

REPRESENTATIVE FOR PETITIONER:
Marilyn S. Meighen, MEIGHEN & ASSOCIATES

REPRESENTATIVE FOR RESPONDENT:
Jeffrey S. Dible, LOCKE REYNOLDS, LLP

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

In the matter of:

WILLIAMS REALTY FOUR,)	Petition No.: 49-600-01-1-4-00273R
)	
Petitioner)	County: Marion
)	
v.)	Township: Pike
)	
MARION COUNTY PROPERTY)	Parcel No.: 6016728
TAX ASSESSMENT BOARD OF)	
APPEALS and PIKE TOWNSHIP)	Assessment Year: 2001
ASSESSOR,)	
)	
Respondents.)	
)	

On Remand From the Indiana Tax Court
Case No. 49T10-0206-TA-67

March 28, 2003

FINAL DETERMINATION

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History

1. Pursuant to Ind. Code § 6-1.1-15-3 Frank Kelly with Nexus Group, filed a Form 131 on behalf of Williams Realty Four (Petitioner) petitioning the Board to conduct an administrative review of the above petition. The Form 131 was filed on November 16, 2001. The Marion County Property Tax Assessment Board of Appeals (PTABOA) Notification of Final Assessment Determination was dated October 19, 2001.
2. Pursuant to Ind. Code § 6-1.1-15-4 a hearing was held on February 20, 2002 in Indianapolis, Indiana before Debra Eads, the duly designated Administrative Law Judge (ALJ) authorized by the Board under Ind. Code § 6-1.5-5-2.
3. The Board issued its Final Determination on May 6, 2002. The Petitioner then sued the Board in the Indiana Tax Court (Court) on June 6, 2002. On November 1, 2002 the Court remanded this case to the Board to “hold another hearing or such other action as is appropriate.”
4. The issue remanded by the Court was:

Whether the subject property should receive obsolescence depreciation.

Hearing Facts and Other Matters of Record

5. Pursuant to the remand order, the Board conducted a second hearing in this matter. The remand hearing was conducted on December 19, 2002 in Indianapolis, Indiana before Brian McKinney, the duly designated ALJ authorized by the Board under Ind. Code § 6-1.5-5-2.

6. The following persons were present at this hearing:

For the Petitioner:

Marilyn S. Meighen, MEIGHEN & ASSOCIATES

Frank Kelly, Nexus Group

Jeff Wuensch, Nexus Group

For the Respondent:

Jeffrey S. Dible, LOCKE REYNOLDS, LLP

Liz R. Keele, Pike Township Assessor

Janis Wilson, Pike Township Deputy Assessor

Wayne Grabman, Pike Township Deputy Assessor

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

For the Petitioner:

Frank Kelly

Jeff Wuensch

For the Respondent:

Liz R. Keele

Janis Wilson

Wayne Grabman

8. The following exhibits were presented:

For the Petitioner:

Petitioner's Exhibit 1 – A binder that included a Brief and Tabs A through G as follows:

A – Property record card (PRC) of subject property

B – Forms 131, 130, 115 and a copy of Final Determination issued by the Board on May 6, 2002

C – Letter from Edward Okun

D – E-mail to Frank Kelly, with attached flyer

E – Rent Roll for subject property

F – Crooked Creek Obsolescence Calculation

G – Critique and Comparative Analysis: Crooked Creek Shopping
Center

For the Respondent:

Respondent's Exhibit 1 – Pike Township memo in support of Respondent position

Respondent's Exhibit 2 – CAD drawing of subject area*

Respondent's Exhibit 3 – Aerial photo with property boundaries of subject area*

Respondent's Exhibit 4 – Site drawing of property to the north of subject

Respondent's Exhibit 5 – Two (2) photographs of the subject property to the north

Respondent's Exhibit 6 – Two (2) photographs of subject property

Respondent's Exhibit 7 – Three (3) photographs of subject property

Respondent's Exhibit 8 – Three (3) photographs of subject property

Respondent's Exhibit 9 – Two (2) photographs of property to the north of subject

Respondent's Exhibit 10 – Memo to Pike Township from Edward Okun

Respondent's Exhibit 11 – Marion County memo in support of Respondent
position

Respondent's Exhibit 12 – Subject's PRC

Respondent's Exhibits 13 through 30 – Photographs of subject property and
surrounding area

Respondent's Exhibit 31 – Videotape taken from a car driving around subject area

9. At the hearing, the Respondent submitted numerous pictures and videotape that had not been submitted at the original hearing (February 20, 2002) in this matter. The Respondent also requested that all evidence submitted at the original hearing be included in this hearing. In addition, the Respondent objected to Petitioner's Exhibit G because Mr. Scot A. Courtney was not present at the hearing to answer questions regarding his report.

* These two items were taken from the original Tax Court Record filed in this case.

