by County Board of Review of Hearing on Petition" dated January 30, 1991. (Exhibit A7)

d. In the upper right hand corner of that document, we see the notation:

L 36030 NC
I 341900 100% Grd.

e. On the same document toward the middle on the right hand side, however, we see the following:

Land 80¢ sq. ft. Amend 8-21-91
Imp fig as General Retail 6/21/91
L 80¢ = 25070
Imp 266970
292040

f. There are no minutes from the County Board pertaining to the notations dated 6/21/91 or 8/21/91.

g. The only other documentation on the changes is found in the Form 115 dated August 21, 1991. (Exhibit A4/A5)

30. The County asserts the irregularities surrounding the County Board's actions in 1991 prevent the County Board's earlier determinations from being of any precedential value. The County contends the PTABOA acting in 2000 cannot be bound by the 1991 determinations of the County Board relating to Bradford Park on the basis of res judicata, collateral estoppel, or legislative acquiescence.

31. Referencing Exhibits A2/A3 and A4/A5, the County contends the decision to refigure Bradford Park as General Retail is in direct contravention to the County Board's March 5, 1991 determination, which left the General Office use classification in place. The County questions how the Petitioner can support the County Board's decision to overturn its March 5, 1991 determination on use classification while arguing that the PTABOA cannot do likewise in 2000.

32. The County contends that on March 5, 1991, the County Board determined the Grade to be 100%, or Grade C (Exhibits A1 and A2/A3). The County contends the township assessor applied the Grade C in place of the D and C-2 Grades, which had been applied previously. (See Exhibits A11 and A12) The County opines the Petitioner disregards the determination on grade because it does not support his position. The County opines the Petitioner cannot argue that one aspect of the 1991 determination should be binding while another should be ignored.

33. Mr. Schopmeyer contends further evidence of the arbitrary and capricious action by the local Board is the fact that Spurling was singled out for reassessment. Knight Township Assessor Folz testified the actions of the County Board were arbitrary and capricious in reassessing all of the properties of one developer and no one else. He testified he had never seen such action in fourteen years as an assessor. Mr. Schopmeyer contends the PTABOA acted inappropriately in reviewing the Spurling properties in between regular reassessment periods.

34. Mr. Spurling opined the PTABOA review of his assessments was politically motivated. He contends the review of his properties was initiated in retaliation for his involvement in a mayoral election.

35. Regarding the Petitioner's contention that the PTABOA's action was politically motivated, the County contends there is no credible evidence that politics played any role in the process. Referencing the affidavit of Mr. Seger, Respondent's Exhibit 18, the County contends:

    a. Mr. Elliott, who voted to change the assessments, is a Democrat.
    b. According to Petitioner's theory, Mr. Elliott should have sided with a fellow Democrat, but he did not, because political motives were not involved.
    c. Ms. Pfister, who voted to change the assessments, does not live in Vanderburgh County.

d. It's difficult to imagine what Ms. Pfister had to gain on the political front in Vanderburgh County by voting to open the codes or change the assessments.
e. Mr. Koch who did not vote to change the assessments is a Republican who does live in Vanderburgh County.
f. Based on Petitioner's theory of political motivation, Mr. Koch should have been a board member to vote in favor of changing the assessment but he did not.
g. Mrs. Musgrave, a Republican, did vote to change the assessments.
h. There is nothing in the record to indicate that Mrs. Musgrave's vote was politically motivated, unless one assumes that any Republican will always vote to the detriment of any Democrat.
i. The Petitioner is promoting a "conspiracy theory" which is without any basis in fact.

36. Spurling contends the decision to undertake the review of the subject properties was arbitrary and capricious because the PTABOA hearing officer undertook an investigation of the properties prior to the PTABOA's vote to "open the codes" on the properties.

37. Mr. Seger testified that, after it was alleged the Spurling properties were assessed lower than comparable properties, Mrs. Musgrave, the County Assessor, instructed him to investigate the allegation. The County contends Mrs. Musgrave followed an appropriate course by seeking an investigation by the PTABOA hearing officer prior to bringing the matter before the PTABOA to decide whether to open the codes. Mr. Seger testified that during his employment with the County Assessor's office he had never undertaken such a review of a single taxpayer's properties.

38. Mr. Schopmeyer contends the assessed value of the Spurling properties should not have been changed due to the lack of evidence provided by the County's Hearing Officer at the County Board hearing. Referencing the State Board

hearing transcript pages 49 and 50, he asserts, the County Hearing Officer admits that the County Board, as the petitioner, had the burden of proof to present probative evidence and establish a prima facie case in order to change the assessed value of the taxpayer's properties. He contends no new probative evidence was submitted on behalf of the County, other than the testimony of the County Hearing Officer. He asserts the County Board ignored the lack of evidence presented by the Hearing Officer and proceeded to increase the grades of all of the properties. He contends the County Board did not deal with Spurling's evidence in a meaningful manner and through its hearing officer, presented only conclusions.

39. Regarding Mr. Schopmeyer's contention that the PTABOA singled out Spurling properties for review, the County contends there is an absence of proof by the Petitioner that any comparable properties were improperly assessed but not reviewed. The County asserts the PTABOA acted pursuant to Ind. Code § 6-1.1-13-1, which provides that the PTABOA may change "any valuation" with respect to the last preceding assessment date.

40. Regarding the Petitioner's assertion that the PTABOA undermined the reassessment process by reviewing the Spurling properties in between regular reassessment periods, the County opines that Ind. Code § 6-1.1-13-1 specifically authorizes the PTABOA to review and change assessments with respect to the last preceding assessment date. The County contends it is evident that the legislature understood and intended that assessments would be reviewed in between reassessment periods.

41. The County contends there is no burden of proof imposed on a PTABOA. The County contends the PTABOA receives evidence on both sides of the issues and then makes a determination. Once a matter comes before the State, it contends, there is a rebuttable presumption that the determination of the PTABOA is correct. The County asserts whether either party met some undefined "burden of proof" at the county level is immaterial at this stage of the appeal process. The

County opines the only burden of proof of consequence at this juncture is that which is placed on the Petitioner to rebut the presumption that the determination of the PTABOA is correct.

Testimony and Documents Regarding Bias and/or Prejudice

42. Spurling contends the PTABOA acted with bias and/or prejudice. Mr. Schopmeyer contends comments made shortly after his opening statement at the local hearing demonstrate the County Board members prejudged this case. Referencing Petitioner's Exhibit 7, he contends the evidence of prejudgment continues throughout the record.

43. Spurling contends the bias and prejudice of the PTABOA is further demonstrated when the Board ignores the cost to construct evidence that it had requested. Referencing Petitioner's Exhibit 5, Mr. Schopmeyer contends Spurling presented substantial evidence reflecting the cost to construct Vogel Business Park was $23.88 per square foot. He contends the evidence regarding the cost to construct Vogel Business Park was introduced because it was the most recently built "hip roof" style development. Referencing Petitioner's Exhibit 7, document #8, Mr. Schopmeyer contends the PTABOA lowered the assessment of the Morgan Ave. property based on the cost to construct the improvements. By ignoring the evidence as to actual cost of construction of the subject properties, Mr. Schopmeyer contends, the PTABOA demonstrates a bias and prejudice that is proof of their arbitrary and capricious actions.

44. Mr. Schopmeyer contends the prejudice is further shown by the County Board members ignoring the taxpayer's evidence and "blindly and incompetently" relying on the Hearing Officer's conclusory statements. He contends:
    a. The County or the County Board presented no evidence regarding grade.
    b. Based on viewing the properties, the hearing officer testified all the grades should be the same.

c. The hearing officer made no reference to individual components used in the construction of the buildings.
d. No reference was made by the hearing officer to the factors comprising grade such as materials, workmanship, architectural treatment, interior finish, built-in features, and/or mechanical.
e. The hearing officer's testimony is a conclusory statement based on his "feeling" that the grades should all be the same.
f. The lack of evidence was pointed out to the PTABOA.
g. The PTABOA ignored the lack of evidence and proceeded to increase the grade of all of the properties.
h. Regarding the issue of use classification the hearing officer presented conclusory statements to justify the changes.
i. The County did not deal with Spurling's evidence in a meaningful manner as directed in *Clark v. State Board of Tax Commissioners,* 604 N.E, 2d 1230, 1235 (Ind. Tax Ct. 1998).

45. Mr. Schopmeyer contends the bias and lack of due process afforded Spurling is apparent in the way the County Board stated the hearing would be conducted. He contends the County Board stated the taxpayer would be allowed to present all evidence before voting. He contends the Board proceeded to vote before all of Spurling's evidence was entered.

46. Mr. Schopmeyer contends bias is reflected in remarks about why the taxpayer did not earlier appeal his property tax assessments. (Cty. Bd. Trans., p. 87 & 89) He contends a taxpayer's decision not to appeal his property taxes cannot legally be considered or inferred to be an admission that his tax assessment is correct.

47. The County contends there is no evidence of bias against the Petitioner. The PTABOA contends:
    a. The only evidence presented by the Petitioner shows that some of the PTABOA members, being duly informed on the issues, did not agree with Petitioner's arguments.

b. The sole source for Petitioner's allegations of bias is that some members of the PTABOA made comments during the hearing, which Petitioner interprets as evidence of bias or prejudice.
c. The record demonstrates that none of the comments cited by Petitioner include facts from an extra-judicial source.
d. The PTABOA members acquired the facts solely through participation in the process of hearing and making a determination in this matter.
e. Prior to the hearing the PTABOA members were presented with briefs and affidavits from both sides. At the hearing Petitioner's Counsel confirms this. (PTABOA Tr. p 1).
f. Prior to the hearing Mr. Elliot drove through the complexes and looked at the structures.

48. Regarding the issue of use classification, the County contends the Petitioner presented evidence on the "factors test", evidence of the use for which the structures were built, and evidence of the actual cost to build the structures. The County contends the Petitioner's main contention is that the board members inappropriately prejudged the "retail use test" for classification. It contends there are no allegations that anyone had any preconceived notions about the other tests. The County asserts that the Petitioner was not prevented from having a fair hearing or was prejudiced in any way because some board members were not persuaded by one of Petitioner's arguments.

49. Referencing Petitioner's Exhibit 7, document #5, the County contends the comment made by Mr. Elliott to the Petitioner's expert is not evidence that Mr. Elliott had made up his mind that the structures should be classified as office prior to considering Petitioner's evidence on the issue. The County asserts Mr. Elliott had previously received evidence on this issue including an affidavit from Mr. Spurling and a list of tenants and their uses of the property. The County asserts the Petitioner did not demand that Mr. Elliott recuse himself from the matter based on the comment in the hallway or any of the other comments about which Petitioner now complains.

50. Regarding the allegation that Ms. Pfister acted improperly in questioning Mr. Spurling's construction cost evidence; the County contends she was seeking clarification on the issue of "total" cost. The County contends Ms. Pfister demonstrated that she wanted to consider additional evidence and had an open mind on the issue when she suggested hiring an outside professional.

51. Mr. Schopmeyer contends the transcript cannot reflect the manner in which comments were "hurled" at Spurling by Ms. Pfister. He contends she was not "finding it difficult to accept" or "attempting to reconcile" Spurling's testimony, but rather calling Spurling a liar. (Cty. Bd. Trans., p. 102).

52. Regarding the Petitioner's contention that Mrs. Musgrave exhibited bias with questions concerning the Petitioner's decision not to appeal earlier assessments, the County asserts that any inference raised by the line of questioning was effectively negated when counsel for the PTABOA opined that the decision not to appeal an earlier assessment is not relevant.

53. Regarding the Petitioner's assertion that the vote taken at the end of the first day of the hearing is evidence of bias and a rush to judgment, the County contends Mrs. Musgrave suggested the Board begin narrowing down the issues. The County contends Mrs. Musgrave suggested the PTABOA vote on all issues other than use and grade. The record shows the PTABOA decided the following issues at the end of the first day:

    a. Adding concrete or face brick that had been omitted.
    b. Removing concrete that should not have been included.
    c. Changing or adding canopies.
    d. Adding the "clock towers" which had been omitted.
    e. Repricing a structure using the GCK schedule with certain adjustments.
    f. Adding division walls that had been omitted.
    g. Changing wall heights.
    h. Changing the dimensions of a building.

The County contends the Petitioner chose not to present any evidence on these issues during his initial presentation to the PTABOA and did not address the issues at the State Board hearing. The County contends the Petitioner failed to show the harm caused by this vote occurring at the end of the first day of hearings. The County contends the Petitioner's request was that the Board not vote first on classification and then on grade.

54. Regarding the County's contention that the Petitioner "chose" not to present evidence before the vote on February 3, 2000, Mr. Schopmeyer asserts prior to the local hearing Spurling's attorneys were instructed that they had forty-five minutes to provide evidence as to why the assessed value of the properties should not be increased by over $1,000,000. He asserts the attorneys for Spurling did not know at 1:30 p.m. on February 3, that they would subsequently be given an opportunity to return on February 10, 2000. He contends Spurling was forced to concentrate on the two largest issues. He contends Spurling did not "choose" not to present evidence on the other issues, but rather was required to decide how best to utilize his time.

Testimony and Documents Regarding Legislative Acquiescence

55. Spurling contends the assessment of the subject structures should remain at the same value established during the 1995 reassessment. He contends the assessed value established during the1995 reassessment should remain the same until the next legislatively mandated reassessment. Mr. Schopmeyer contends that there have been no changes in the characteristics of the buildings or legislative action making circumstances any different today than during the 1995 reassessment. *Whirlpool Corp. v. State Board of Tax Commissioners,* 338 N.E.2d 501 (1975).

56. The County contends the doctrine of legislative acquiescence does not prevent the PTABOA from reviewing and changing the assessments on the Spurling

properties. Citing the decision in *St. Mary's Medical Center of Evansville, In., et al. v. State Board of Tax Commissioners, et al,* 571 N.E.2d 1247, 1250 (Ind. 1991) the County contends the actions by the County Board in *St. Mary's Medical Center* were not of sufficient "notoriety and significance" to invoke the doctrine of legislative acquiescence. In this case they contend any earlier action on the part of the PTABOA with respect to the assessments of Spurling's properties is not sufficient to invoke the doctrine of legislative acquiescence.

57. The County contends the doctrine of legislative acquiescence is used only when interpreting ambiguous statutory language. The County contends:
    a. The language at issue is not ambiguous.
    b. The directive to apply a use classification model to a building based on the features of the building is not ambiguous.
    c. The directives to apply a grade factor and condition factor are not ambiguous.

    Because these issues before the PTABOA do not involve construction of ambiguous statutory language, the County contends there is no reason to employ the doctrine of legislative acquiescence.

58. The County contends it has been uniformly recognized that legislative acquiescence does not compel application of an administrative interpretation, which is erroneous. *Indiana Department of Revenue v. General Foods Corporation,* 427 N.E.2d 665, 671 (Ind. App. 1981). The County contends that even if the PTABOA had issued prior determinations on the matters at issue, they are erroneous in light of the evidence presented and cannot form the basis for asserting legislative acquiescence.

59. The County contends there is nothing in the record indicating that the Indiana General Assembly was aware of any prior decisions by the PTABOA with respect to the Petitioner's assessments, and tacitly agreed with them by choosing not to

amend the underlying statute. The County contends, absent such a showing, there is no legislative acquiescence.

60. The County contends the doctrine of legislative acquiescence is "an estoppel doctrine designed to protect those who rely on a long standing administrative interpretation." *Citizens Action Coalition of Indiana, Inc. v. Northern Indiana Public Service Company,* 485 N.E. 2d 610 (Ind. 1985). The County contends the Petitioner has not provided any evidence of detrimental reliance on the alleged administrative interpretations. Rather, Petitioner can assert only that the previous assessments were beneficial to him. The County contends, absent a showing of detrimental reliance, the doctrine of legislative acquiescence is not applicable.

61. The County contends the doctrine of legislative acquiescence is not binding upon an adjudicatory body. Rather, it is an *aid* in the construction of ambiguous language. The County contends, at most, an interpretation established by legislative acquiescence is entitled to considerable weight, but it is not binding. *Indiana State Board of Tax Commissioners v. Fraternal Order of Eagles, Lodge No. 255,* 521 N.E.2d 678 (Ind. 1988) and *Citizens Action Coalition of Indiana, Inc. v. Northern Indiana Public Service Company,* 485 N.E.2d 610 (Ind. 1985).

Testimony and Documents Regarding Use Classification

62. Spurling contends Parke I, Parke II, Center Pointe, Bradford Park and The Crossing were built for retail use and should be assessed using the General Retail cost schedules. Spurling contends the structures fit within the General Retail models of the Regulation and that their predominate uses were and continue to be retail.

63. On February 10, 2000, the PTABOA determined the use classification most representative of the structures under review is "General Office". The County contends the components found in the building's construction should serve as

the primary indicator in the assessor's selection of the proper model. However, when selecting the proper model, the County asserts, it is helpful to know some information about the type of building typically constructed for a particular occupancy.

64. Spurling contends the physical characteristics of the subject properties are retail and do not fit within the "general office" model. Regarding the characteristics of Spurling's properties Duke Coudret testified:

a. The doors are aluminum and plate glass, typical of those found in retail establishments and typical of those pictured in the photographs within the State Board regulations.
b. Partitioning goes to the ceiling tile and not above it.
c. Partitioning is cheap.
d. There is very little direct lighting.
e. The lighting is "lay in" fluorescent lighting.
f. The furnaces and air are electric and therefore the HVAC is inferior to both zoned air conditioning with warm and chilled water as mandated by the State Boards "general office" cost schedules.
g. The HVAC is inferior to evaporative coolers indicative of "general retail" buildings under the cost schedules.

65. Referencing *State Beard of Tax Commissioners v. Town of St John,* 702 N.E. 2d 1034 (Ind. 1998), Mr. Schopmeyer contends that in assessing property as retail or office the Board must consider whether the predominate use is office or retail.

66. Mr. Schopmeyer contends the Regulations do not specifically define "retail " use and "office" use. Mr. Schopmeyer contends:

a. Black's Law Dictionary defines retail as "a sale for final consumption" and "a sale to the ultimate consumer."
b. Webster's Dictionary defines retail as to "sell individually or in small quantities; sell directly to the consumer."

c. Webster's Dictionary defines office as "a place, such as a building, room, or suite, in which services, clerical work, professional duties, or the like, are carried out."
d. Retail use is a sale to the consumer, which includes any business that uses a cash register.

67. Referencing Petitioner's Exhibit 7, document #12, Lisa Daugherty testified the tenant list demonstrates the percentage of square footage used for retail purposes for the developments as of March 1, 1999. Based on the "cash register" theory, she testified, she performed an analysis of the percentage of retail use for each of the subject properties.

68. Mr. Schopmeyer contends a development should either be assessed as a mix of general office and general retail in accordance with the actual use as of March 1, 1999 or a development should be assessed either completely office or completely retail based upon the predominant use. He contends no one would expect or want the assessors, on a yearly basis, to examine each and every tenant within each and every commercial building to determine the mix of retail and office tenants. Mr. Schopmeyer contends to do so would be inconsistent with Ind. Code § 6-1.1-4-4, which provides for reassessments every four (4) years, not yearly.

69. Spurling contends the proper method in determining the "use" of a property is to examine the predominate use at the time of the initial assessment or reassessment. Referencing Petitioner's Exhibit 7 document #13, Mr. Folz testified:
a. He is the Knight Township Assessor.
b. The subject improvements were properly assessed using the general retail cost schedules due to the purposes for which the improvements were constructed and the physical characteristics of the improvements.

c. The general retail cost schedules continue to be the proper cost schedules to use due to the intended and actual predominate use of the subject properties and the physical characteristics of the improvements.
d. Requiring assessors to in effect assess commercial property annually is contrary to the Indiana Code, which requires assessments every four (4) years.

70. Referencing Petitioner's Exhibit 2, Mr. Spurling testified that when Virgil Miller first designed the original of these "hip roof design cluster buildings" (125 North Weinbach) they were classified as "retail" buildings.