10. At the hearing, the Petitioner objected to the evidence submitted by the Respondent. The Notice of Hearing on Petition sent out by the Board, indicated the parties should exchange evidence and summary of witness testimony five (5) days prior to hearing. The Petitioner sent their information to the Respondent as required; however, the Respondent did not send the information to the Petitioner.

11. The Board now makes the following determinations as they relate to ¶9 and ¶10 above:
 - a. The Board will admit into evidence the twelve (12) exhibits submitted by the Respondent at the original hearing on February 20, 2002. For the record these exhibits are labeled Respondent's Exhibits 1 through 12.
 - b. Based on the objection made by the Petitioner that the Respondent failed to exchange its additional exhibits (Respondent's Exhibits 13 through 31) and witness summary five (5) days prior to this hearing, the Board rules that the Respondent's additional exhibits will not be allowed into evidence. (These exhibits are labeled for identification purposes only).
 - c. The Respondent's objection to the admission into evidence of Petitioner's Exhibit G because the author of the report was not present at the hearing, is overruled and the exhibit will be allowed into evidence.

12. The Respondent requested permission from the ALJ to submit a post hearing brief. The Respondent was given until January 27, 2003 to submit the brief. The Petitioner was then given until February 18, 2003 to submit a reply brief. Both briefs were received in a timely manner by the ALJ, labeled and entered into the record as Petitioner's Exhibit 2 and Respondent's Exhibit 32, respectively.

13. The following additional items are officially recognized as part of the record of proceedings:
 - Board's Exhibit A – Remand Order from the Court
 - Board's Exhibit B – Form 131 Petition filed by the Petitioner
 - Board's Exhibit C – Notice of Hearing on Petition
 - Board's Exhibit D – Waiver of 30-day notice to hold hearing

Board's Exhibit E – Motion and Order granting extension in time to issue findings

14. The following matters or facts were stipulated and agreed to by the parties:
 - a. The subject facility is a strip mall located at the intersection of Michigan Road and 79th Street in Pike Township, Marion County.
 - b. During the month of April 2001, the subject facility was 98% occupied and receiving an average rent of approximately \$10.80 per square foot.
 - c. The Petitioner is requesting 93.5% obsolescence depreciation.
 - d. The subject structure presently receives no obsolescence depreciation.
 - e. A new strip mall was under construction across the street from the subject facility and the leasing agent for the new facility was asking \$13.50 per square foot rent.
 - f. Edward Okun, owner of the Ace Hardware in the subject facility, is also a partner in the group that owns the subject facility.

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

Jurisdictional Framework

16. This matter is governed by the provisions of Ind. Code § 6-1.1-15, and all other laws relevant and applicable to appeals initiated under those provisions, including all case law pertaining to property tax assessment or matters of administrative law and process.

17. The Board is authorized to issue this final determination pursuant to Indiana Code § 6-1.1-15-8.

Indiana's Property Tax System

18. The Indiana Constitution requires Indiana to create a uniform, equal, and just system of assessment. See Ind. Const. Article 10, §1.

19. Indiana has established a mass assessment system through statutes and regulations designed to assess property according to what is termed “True Tax Value.” See Ind. Code § 6-1.1-31, and 50 Ind. Admin. Code 2.2.
20. True Tax Value does not precisely equate to fair market value. See Ind. Code § 6-1.1-31-6(c).
21. An appeal cannot succeed based solely on the fact that the assessed value does not equal the property’s market value. See *State Board of Tax Commissioners v. Town of St. John*, 702 N.E. 2d 1034, 1038 (Ind. 1998) (*Town of St. John V*).
22. The Indiana Supreme Court has said that the Indiana Constitution “does not create a personal, substantive right of uniformity and equality and does not require absolute and precise exactitude as to the uniformity and equality of each individual assessment”, nor does it “mandate the consideration of whatever evidence of property wealth any given taxpayer deems relevant”, but that the proper inquiry in tax appeals is “whether the system prescribed by statute and regulations was properly applied to individual assessments.” See *Town of St. John V*, 702 N.E. 2d at 1039 – 40.
23. Although the Supreme Court in the *St. John* case did declare the cost tables and certain subjective elements of the State’s regulations constitutionally infirm, it went on to make clear that assessment and appeals must continue to be determined under the existing rules until new regulations are in effect.
24. New assessment regulations have been promulgated, but are not effective for assessments established prior to March 1, 2002. See 50 Ind. Admin. Code 2.3.