71. Mr. Spurling contends the quality of the construction of his properties is not only lower than office standards, but also lower than retail, actually being more residential in materials and design. Describing the construction quality of the subject structures, Mr. Spurling testified:
a. The buildings are 2 x 4 and 2 x 6 wood construction with brick veneer.
b. The roofs are constructed with wood trusses with conventional asphalt shingles.
c. The buildings are built on 4-inch concrete slab.
d. The buildings are built of wood and brick, not steel and cost less per square foot to build than retail strip centers such as his Woodland Center.

72. Mr. Spurling testified the subject buildings cost $24.00 per square foot to build. He testified he maintains his own construction crew enabling him to achieve the low square footage cost. Spurling testified that when initially built the buildings lack partitioning which is added based on the tenant's specifications. Spurling testified he uses the least expensive way to construct partitions, using 2 x 4s with ½ inch drywall. Referencing Petitioner's Exhibit 5, Mr. Spurling testified the 1998 Federal Income Tax Form 4562 – Depreciation Schedule as well as expense registers and the calculations show that the cost to construct Vogel Business Park Buildings was $23.88 per square foot.

73. Alternatively, the Petitioner contends, if the State were to decide that the developments should be assessed as a combination of general office and general retail based upon actual use as of March 1, 1999, Parke I, Parke II, Center Pointe, Bradford Park, and Vogel Business Park should be assessed as a combination of general office and general retail based upon the square footage for each use. The Petitioner contends the regulations allow for such an assessment in 50 IAC 2.2-10-2(h). Referencing Petitioner's Exhibit 7, document #14, Mr. Schopmeyer contends the improvements are assessed using a combination of the medical office, general office, and purportedly the general retail cost schedules, even though the Hebron Avenue buildings are physically the same as the subject structures.

74. Citing *Peter Zakutansky v. State Board of Tax Commissioners,* 696 N.E. 2d 494, 497 (Ind. Tax Ct. 1998), *Barth v. State Board of Tax Commissioners,* 699 N.E. 2d 800, 802 (Ind. Tax Ct. 1998), and *Herb v. State Board of Tax Commissioners*, 656 N.E. 2d 890 (Ind. Tax Ct.1995), Mr. Seger testified that it is the physical features and building characteristics that are the determining factors in model selection.

75. Referencing 50 IAC 2.2-10-6.1(a)(2) Mr. Seger contends "Use Type" represents the model that best describes the structure. He contends the use classification of a particular building describes the model that has been chosen to assess the improvement. Referencing Respondent's Exhibit 4, Mr. Seger testified that the use classification of the subject buildings should be "General Office" in accordance with Regulation 17. Comparing the subject buildings to the "General Office" model, Mr. Seger testified:
    a. The ceiling heights of the subject properties conform to the base specification of the model.
    b. The heating systems found in the subject properties conform with the base specifications of the model.
    c. Regarding hollow metal service doors and aluminum plate glass windows, the subject properties do conform to the model.

d. The subject properties conform with the base specifications of the "General Office" model with regard to openings.
e. Regarding ceiling finish the subject conforms with the base specifications of the model.
f. Regarding partitioning the "General Office" model calls for finished divided construction whereas the "General Retail" model calls for finished open construction. It is not so much what materials are used as it is how much material is used.
g. If the buildings were classified as "General Retail" an upward adjustment would be warranted for partitioning in the subject buildings.
h. The subject properties are consistent with model specifications for "General Office" with regard to partitioning.
i. Regulation 17 does not explain the make-up of the lighting contained in the model "General Office", only that it is typical of finished divided construction.
j. The lighting found in the subject properties conforms to the base specifications of the "General Office" model.

Respondent's Exhibit 1 provides a detailed comparison of the various features with a step-by-step analysis of actual components.

76. When selecting the proper model Mr. Seger contends it is helpful to know some information about the type of building typically constructed for a particular occupancy. Mr. Seger testified that according to *Marshall Valuation Service,* Section 15, page 1, office buildings designed for general commercial occupancy are normally subdivided into relatively small units. According to *Marshall Valuation Service,* Section 13, page 1, Mr. Seger testified, retail stores are designed to display merchandise and handle shoppers. He testified these buildings usually have display and/or decorative fronts. He testified that typically these buildings are occupied by so called secondary or junior department stores with limited merchandise lines, specialty shops and commercial buildings designed for general occupancy.

77. Referencing 50 IAC 2.2-11-4.1, Mr. Seger contends that although this section of Rule 11 is meant to give the assessor an indication of grade, it is useful for model selection as the photographs of the buildings are labeled by use classification. (Respondent's Exhibit 4, tabs F & G). He contends the buildings pictured at the bottom of page 86 and in the center of page 87 of Rule 11 are comparable to the subject properties in design, construction, and materials. Specifically, he testified:

    a. The illustration depicts a wall height of between ten (10) and twelve (12) feet.
    b. The roof design of the buildings pictured in the illustrations is hip-type with asphalt shingles, like the subject.
    c. Both the subject and the pictured buildings utilize face brick in their exterior wall construction.
    d. The frequency and type of opening present in the subject are almost identical to that of the structures pictured on pages 86 and 87 of Rule 11.
    e. Each of these illustrations is identified as "general office".

78. In contrast to the physical appearance and use of the subject properties, Mr. Seger testified, various improvements distinguished as "general retail" are pictured on pages 92 and 93 of Rule 11. Referencing Respondent's Exhibit 4 tabs H & I, Mr. Seger contends a common denominator among the buildings identified as "general retail" is that they each have display or decorative front and they are singularly occupied with no smaller, subdivided units. Mr. Seger asserts the subject properties do not exhibit decorative or display fronts and are predominately subdivided for multiple occupancy of the same building.

79. In the Respondent's Reply Brief the PTABOA asserts Mr. Coudret did not provide testimony as to how the subject properties differed from or conformed to the models at issue. The Respondent contends Mr. Coudret's testimony consisted of generalized characterizations about the materials used to construct the subject properties, which he then described as being consistent with either commercial

or residential type construction. The Respondent contends this type of testimony merely asserts that in Mr. Coudret's opinion, the subject properties are built with cheap materials, which are not typically found in office buildings. Further, the Respondent contends, this type of testimony does not indicate how the subject properties deviate form the "General Office" model or conform to the "General Retail" model and therefore falls short of the Petitioner's burden.

80. The County contends each of the following properties are comparable to the subject property and are classified as "General Office":

	Address	Code #
1.	2524 Waterbridge Way	12-230-24-278-016
2.	6500 N Interchange Rd	04-021-04-134-005
3.	2536 Waterbridge Way	12-230-34-278-005
4.	2501 Cullen Ave	09-251-12-148-002

(Respondent's Exhibits 10, 11, 12, and 13.)

81. The County contends the property located at 2524 Waterbridge Way is almost identical to the subject property in design, construction, materials, and workmanship. Like the subject, the County contends, the buildings in the Waterbridge Way complex are:

a. Constructed of 2 x 4 and 2 x 6 wood studded walls with a brick veneer.
b. Built on concrete slab.
c. Built with roofs composed of 2 x 4 and 2 x 6 construction.
d. Finished with flooring that is predominately carpet with some tile, mineral fiber acoustical tile ceiling, and standard fluorescent light fixtures.
e. Heated with gas fired forced air.
f. Built with hollow metal service doors and aluminum plate glass windows.

82. The County contends, except for architectural appearance, the properties located at 6500 N. Interchange Rd., 2536 Waterbridge Way, and 2501 Cullen Ave., are also similarly comparable to the subject.

83. The County contends the two properties offered by the Petitioner in support of his grade argument are classified as “general office”. The County contends the Petitioner identified Hebron Pointe North and Hebron Office Plaza as comparable to the subject properties.

Testimony and Documents Regarding Grade

84. Spurling contends the County Board overstates the grades of the properties that are the subject of this appeal. The County Board applied a C (100%) grade to all the Spurling properties opened for review. Before the determination of the PTABOA the grades ranged from D (80%) to C-1 (95%). Spurling asserts the grades should be D (80%).

1. Regarding the structures in the complexes known as Parke I, Parke II, Vogel Business Park, Center Pointe, Bradford Park, and the Crossing

85. The affidavit of Mr. Spurling attests that the subject properties are constructed with materials used in residential construction, which are inferior to materials typically used in commercial buildings, and that the interior finish and mechanical features are typical of that found in residential construction, which are also substandard in comparison to typical commercial structures. (Petitioner’s Exhibit 4)

86. With regard to plumbing fixtures, HVAC and architectural treatment, Mr. Spurling testified the subject properties are constructed of materials that are residential in nature and inferior to that typically found in commercial structures. He further testified the people who construct his buildings are not top-quality craftsmen; therefore, the workmanship found in the subject properties is less than perfect. Mr. Spurling testified that his properties are closer to a grade of “D” than “C”.

87. Mr. Coudret testified that based on his inspection of the properties, he considered the subject properties to be below “C” grade or even closer to a “D” grade. Mr. Coudret provided the following testimony as to materials:

a. Low-grade ceiling tiles that are of the cheapest quality.
b. Lowest quality fluorescent lighting fixtures.
c. 2 x 4 and 2 x 6 construction that is low-grade.
d. Residential type drywall.
e. Partitions constructed of inexpensive 2 x 4 studded walls and drywall.
f. Drywall, ceiling tile and lighting are all cheap.
g. Walls do not go above the ceiling, which makes interior finish substandard.
h. Residential quality carpeting.
i. The properties lack built-in features.
j. The furnaces are electric and are of residential quality.
k. 100 amp electrical service.

88. Referencing Petitioner’s Exhibit 7, documents #14 and #16, Mr. Schopmeyer contends the grades determined by the PTABOA are higher than the grades assigned to the buildings located in Hebron Pointe North and in Hebron Office Plaza. Mr. Spurling testified that the Hebron Properties are similar to the subject properties with the exceptions that the subject buildings do not have gutters or a floor joist system. He further testified that the subject buildings are built on a slab foundation, causing the subject to be less costly to construct.

89. The affidavit of Mr. Coudret, Petitioner’s Exhibit 7, document #11, attests that the subject properties are similar in construction and finish to Hebron Pointe North and Hebron Office Plaza (Petitioner’s Exhibit 7, documents #14 and #16), except the subject properties have slab foundations, which are inferior to the concrete block foundations of the Hebron properties and the subject properties do not have gutters while the Hebron properties do have gutters.

90. Mr. Folz, Knight Township Assessor, testified the grades of the subject properties were correct prior to the County Board action. He asserts that Knight Township quantifies grades and the County Assessor did not quantify the increased grades determined at the County Board hearing. Further he testified the Spurling properties are of economy construction that reminds him of KIT buildings. He testified the subject structures have low rooflines and no guttering.

91. Mr. Seger testified the Hebron properties that the Petitioner contends are similar to the subject properties are classified as "General Office".

92. Mr. Seger testified that according to *Marshall Valuation Service* a building of that class of construction could have either concrete slab or wood floor joists.

93. Citing *Peter Zakutansky v. State Board of Tax Commissioners,* 696 N.W. 2d 494 (Ind. Tax 1998), Mr. Schopmeyer asserts the cost of construction is an indication of the correctness of grade. He contends the actual cost per square foot of the subject structures indicates the use of materials, construction and design of a lesser quality.

94. The affidavit of Mr. Spurling attests that the current cost to construct these buildings is $24.00 per square foot. In support of the cost testimony offered by Mr. Spurling, Petitioner submitted depreciation amortization schedules, expense registers as well as a summary sheet that gives a breakdown of costs for the complex known as Vogel Business Park. (See Petitioner's Exhibit 7, documents #18 and #19). Mr. Spurling testified that Vogel Business Park was the last of the subject properties to be constructed. He testified the project was completed in 1998. He further testified that the total area of the buildings in the complex was 45,000 square feet which when divided in to the total cost ($1,074,901) resulted in a figure of $23.88 per square foot.

95. Referencing Petitioner's Exhibit 5, Mr. Spurling testified the Form 4562, Depreciation Schedule filed with his 1998 Federal Income Tax Return, supports

his testimony regarding the cost of constructing the subject property. He testified it would not be advantageous to understate, for depreciation purposes, the costs involved in constructing this property.

96. Mr. Seger contends the evidence and testimony offered by Petitioner with regard to the $24.00 per square foot cost of construction is deficient because it does not take into account entrepreneurial profit, typical material costs and interior finish cost. (Respondent's Exhibit 1, page 19)

97. Mr. Seger contends the evidence offered by the Petitioner as to the cost to construct the subject properties is not probative of the quality of materials, construction, or design. Referencing Respondent's Exhibit 14, Mr. Seger testified he developed the cost estimate utilizing the *Marshall Valuation Service* cost manual. He testified that valuing the subject as an Average, Class D Shell Office Building resulted in a value estimate of $25.02 per square foot.

98. Mr. Seger contends the Petitioner's characterization of the subject improvements as being constructed in a residential manner and of cheap, economic, and substandard materials is of no probative value. Citing *Freudenberg-NOK General Partnership v. State Board of Tax Commissioners,* 715 N.E. 2d 1026, 1030 (Ind. Tax 1999) and *Whitley Prods. v. State Board of Tax Commissioners,* 704 N.E. 2d 111 (Ind. Tax 1998), Mr. Seger contends the conclusory statements made by Petitioner are not probative evidence concerning the grading of the buildings.

2. Regarding the structures known as Woodland I, Woodland II, and Woodland III

99. The Vanderburgh County Property Tax Assessment Board of Appeals determined the building grade factor of each of the three structures to be "C". The Petitioner contends the grade of these buildings should be reduced to "D".

100. Mr. Schopmeyer contends the grade factors applied by the PTABOA are improper based upon the Petitioner's evidence regarding the quality of materials, workmanship, interior finish and mechanical components, as well as the absence of architectural treatment and built-in features.

101. Mr. Spurling testified the subject buildings are steel frame with masonry.

102. Referencing Petitioner's Exhibit 7, documents #14 and #16, Mr. Schopmeyer contends that the grades determined by the PTABOA are higher than the grades assigned to the buildings located in Hebron Pointe North and in Hebron Office Plaza.

103. In valuing the subject structures, Mr. Seger contends the PTABOA determined the construction was consistent with a light pre-engineered building of steel frame construction. He testified the Board concluded the structures should be valued in accordance with Schedule A.4, Pre-engineered & Pole Framed Buildings. He testified adjustments to the assessments were made to account for structural and architectural modifications, specifically the concrete block, face brick, paint on masonry, and division walls.

104. As a result of the PTABOA's determination to value the subject structures from Schedule A.4, Mr. Seger contends, the Board found it necessary to reexamine the grade factor applied to these assessments. He contends that in *Barth, Inc. v. State Board of Tax Commissioners,* 699 N.E. 2d 800 at 807 (Ind. Tax 1998) the Tax Court found that "the kit adjustment and the grading of the buildings, though discrete issues, are inextricably linked."

105. Mr. Seger contends, the Tax Court held that "where a taxpayer alleges that it's building qualifies for the kit adjustment, the allegation itself … puts the grade assigned to the building at issue. Consequently, it would be nonsensical to refuse to allow the State Board to adjust the grade of the buildings if the kit adjustment is deemed to be warranted." *Barth, Inc.,* 699 N.E. 2d at 807.

106. Setting aside the adjustments for structural and architectural modifications, Mr. Seger contends the PTABOA determined the subject improvements conformed to the base specifications of the GCK model, thereby warranting a building grade factor of "C".

107. Because the Hebron Pointe North and Hebron Office Plaza buildings are different in their construction and valued from the General Mercantile Model, Schedule A.1, Mr. Seger contends the Petitioner's comparison to the subject structures is flawed.

3. Regarding Eastland North

108. The Vanderburgh County Property tax Assessment Board of Appeals determined the building grade factor of this structure to be "C". The Petitioner contends the grade of the subject building should be reduced to "D".

109. Mr. Schopmeyer contends the grade factor applied by the PTABOA is improper based upon the Petitioner's evidence regarding the quality of materials, workmanship, interior finish and mechanical components, as well as the absence of architectural treatment and built-in features.

110. Referencing Petitioner's Exhibit 17, documents #14 and #16, Mr. Schopmeyer contends that the grade determined by the PTABOA is higher than the grades assigned to the buildings located in Hebron Pointe North and in Hebron Office Plaza.

111. Because the Hebron Pointe North and Hebron Office Plaza buildings are different in their construction and valued from the General Mercantile Model, Schedule A.1, Mr. Seger contends the Petitioner's comparison to the subject structure is flawed. He asserts the Hebron buildings are valued primarily as "General Office" while the subject building is assessed utilizing the "General Retail" model.

Testimony and Documents Regarding Utility Storage

112. Spurling contends Parke I, Vogel Business Park and Center Pointe have "clock towers" that the local officials have assessed as utility storage buildings. Spurling contends the towers have a clock and signs that advertise the businesses of the tenants and should be assessed as signs.

113. The County contends the structures, referred to as "clock towers", are real property and add value to the property. Accordingly, the PTABOA determined the structures should be valued as "Utility Storage" and a grade of C (100%) was applied.

114. Mr. Schopmeyer contends the subject structures are small in size and of no use for storage space. He contends the structures range in size from 12 x 12 feet to 10 x 9 feet and twenty-five to forty-one feet in height. Regarding the structures, Mr. Spurling testified:
    a. The structures are not used for storage.
    b. They are a nice looking place to locate signs.
    c. They have no heat.
    d. They do not house a sprinkler system
    e. They are reported as business personal property.
    f. The structures have a foundation and four (4) brick walls.
    g. The roof on the towers is consistent with the roofs of the buildings in each complex for aesthetic purposes.

115. Mr. Seger contends the subject structures were not assessed prior to the review of this property by the PTABOA. He contends that although small in area the structures are of wood frame construction with face brick exterior walls and a hip-type roof. He contends the interior of the structures is unfinished and the materials and quality of workmanship is consistent with the other buildings on these codes.

Testimony and Documents Regarding Economic Obsolescence Depreciation

116. Spurling contends Bradford Park, Center Pointe and The Crossing qualify for obsolescence depreciation because of vacancy due to the properties' neighborhood locations.

117. The County contends that based on the premise of vacancy alone, obsolescence depreciation is not warranted.

118. Mr. Spurling contends Weinbach Avenue, the location of the subject properties, was the economic center between downtown and the east side at the time the subject properties were constructed. He contends the vacancy rates of the properties have increased because the economic center is now on Green River Road and moving towards Burkhardt Road and I-164. The affidavit of Mr. Spurling attests that the high vacancy rates are attributable to the undesirable neighborhood that abuts the subject properties. Mr. Spurling testified:
    a. Significant vandalism occurs at Bradford Park, The Crossing and Center Pointe.
    b. The vacancy rate on Weinbach has increased each year.
    c. The properties are not as desirable as they once were.
    d. March 1, 1999 Bradford Park had a vacancy rate of almost 25%.
    e. March 1, 1999 The Crossing vacancy rate was 20%.
    f. March 1, 1999 Center Pointe vacancy was 12%.
    g. His properties located on Green River Road have a 4% to 5% vacancy rate.

119. Mr. Seger contends the Petitioner's claim for obsolescence revolves on the premise that obsolescence can be measured by examining the properties' vacancy rate in a given year. He contends that without a more complete analysis of the properties value the Petitioner's claim of obsolescence is unsubstantiated.

He asserts that mere reference to elements of the income approach to value (vacancy) serve only to allege causes of obsolescence.

Testimony and Documents Regarding Condition

120. Spurling contends the condition of Bradford Park is overstated. Spurling cites reoccurring flooding as the cause of deterioration of Bradford Park that is significantly worse than would normally be expected.

121. The County contends it was the Petitioner's burden to establish a benchmark of "normal deterioration" by which to measure the deterioration of the subject property. Absent this showing of normal deterioration, the County contends, the Petitioner did not establish that the deterioration in the subject property is significantly worse than would normally be expected. Therefore, the PTABOA determined the condition of the structures should remain "average".

122. Spurling contends the condition of Bradford Park should be assessed as poor. Mr. Spurling testified that Bradford Park is on a low elevation and tends to flood. He testified the damage caused by three (3) major flooding incidents has been estimated between $60,000 and $100,000.

123. Mr. Seger contends there was some indication in the PTABOA record that the damage caused by flooding had been remedied. Mr. Seger testified there are nine (9) buildings in the Bradford Park complex. He asserts the Petitioner failed to identify a specific building that is suffering from deterioration significantly worse than would normally be expected.

Testimony and Documents Regarding Corrections

124. At the hearing Mr. Seger testified the County found errors on two of the Form 115s after they were issued on February 17, 2000. He contends:

1. The Form 115 issued on February 17, 2000 for petition #82-027-99-004-00019 failed to coincide with the determinations of the PTABOA. It was determined by the PTABOA on February 10, 2000 that the use classification of the building on card 9 of 10 be changed from "General Retail" to General Office".
2. The Form 115 issued on February 17, 2000 for petition #82-027-99-004-00014, failed to coincide with the determinations of the PTABOA. It was determined by the PTABOA on February 10, 2000 that the use classification of the building on card 3 of 9 reflect 2,800 square feet classified as "General Office" rather than the "Utility Storage" classification which is now the case.

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; Ind. Code §§ 6-1.1-15-1, -2.1, and –4. See the Forms 130 and 131 petitions. In addition, Indiana courts have long recognized the principle of exhaustion of administrative remedies and have insisted that every designated administrative step of the review process be completed. *State v. Sproles,* 672 N.E. 2d 1353 (Ind. 1996); *County Board of Review of Assessments for Lake County v. Kranz* (1964), 224 Ind. 358, 66 N.E. 2d 896. Regarding the Form 130/131 process, the levels of review are clearly outlined by statute. First, the Form 130 petition is filed with the County and acted upon by the PTABOA. Ind. Code §§ 6-1.1-15-1 and –2.1. If the taxpayer, township assessor, or certain members of the PTABOA disagree with the PTABOA's decision on the Form 130, then a Form 131 petition may be filed with the State. Ind. Code § 6-1.1-15-3. Form 131 petitioners who raise new issues at the State level of appeal circumvent review of the issues by the PTABOA and, thus, do not follow the prescribed statutory scheme required by the statutes and case law. Once an appeal is filed with the State, however, the State has the discretion to address

issues not raised on the Form 131 petition. *Joyce Sportswear Co. v. State Board of Tax Commissioners,* 684 N.E. 2d 1189, 1191 (Ind. Tax 1997). In this appeal, such discretion will not be exercised and the Petitioner is limited to the issues raised on the Form 131 petition filed with the State.

2. The State is the proper body to hear an appeal of the action of the County pursuant to Ind. Code § 6-1.1-15-3.

A. Indiana's Property Tax System

3. Indiana's real estate property tax system is a mass assessment system. Like all other mass assessment systems, issues of time and cost preclude the use of assessment-quality evidence in every case.

4. The true tax value assessed against the property is not exclusively or necessarily identical to fair market value. *State Board of Tax Commissioners v. Town of St. John,* 702 N.E. 2d 1034, 1038 (Ind. 1998)(*Town of St. John V)*.

5. The Property Taxation Clause of the Indiana Constitution, Ind. Const. Art. X, § 1 (a), requires the State to create a uniform, equal, and just system of assessment. The Clause does not create a personal, substantive right of uniformity and equality and does not require absolute and precise exactitude as to the uniformity and equality of each *individual* assessment. *Town of St. John V,* 702 N.E. 2d at 1039 – 40.

6. Individual taxpayers must have a reasonable opportunity to challenge their assessments. But the Property Taxation Clause does not mandate the consideration of whatever evidence of property wealth any given taxpayer deems relevant. *Id.* Rather, the proper inquiry in all tax appeals is "whether the system prescribed by statute and regulations was properly applied to individual assessments." *Id.* at 1040. Only evidence relevant to this inquiry is pertinent to the State's decision.

B. Burden

7. Ind. Code § 6-1.1-15-3 requires the State to review the actions of the PTABOA, but does not require the State to review the initial assessment or undertake reassessment of the property. The State has the ability to decide the administrative appeal based upon the evidence presented and to limit its review to the issues the taxpayer presents. *Whitley Products, Inc. v. State Board of Tax Commissioners,* 704 N.E. 2d 1113, 1118 (Ind. Tax 1998) (citing *North Park Cinemas, Inc. v. State Board of Tax Commissioners,* 689 N.E. 2d 765, 769 (Ind. Tax 1997)).

8. In reviewing the actions of the PTABOA, the State is entitled to presume that its actions are correct. "Indeed, if administrative agencies were not entitled to presume that the actions of other administrative agencies were in accordance with Indiana law, there would be a wasteful duplication of effort in the work assigned to agencies." *Bell v. State Board of Tax Commissioners,* 651 N.E. 2d 816, 820 (Ind. Tax 1995). The taxpayer must overcome that presumption of correctness to prevail in the appeal.

9. It is a fundamental principle of administrative law that the burden of proof is on the person petitioning the agency for relief. 2 Charles H. Koch, Jr., *Administrative Law and Practice,* § 5.51; 73 C.J.S. Public Administrative Law and Procedure, § 128. *See also* Ind. Code § 4-21.5-2-4(a)(10) (Though the State is exempted from the Indiana Administrative Orders & Procedures Act, it is cited for the proposition that Indiana follows the customary common law rule regarding burden).

10. Taxpayers are expected to make factual presentations to the State regarding alleged errors in assessment. *Whitley*, 704 N.E. 2d at 1119. These presentations should both outline the alleged errors and support the allegations with evidence. "Allegations, unsupported by factual evidence, remain mere

allegations." *Id* (citing *Herb v. State Board of Tax Commissioners,* 656 N.E. 2d. 890, 893 (Ind. Tax 1995)). The State is not required to give weight to evidence that is not probative of the errors the taxpayer alleges. *Whitley,* 704 N.E. 2d at 1119 (citing *Clark v. State Board of Tax Commissioners,* 694 N.E. 2d 1230, 1239, n. 13 (Ind. Tax 1998)).

11. The taxpayer's burden in the State's administrative proceedings is two-fold: (1) the taxpayer must identify properties that are similarly situated to the contested property, and (2) the taxpayer must establish disparate treatment between the contested property and other similarly situated properties. In this way, the taxpayer properly frames the inquiry as to "whether the system prescribed by statute and regulations was properly applied to individual assessments." *Town of St. John V, 702 N.E. 2d* at 1040.

12. The taxpayer is required to meet his burden of proof at the State administrative level for two reasons. First, the State is an impartial adjudicator, and relieving the taxpayer of his burden of proof would place the State in the untenable position of making the taxpayer's case for him. Second, requiring the taxpayer to meet his burden in the administrative adjudication conserves resources.

13. To meet his burden, the taxpayer must present probative evidence in order to make a prima facie case. In order to establish a prima facie case, the taxpayer must introduce evidence "sufficient to establish a given fact and which if not contradicted will remain sufficient." *Clark,* 694 N.E. 2d at 1233; *GTE North, Inc. v. State Board of Tax Commissioners,* 634 N.E. 2d 882, 887 (Ind. Tax 1994).

14. In the event a taxpayer sustains his burden, the burden then shifts to the local taxing officials to rebut the taxpayer's evidence and justify its decision with substantial evidence. 2 Charles H. Koch, Jr. at §5.1; 73 C.J.S. at § 128. *See Whitley,* 704 N.E. 2d at 1119 (The substantial evidence requirement for a taxpayer challenging a State Board determination at the Tax Court level is not "triggered" if the taxpayer does not present any probative evidence concerning

the error raised. Accordingly, the Tax Court will not reverse the State's final determination 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 action taken by the PTABOA with respect to each property is void abinitio due to the board's acting with four rather than five members.

18. The Petitioner asserts that the action of the PTABOA is void abinitio (from the beginning) because only 4 members had been appointed. The Petitioner is arguing that the PTABOA could not have taken action until the fifth and final member of the board had been appointed. However, the Petitioner provides no legal authority on which to base this assertion.

19. The State can find no requirement that the entire board be in place before the PTABOA may conduct business. Ind. Code § 6-1.1-28-1 (the "statute") reads:

"A majority of the board constitutes a quorum for the transaction of business. Any question properly before the board may be decided by the agreement of a majority of the whole board."

20. At the time the PTABOA took action in this appeal, there were four members present. This is a majority of the whole board. This action by the board was decided by a vote of 3 to 1. Even if there had been another member appointed and present the result would have been the same.

21. The statute is silent on the question whether the entire board must be appointed before it can conduct any business. When construing a statute, it is equally as important to recognize what the statute does not say as it is to recognize what it does say. *City of Evansville v. Zirkelbach,* 662 N.E. 2d 651, 654 (Ind. App. 1996).

22. The statute does not say that all members must be appointed and present. To find that all members must be appointed would be impractical. For Example, if a member dies or resigns, under the Petitioner's theory the PTABOA would be prohibited from conducting any business until a new member was appointed.

23. The statute contemplates situations where the PTABOA has less then five members available by requiring a quorum to conduct business and a majority of the whole board to vote a certain way to validate decisions.

24. For all the above reasons, there is no change in the assessment as a result of this issue.

Issue No. 2 – Whether the actions of the PTABOA were arbitrary and capricious

Issue No. 3 – Whether any of the members of the PTABOA acted on the basis of bias or prejudice stemming from an extra-judicial source which resulted in an opinion on the merits on some basis other than what was learned through participation in the case.

25. Petitioner next argues that the decision of the PTABOA is arbitrary and capricious and that bias or prejudice was present due to knowledge gained other than by evidence presented at hearing. These issues will be addressed together because the same theory will tend to reject both arguments.

26. The State, through its Hearing Officer, conducted a review de novo of a PTABOA decision. In this proceeding, the Petitioner was allowed to present evidence and testimony on its behalf.

27. While the burden of going forward with the evidence is placed upon the Petitioner, if met, the burden of persuasion shifts to the Respondent.

28. Any arbitrary and capricious or bias action of the PTABOA hearing is remedied by de novo review.

29. The Indiana Supreme Court has determined the propriety of a de novo review applied at administrative proceedings. *Indiana Department of Natural Resources v. United Refuse Company, Inc.*, 615 N.E.2d 100 (Ind.1993).

30. The Petitioner's burden is to demonstrate that the PTABOA decision is wrong and the requested assessment is correct. This case is decided based on a de novo review of the evidence making a determination regarding the alleged arbitrary and capricious action of the PTABOA irrelevant. There will be no change to the assessment as a result of this issue.

31. The general allegation of bias conduct by PTABOA members must fail for the same reasons advanced above.

32. In its post hearing brief the Petitioner points-out numerous examples of alleged bias by the PTABOA. Again, a de novo review of the evidence by the State remedies any such defects.

Issue No. 4 – Whether the PTABOA is bound by the doctrine of legislative acquiescence such that the assessed value given to the properties at issue must remain at the assessed value given to them during the March 1, 1995 reassessment.

33. At the hearing the Petitioner contended that based on the doctrine of legislative acquiescence, the assessed value established during the 1995 reassessment should remain the same until the next legislatively mandated reassessment. The Petitioner cites *Whirlpool Corp. v. State Board of Tax Commissioners,* 338 N.E.2d 501 (Ind. App. 1975) as authority for this assertion.

34. *Whirlpool Corp.* was an appeal from a State Board of Tax Commissioners' denial of Whirlpool's claim for business personal property deductions for 1969 after the State Board permitted the company's exemption in 1966, 1967 and 1968. The Court of Appeals of Indiana, First District found that "* * * where legislature did not amend or alter statute in any way during such period, legislature was deemed to have acquiesced in such exemption, and such exemption was binding and controlling on Board." *Id* at 501.

35. Later, the Indiana Supreme Court in *Indiana State Board of Tax Commissioners v. Fraternal Order of Eagles, Lodge No. 255,* 521 N.E.2d 678 (Ind. 1988) provided additional guidance regarding the concept of legislative acquiescence.

36. In *Eagles Lodge* both the Howard County Board of Review and the State Board of Tax Commissioners denied a request for a charitable property tax exemption.

The Indiana Tax Court reversed and granted the exemption solely on the basis of legislative acquiescence. *Id* at 679.

37. In reversing the Tax Court and affirming the decision of the State Board of Tax Commissioners the Indiana Supreme Court made the following observations regarding legislative acquiescence:
    a. "Generally, when doctrine of legislative acquiescence has been applied, there has been an administrative or judicial interpretation of ambiguous statutory language, and legislative inaction causes the interpretation to stand until the legislature does act; doctrine does not apply when administrative agency has failed to enforce clear statutory language." *Id* at 678.
    b. "In cases where the doctrine has been applied, there has generally been administrative interpretation of ambiguous statutory language. We find the same situation in judicial interpretation of statutes. In either case, we find legislative acquiescence when the legislature is apprised of the interpretation of the ambiguous language and does nothing." *Id* at 681.

38. Subsequent case law is consistent with *Eagles Lodge* in pointing-out that the invoking of the doctrine of legislative acquiescence would require ambiguous statutory language that has been subject to an administrative or judicial interpretation that should have been noticed by the legislature. If the legislature then fails to act, it can be said that legislative acquiescence has taken place.

39. In the instant case the Petitioner has made no showing that the criteria mentioned above is present and that the doctrine of legislative acquiescence would apply.

Issue No. 5 – Use Classification

40. The Petitioner contends Parke I, Parke II, Center Pointe, Bradford Park, and The Crossing should be assessed using the General Retail cost schedule rather than

the General Office cost schedule.

41. According to 50 IAC 2.2-10-6(a)(2), “Use Type” represents the model that best describes the structure. The format and procedures for application are the same for General Commercial Mercantile (GCM), General Commercial Industrial (GCI), and General Commercial Residential (GCR) association groupings. Each schedule lists the models in a vertical column on the left of the schedule. Locate and use the model that best represents the structure being assessed. When necessary, adjustments to the base price are made from Schedule C. A guide for selecting the correct model is located in 50 IAC 2.2-11.

42. A model is a “conceptual tool used to replicate reproduction cost of a given structure using typical construction materials. The model assumes that there are certain elements of construction for a given use type." 50 IAC 2.2-10-6.1

43. 50 IAC 2.2-11 identifies the components of the differing models. In this case, the Petitioner contends the subject should be priced as General Retail and the Respondent contends the General Office model is the more appropriate model.

44. 50 IAC 2.2-11-1(25) is the model for General Office. 50 IAC 2.2-11-1(34) is the model for General Retail. Very rarely would a building contain every component within a model. For this reason, the models are guides to be used in assessing the structures. When a building deviates from the model, adjustments may be made to the base price.

45. Selection of a model requires the subjective judgment of an assessing official. Because a building being assessed for tax purposes may not conform perfectly with the model specifications used in cost schedule, subjective judgment must be used to decide which model the building most closely resembles; thus, assessing officials have some discretion in selecting which model to use. *Inland Steel Co. v. State Board of Tax Commissioners,* 739 N.E. 2d 201, 223 (Ind. Tax 2001).

46. To demonstrate that the wrong model was used under cost schedule in making the assessment of a property, the taxpayer must submit "probative evidence to establish a prima facie case that another model was more appropriate." *Id.*

47. Subject improvements often deviate from the model used to assess them. *Clark,* 694 N.E. 2d at 1237. Deviations often affect the reproduction cost of an improvement. *Whitley,* 704 N.E. 2d at 1117. In *Whitley,* the Tax Court stated: "The preferred method of accounting for this deviation is to use separate schedules that show the costs of certain components and features present in the model. This allows an assessor to adjust the base reproduction cost of the improvement objectively. The other means of accounting for an improvement's deviation from the model used to develop the cost schedule is via an adjustment to the grade of the improvement. This type of adjustment requires the assessor's subjective judgment. Where possible, this type of adjustment should be avoided. However, because the component (base rate adjustment) schedules are not comprehensive, this type of adjustment may be necessary."

48. The burden is on the Petitioner to present probative evidence that the assessment by the local officials is incorrect. 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,* 634 N.E. 2d at 887.

49. In this case, the evidence indicates that the subject buildings are neither identical to the General Retail model nor the General Office model. The local officials have assessed the subject properties as General Office, which they believe is the most appropriate schedule for the buildings. The Petitioner has pointed out some differences between the subject and the General Office model.

50. These circumstances raise the question of whether the differences are great enough to warrant a change in model, or if they are the type of differences that

should be taken into consideration when determining grade, or be corrected with base rate adjustments.

51. In the *Indianapolis Racquet Club Inc. v. State Board of Tax Commissioners,* 722 N.E. 2d 926 (Ind. Tax 2000), the court found that 90% of the tennis facility in dispute lacked a substantial number of features described in the health club model that was used to assess it. The Court also observed that the tennis facility's interior matched the description "Unfinished," as found in the Light Warehouse model, better than the description Finished Open, as used in the Health Club model. The Tax Court determined that using the health club model was an abuse of discretion. The Tax Court remanded the case to the State, with the instruction to use a more appropriate model to assess the facility.

52. In *Inland Steel,* the court found the Petitioner did not present probative evidence to demonstrate an inappropriate model had been used to assess certain buildings. The Petitioner in *Inland Steel* identified 3 differences between the selected model, and what they believed to be the appropriate model, including cost per square foot differing from the model selected.

53. The Court reasoned in *Indianapolis Racquet Club* that, when considered in its entirety, the evidence demonstrated that at least one model better resembled the features of the subject facility. In *Inland,* the Court found that Inland's evidence was insufficient to establish that the Heavy Manufacturing model or any other model was the better model for assessing the Major Buildings.

54. In the instant case, the Petitioner opines that there are some differences between the subject properties and the General Office model, and those are listed in Findings of Fact ¶ 64. Each will be discussed here:

    a. Doors. Each model identifies hollow metal service doors, the General Office at ½ % and General Retail at 1%. The Petitioner never identifies which is more like the subject. Instead, the Petitioner asserts the doors are aluminum and plate glass, typical of those found in retail

establishments. The Petitioner failed to show how the doors of the subject are more like those of the General Retail model.

b. Partitioning goes to the ceiling tile and not above it. The General Office model indicates partitions are typical of finished divided office, for a ceiling height of 10'. The General Retail model just indicates typical of finished open construction found in retail areas. Neither model indicates that partitioning should go beyond the ceiling tile. The Petitioner failed to show how this aspect of the partitioning is more like the General Retail model.
c. Partitioning is cheap. The General Office model indicates partitioning typical of finished divided office. The General Retail model indicates partitioning typical of finished open retail area. The Petitioner does not present any evidence of what is typical of those areas, and labeling the partitioning as cheap does not make in more like the partitioning found in the General Retail model.
d. There is very little direct lighting. The General Retail model indicates lighting is typical of finished open area. The General Office model indicates lighting is average cost, typical of finished divided office buildings. The Petitioner does not present any evidence of what is typical for either model. Accordingly, stating that there is very little direct lighting is not sufficient to establish the similarity of the subject buildings to the General Retail model.
e. The lighting is "lay in" florescent lighting. There is no specific lighting listed in either model (see d. above). Accordingly, the fact that the subject buildings have "lay in" florescent lighting does not make them more like the General Retail Model.
f. HVAC inferior. The Petitioner did present evidence to indicate that the subject differs from the model, because the HVAC is not zoned air conditioning with warm and chilled water. However, see g. below.
g. The HVAC is inferior to the evaporative coolers of the General Retail model. The Petitioner admits that the HVAC is also inferior to the General Retail model. Therefore, the subject is not like either the General Office model or the General Retail model with respect to the HVAC. This does

not indicate the General Retail model is more appropriate for the subject buildings.

55. These alleged differences the Petitioner identifies are not sufficient to establish the General Retail model as more appropriate for the subject buildings. To demonstrate that the wrong model was used under cost schedule in making the assessment of a property, the taxpayer must submit "probative evidence to establish a prima facie case that another model was more appropriate." *Inland Steel,* 739 N.E. 2d at 223.

56. The Petitioner also presented cost information. The Petitioner states the cost to construct the subject buildings was $24.00 per square foot. With regard to the cost of constructing, the Tax Court stated: "Relative costs of construction materials are irrelevant in deciding whether the Major Buildings better resemble the characteristics attributed to the Mill Manufacturing or Heavy Manufacturing models." *Inland Steel,* 739 N.E. 2d at 226. Accordingly, the cost of constructing the subject buildings in this appeal are deemed irrelevant in deciding whether the General Office or General Retail model is more appropriate.

57. The Petitioner presented testimony regarding actual use of the subject buildings. A witness for the Petitioner testified that the intended and predominant use of the subject properties is general retail.

58. Quoting *Herb v. State Board of Tax Commissioners,* 656 N.E.2d 890, 893 (Ind.Tax1995), the Court stated: "The actual use of the property is not a determinative factor in selecting the appropriate model, but merely a starting point. As a result, the model that most closely resembles the subject improvement with respect to physical features is to be used, regardless of the model's name."

59. Accordingly, even if general retail is the actual use, this fact alone does not qualify the subject buildings to be priced from the general retail model. The

characteristics of the building are the determining factor used in deciding which model is more appropriate in the assessment process.

60. The Petitioner did identify some differences between the subject and the General Office model used to assess it. However, the Petitioner did not identify a more appropriate schedule that more closely resembles the subject buildings. Instead, the Petitioner lists differences then contends the General Retail model is more appropriate. The Petitioner also opines that the building was originally classified as General Retail.

61. The fact that previous to the reassessment by the PTABOA the subject properties were classified as General Retail does not help the Petitioner's case. In *Glass Wholesalers, Inc., v. State Board of Tax Commissioners,* 568 N.E. 2d 1116 (Ind. Tax 1991), the Court stated that "each tax year stands alone, to be assessed separately." Accordingly, the State will not make a change just because the buildings have been assessed differently in the past. The Petitioner must meet its burden in the appeal.

62. In this appeal, the Petitioner did not present probative evidence indicating the General Retail model is more appropriate to use in assessing the subject properties.

63. For all the reasons above, the Petitioner did not meet its burden in this appeal. Accordingly, there will be no change in the use classification of Parke I, Parke II, Center Pointe, Bradford Park, or The Crossing as a result of this issue.

Issues 6, 7, & 8 – Grade

64. "Grade" means the classification of an improvement based on certain construction specifications and quality of materials and workmanship. 50 IAC 2.2-1-30.

65. Grade is used in the cost approach to account for variations from the norm or "C" grade. The quality and design of a building are the most significant variables in establishing grade. 50 IAC 2.2-10-3.

66. The determination of the proper grade requires assessors to make a variety of subjective judgments regarding variations in the quality of materials and workmanship and the quality of style and design. *Mahan v. State Board of Tax Commissioners,* 622 N.E. 2d 1058, 1064 (Ind. Tax 1993). For assessing officials and taxpayers alike, however, the Manual provides indicators for establishing grade. The text of the Manual (see 50 IAC 2.2-10-3), models and graded photographs (50 IAC 2.2-11-4), assist assessors in the selection of the proper grade factor.

67. The major grade classifications are A through E. 50 IAC 2.2-10-3.The cost schedules (base prices) in the Manual reflect the C grade standards of quality and design. The following factors (or multipliers) are assigned to each major grade classification:

"A" grade	160%
"B" grade	120%
"C" grade	100%
"D" grade	80%
"E" grade	40%

68. Intermediate grade levels ranging from A+10 through E-1 are also provided for in the Manual to adequately account for quality and design features between major grade classifications. 50 IAC 2.2-10-3(c).

69. 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.

1. Grade of Parke I, Parke II, Vogel Business Park, Center Point, Bradford Park, and The Crossing.

70. The Petitioner contends that the complexes known as Parke I, Parke II, Vogul Business Park, Center Pointe, Bradford Park, and The Crossing are closer in grade to a D than to C, as currently assessed.

71. In support of his position, the Petitioner presented the testimony of Mr. Coudret. Mr. Coudret testified that the materials used in constructed the subject properties are inferior to general commercial construction. Mr. Spurling contends the materials used to construct the subject properties are more like materials used in residential construction.

72. The Petitioner testified that the ceiling tiles are of the cheapest quality, the lowest quality fluorescent lighting fixtures were used, 2x4 and 2x6 construction that is low grade, residential type drywall, and lighting are all cheap, substandard interior finish, residential quality carpeting, the properties lack built-in-features, and the furnaces and electric service are of residential quality. (See Finding of Fact ¶ 87).

73. Each of these statements by the Petitioner is conclusory, with no supporting evidence. The Petitioner did not present any probative evidence indicating that the ceiling tiles are of the cheapest quality. The Petitioner did not present any probative evidence that the lowest quality fluorescent lighting fixtures were used. The Petitioner did not present any probative evidence to back up any of the conclusory statements regarding the quality of materials used.

74. 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.*

75. The Petitioner did not meet its burden in this appeal because they did not present probative evidence in support of its position.

76. The Petitioner also testified that the cost to construct these properties was $24.00 per square foot. However, there is some disagreement whether this includes all the costs. The Respondent testified that this cost does not include the cost to finish the inside for tenants, typical material costs, and entrepreneurial profit.

77. The Petitioner did not present a detailed break down of the costs associated with building any of the subject properties. Petitioner’s Exhibit 7, Tab 19 is a one page handwritten sheet of costs for the Vogul Business Park. There are labels for the amount spent on landscape, sewer, and lot poles. The next label indicates the amount for drive and sidewalks. Under this label, there are 17 costs listed with no label or explanation. It is unclear the amount spent for labor, permits, materials, contractor profit, cost of blue prints, and other costs that should be included.

78. The type of cost information presented is insufficient to meet the burden of proof. The Petitioner did not present cost information for any of the other buildings at issue in this appeal, therefore, even if the State accepted this information, it would still be insufficient to meet the burden of proof on any other of the subject buildings.

79. The Petitioner also contends that the subject buildings are comparable to the Hebron Pointe North and Hebron Office Plaza. The Petitioner presented exterior photographs of both Hebron properties and their respective property record cards. The Petitioner did not present any interior photographs of the purported

comparable properties. The only comparison presented by the Petitioner of the Hebron properties and the subject is that the Hebron properties have gutters and are built on concrete block foundation and the subject properties do not have gutters and are built on concrete slab.

80. The Petitioner then testifies that the subject properties are less costly to construct than these purported comparables. The Petitioner then questions whether the subject buildings should be graded higher than the Hebron properties. In this case, the Petitioner seems to be arguing that the subject properties should be graded lower than these purported comparables.

81. It is not clear why the Petitioner argues that the subject properties are similar to the Hebron properties, then state that the Hebron properties cost more to construct. This does not represent probative evidence that the Hebron properties are similar to the subject properties. The Petitioner did not meet its burden in this appeal. Accordingly, there is no change in the assessment as a result of this issue.

82. For all the reasons above, the Petitioner did not meet its burden regarding Parke I, Parke II, Vogul Business Park, Center Pointe, Bradford Park, and The Crossing. Accordingly, there is no change to the grades assigned to these structures as a result of this issue.

2. Regarding the Grade of the structures know as Woodland I, Woodland II, and Woodland III

83. The Petitioner contends that the grades of Woodland I, Woodland II, and Woodland III should be a D rather than a C as assigned by the PTABOA. These buildings are currently assessed as General Commercial Kit (GCK) structures.

84. The Petitioner contends that the properties are graded higher than the Hebron Pointe North and the Hebron Office Plaza properties. The Petitioner did not

present any comparison between the subject properties and the Hebron properties.

85. In fact, the Hebron properties are assessed from a completely different schedule, the General Commercial Mercantile (GCM). In this case, the Petitioner would need to show how the subject properties are being graded differently than other GCK buildings. The Petitioner has not done that.

86. The Petitioner also contends the quality of materials, workmanship, interior finish, mechanical components, and built-in-features are inferior and therefore, the subject should be graded at a D rather than a C.

87. The Petitioner testified that ceiling tiles are of the cheapest quality, the lowest quality fluorescent lighting fixtures were used, 2x4 and 2x6 construction that is low grade, residential type drywall, ceiling tile, and lighting are all cheap, substandard interior finish, residential quality carpeting, the properties lack built-in-features, and the furnaces and electric are of residential quality. (See Finding of Fact ¶ 87).

88. Each of these statements by the Petitioner is conclusory, with no supporting evidence. The Petitioner did not present any probative evidence indicating that the ceiling tiles are of the cheapest quality. The Petitioner did not present any probative evidence that the lowest quality fluorescent lighting fixtures were used. The Petitioner did not present any probative evidence to back up any of the conclusory statements regarding the quality of materials used.

89. 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.*

90. The Petitioner also testified that the cost to construct these properties was $24.00 per square foot. However, there is some disagreement whether this includes all the costs. The Respondent testified that this cost does not include the cost to finish the inside for tenants, typical material costs, and entrepreneurial profit.

91. The Petitioner did not present a detailed break down of the costs associated with building any of the subject properties. Petitioner's Exhibit 7, Tab 19 is a one page handwritten sheet of costs for the Vogul Business Park. There are labels for the amount spent on landscape, sewer, and lot poles. The next label indicates the amount for drive and sidewalks. Under this label, there are 17 costs listed with no label or explanation. It is unclear the amount spent for labor, permits, materials, contractor profit, cost of blue prints, and other costs that should be included.

92. The cost information presented is insufficient to meet the burden of proof. The Petitioner did not present cost information for any of the other buildings at issue in this appeal, therefore, even if the State accepted this information, it would still be insufficient to meet the burden of proof on any other of the subject buildings.

93. For all the above reasons, the Petitioner did not meet its burden in this appeal. Accordingly, there is no change to the grade of Woodland I, Woodland II, or Woodland III as a result of this issue.

3. Regarding the Grade of Eastland North

94. The Petitioner contends that Eastland North should be graded a D instead of C as assigned by the PTABOA. Eastland North is also classified as General Retail and priced accordingly.

95. The Petitioner contends that the subject is similar to the Hebron Pointe North and Hebron Office Plaza. However, the Hebron properties are classified as General

Office. The Petitioner failed to establish the comparability of the subject with the Hebron Properties. Accordingly, the Petitioner did not meet his burden.

96. The Petitioner also contends the quality of materials, workmanship, interior finish, mechanical components, and built-in-features are inferior and therefore, the subject should be graded at a D rather than a C.

97. The Petitioner testified that ceiling tiles are of the cheapest quality, the lowest quality fluorescent lighting fixtures were used, 2x4 and 2x6 construction that is low grade, residential type drywall, ceiling tile, and lighting are all cheap, substandard interior finish, residential quality carpeting, the properties lack built-in-features, and the furnaces and electric are of residential quality. (See Finding of Fact ¶ 87).

98. Each of these statements by the Petitioner is conclusory, with no supporting evidence. The Petitioner did not present any probative evidence indicating that the ceiling tiles are of the cheapest quality. The Petitioner did not present any probative evidence that the lowest quality fluorescent lighting fixtures were used. The Petitioner did not present any probative evidence to back up any of the conclusory statements regarding the quality of materials used.

99. 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.*

100. The Petitioner also testified that the cost to construct these properties was $24.00 per square foot. However, there is some disagreement whether this includes all the costs. The Respondent testified that this cost does not include the cost to finish the inside for tenants, typical material costs, and entrepreneurial profit.

101. The Petitioner did not present a detailed break down of the costs associated with building any of the subject properties. Petitioner's Exhibit 7, Tab 19 is a one page handwritten sheet of costs for the Vogul Business Park. There are labels for the amount spent on landscape, sewer, and lot poles. The next label indicates the amount for drive and sidewalks. Under this label, there are 17 costs listed with no label or explanation. It is unclear the amount spent for labor, permits, materials, contractor profit, cost of blue prints, and other costs that should be included.

102. The cost information presented is insufficient to meet the burden of proof. The Petitioner did not present cost information for any of the other buildings at issue in this appeal, therefore, even if the State accepted this information, it would still be insufficient to meet the burden of proof on any other of the subject buildings.

103. For all the reasons above, the Petitioner did not meet its burden in this appeal. Accordingly, the grade of Eastland North will not be changed as a result of this issue.

4. Conclusions Regarding Grade

104. The Petitioner did not meet his burden in this appeal. Accordingly, there is no change to the grade of any of the properties as a result of this appeal.

Issue No. 9 – Utility Storage

105. The Petitioner contends that Parke I, Vogel Business Park, and Center Pointe have "clock towers" that the local officials have assessed as utility storage buildings. The Petitioner contends these structures should be assessed as signs on the personal property tax returns.

106. The Respondent opines that the structures are real property and add value to the property. They valued the structures as utility storage, with a grade of C.

107. There is nothing in the personal property manual to assess these structures as personal property. The structures are buildings that range in size from 10' x 9' to 12' x 12' and from 25' high to 41' high. They have a door to allow access to the interior. The only way to assess these structures would be as real property.

108. The Respondent used utility storage, and made a deduction for lack of heat. The Petitioner did not present any evidence or testimony that the structures should have been assessed any differently.

109. The Petitioner did not present any evidence of comparable properties that show the structures are being receiving disparate treatment. The Petitioner did not attempt to identify another model that more closely resembles the subject structures.

110. For all the above reasons, the Petitioner did not meet its burden of proof in this appeal. Accordingly, there is no change in the assessment of the "clock towers" located at Parke I, Vogul Business Park, or Center Pointe as a result of this issue.

Issue No. 10 – Obsolescence

1. Definitions and Burden

111. The subject property is not currently receiving an obsolescence adjustment. The Petitioner requests 25% obsolescence for Bradford Park, 12% obsolescence for Center Pointe, and 20% obsolescence for The Crossing in the proposed findings of fact and conclusions of law submitted.

112. The Petitioner's argument is for economic, or external, obsolescence. The Petitioner made no argument, or request for functional obsolescence.

113. Economic obsolescence depreciation is defined as "obsolescence caused by factors extraneous to the property." 50 IAC 2.2-1-24. External or economic obsolescence is the loss of value resulting from factors external to the property (for example, national economic conditions). *IAAO Property Assessment Valuation* at 155.

114. "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).

115. 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.

116. Depreciation is a market value concept and the true measure of depreciation is the effect on marketability and sales price. *IAAO Property Assessment Valuation* at 153. The definition of obsolescence in the Regulation, 50 IAC 2.2-10-7, is tied directly to that applied by professional appraisers under the cost approach. *Canal Square,* 694 N.E. 2d at 806. Accordingly, depreciation can be documented by using recognized appraisal techniques. *Id.*

117. 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).

118. 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).

119. "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." *IAAO Property Assessment Valuation*, 173 (2nd ed. 1996).

120. "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.*, 183.

121. "The sales comparison method: estimates the 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.*

2. Causes of obsolescence

122. "[I]n advocating for an obsolescence adjustment, a taxpayer must first provide the State Board 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).

123. "Where there is no cause of obsolescence, there is not obsolescence to quantify." *Id.,* citing *Lake County Trust v. State Board of Tax Commissioners,* 694 N.E. 2d 1253, 1257 (Ind. Tax 1998).

124. 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 improvements to suffer losses in value." *Champlin,* 745 N.E. 2d at 936.

125. "Without a loss of value, there can be no economic obsolescence." *Pedcor v. State Board of Tax Commissioners,* 715 N.E. 2d 432, 438 (Ind. Tax 1999).

126. "In the commercial context, a loss of value usually represents a decrease in the improvement's income generating ability." *Loveless Construction v. State Board of Tax Commissioners,* 695 N.E. 2d 1045, 1047 (Ind. Tax 1998). *See also Damon Corp. v. State Board of Tax Commissioners,* 738 N.E. 2d 1108, (Ind. Tax 2000).

127. The Petitioner argues that obsolescence is warranted due to vacancy and location of the Bradford Park, Center Pointe, and The Crossing. The Petitioner specifically argues that vandalism occurs at these locations, and the vacancy rates are 25% for Bradford Park, 20% for The Crossing, and 12% for Center Pointe. The Petition further testifies that the properties located on Green River Road have a 4% to 5% vacancy rate.

128. The Petitioner merely lists causes of obsolescence. There is no explanation how those purported causes lead to a loss in value for the subject property. 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 improvements to suffer losses in value." *Champlin,* 745 N.E. 2d at 936.

129. The Petitioner did not meet its burden in identifying a cause of obsolescence. Accordingly, there is no change in the assessment of Bradford Park, The Crossing, or Center Pointe as a result of this issue. Assuming arguendo that the Petition did identify a cause of obsolescence, the Petitioner must also quantify the obsolescence.

3. Quantification of Obsolescence

130. The Petitioner is requesting obsolescence be applied in the amount of vacancy the subject property is experiencing.

131. This is not one of the generally recognized methods used in quantifying obsolescence. Therefore, the Petitioner's method will not be accepted. The Petitioner did not present probative evidence quantifying the obsolescence requested.

132. For all the reasons above, the Petitioner did not meet its burden in this appeal. Accordingly, there is no change to the obsolescence depreciation of Bradford Park, Center Pointe, or The Crossing as result of this issue.

Issue No. 11 – Condition for Bradford Park

133. Bradford Park is currently assessed as average condition by the local officials. The Petitioner claims the condition rating for Bradford Park is overstated. The Petitioner is requesting that the condition be changed to poor.

134. The Petitioner must present probative evidence indicating the condition assigned by the county is overstated, and the condition requested is more appropriate.

135. The Petitioner testified that there is frequent flooding of the subject property. The damage by the flooding has cost between $60,000 and $100,000. The Respondent testified that repairs had been made to the subject property.

136. Condition is a judgment of the physical condition of the item relative to its age. Average condition indicates structure is in average condition relative to its age, or the condition in which it would normally be expected. Fair condition indicates the structure is in fair condition relative to its age. The degree of deterioration is somewhat worse than would normally be expected. Poor condition indicates the structure is in poor condition relative to its age. The degree of deterioration is significantly worse than would normally be expected. 50 IAC 2.2-10-5(d)(8).

137. The estimate of depreciation is an essential element in the cost approach. An estimate must be predicated on an understanding of the nature, components, and theory of depreciation, as well as practical concepts for estimating its extent in improvements being valued. Physical depreciation is evidenced by wear and tear, decay, dry rot, cracks, or structural defects. 50 IAC 2.2-10-7(a).

138. Condition, the degree of wear and tear displayed by a building, is determined relative to the age of the building. Condition measures the remaining usefulness of the building based on its age. 50 IAC 2.2-10-7(b).

139. The Petitioner did not present evidence indicating the condition assigned by the Respondent is incorrect. The Petitioner does not present any comparable properties to show disparate treatment between the subject property and other similar properties.

140. The Petitioner does not present any evidence showing wear and tear that is "significantly worse than would normally be expected." The Petitioner did not present any evidence indicating the subject building suffers from wear and tear, decay, dry rot, cracks, or structural defects.

141. Instead, the Petitioner testifies that the subject property has flooded on a number of occasions. If the damage done by the flood is repaired (as Petitioner has testified), and the structure is returned to the condition it was prior to the flood, then it is unclear how has the condition changed.

142. To show the condition is incorrect, the Petitioner must (1) 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.

143. The Petitioner did not identify any similarly situated properties or show disparate treatment.

144. For all the above reasons, the Petitioner did not meet his burden in this appeal. Accordingly, the condition of Bradford Park will not be changed as a result of this issue.

Corrections

145. The Respondent testified that the Form 115 issued on February 17, 2000 for petition #82-027-99-004-00019 (Petition No. 82-027-99-1-4-00019) failed to coincide with the determinations of the PTABOA. Specifically, the use classification of the building on property record card 9 of 10 should be General Office and not General Retail.

146. The Respondent testified that the Form 115 issued on February 17, 2000 for petitioner #82-027-99-004-00014 (Petition No. 82-027-99-1-4-00014) failed to coincide with the determinations of the PTABOA. Specifically, the use classification of the building on property record card 3 of 9 should have classified 2,800 square feet as General Office and not Utility Storage.

147. After a review of the minutes from the PTABOA hearing, it is determined that on petition #82-027-99-004-00019 (Petition No. 82-027-99-1-4-00019) the PTABOA voted to change the use classification on property record card 9 of 10 from General Retail to General Office (Petitioner Exhibit 7, Tab 2, Page 130). Therefore, this correction will be made. There will be an increase in the assessment as a result of this correction.

148. After a review of the minutes from the PTABOA hearing, it is determined on petition #82-027-99-004-00014 (Petition No. 82-027-99-1-4-00014) the PTABOA voted to change 1,250 square feet (SF) of General Retail to General Office and 1,550 SF of Utility Storage to General Office (Petitioner Exhibit 7, Tab 2, Page 135). After a review of the property record card, there were two areas priced as Utility Storage. The area that equals 2,800 SF (1,250 SF + 1,550 SF) will be changed to General Office. There will be an increase in the assessment as a result of this correction.

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