State Review and Petitioner's Burden

25. The State does not undertake to reassess property, or to make the case for the petitioner. The State decision is based upon the evidence presented and issues raised during the hearing. See *Whitley Products, Inc. v. State Board of Tax Commissioners*, 704 N.E. 2d 1113 (Ind. Tax 1998).
26. The petitioner must submit 'probative evidence' that adequately demonstrates all alleged errors in the assessment. Mere allegations, unsupported by factual evidence, will not be considered sufficient to establish an alleged error. See *Whitley Products*, 704 N.E. 2d 1113 (Ind. Tax 1998), and *Herb v. State Board of Tax Commissioners*, 656 N.E. 2d 1230 (Ind. Tax 1998). ['Probative evidence' is evidence that serves to prove or disprove a fact.]
27. The petitioner has a burden to present more than just 'de minimis' evidence in its effort to prove its position. See *Hoogenboom-Nofzinger v. State Board of Tax Commissioners*, 715 N.E. 2d 1018 (Ind. Tax 1999). ['De minimis' means only a minimal amount.]
28. The petitioner must sufficiently explain the connection between the evidence and petitioner's assertions in order for it to be considered material to the facts. 'Conclusory statements' are of no value to the State in its evaluation of the evidence. See *Heart City Chrysler v. State Board of Tax Commissioners*, 714 N.E. 2d 329 (Ind. Tax 1999). ['Conclusory statements' are statements, allegations, or assertions that are unsupported by any detailed factual evidence.]
29. Essentially, the petitioner must do two things: (1) prove that the assessment is incorrect; and (2) prove that the specific assessment he seeks, is correct. In addition to demonstrating that the assessment is invalid, the petitioner also bears the burden of presenting sufficient probative evidence to show what assessment is correct. See *State Board of Tax Commissioners v. Indianapolis Racquet Club, Inc.*, 743 N.E.2d 247, 253 (Ind., 2001), and *Blackbird Farms Apartments, LP v. Department of Local Government Finance*, 765 N.E.2d 711 (Ind. Tax, 2002).

30. The Board will not change the determination of the County Property Tax Assessment Board of Appeals unless the petitioner has established a ‘prima facie case’ and, by a ‘preponderance of the evidence’ proven, both the alleged error(s) in the assessment, and specifically what assessment is correct. See *Clark v. State Board of Tax Commissioners*, 694 N.E. 2d 1230 (Ind. Tax 1998)(*Clark 1*), and *North Park Cinemas, Inc. v. State Board of Tax Commissioners*, 689 N.E. 2d 765 (Ind. Tax 1997). [A ‘prima facie case’ is established when the petitioner has presented enough probative and material (i.e. relevant) evidence for the State (as the fact-finder) to conclude that the petitioner’s position is correct. The petitioner has proven his position by a ‘preponderance of the evidence’ when the petitioner’s evidence is sufficiently persuasive to convince the State that it outweighs all evidence, and matters officially noticed in the proceeding, that is contrary to the petitioner’s position.]

Discussion of the Issue

Whether the subject property should receive obsolescence depreciation.

31. The Petitioner contends the subject structure is unable to lease space at the current market level and is entitled to an obsolescence adjustment of 93.5%.
32. The Respondent contends the subject property is 98% occupied and that the Petitioner failed to present evidence establishing that obsolescence depreciation is warranted. The subject structure is currently assessed with no obsolescence depreciation being applied.
33. The applicable rules governing this issue are:

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

The estimation of depreciation is an essential element in the cost approach. An estimate must be predicated upon a comprehensive understanding of the nature,

components, and theory of depreciation, as well as practical concepts for estimating the extend of it in improvements being valued.

50 IAC 2.2-10-7(e)

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

Accurate determination of obsolescence depreciation requires an assessor to recognize the symptoms of obsolescence and to exercise sound judgment in equating his or her observation of the property to the correct deduction in value.

50 IAC 2.2-1-24 – Economic obsolescence

Obsolescence caused by factors extraneous to the property.

50 IAC 2.2-10-7(e)(2)

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

- (A) Location of the building is inappropriate for the neighborhood.
- (B) Inoperative or inadequate zoning ordinances or deed restrictions.
- (C) Noncompliance with current building code requirements.
- (D) Decreased market acceptability of the product for which the property was constructed or is currently used.
- (E) Termination of the need of the property due to actual or probable changes in economic or social conditions.
- (F) Hazards, such as danger from floods, toxic waste, or other special hazards.

50 IAC 2.2-1-29 – Functional obsolescence

Obsolescence caused by factors inherent in the property.

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

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

- (A) Limited use or excessive material and product handling costs cause by an irregular or inefficient floor plan.
- (B) Inadequate or unsuited utility space.

(C) Excessive or deficient load capacity.

Analysis of the ISSUE

34. The Petitioner claims the subject property is experiencing a loss in value due to a number of factors and that this loss in value can be accounted for with the application of an obsolescence factor of 93.5%.
35. To support its position, the Petitioner submitted a report prepared by Scot A. Courtney, Director, Retail Services Division of Grubb & Ellis/Harding Dahm & Company. This report is titled Critique & Comparative Analysis: Crooked Creek Shopping Center. (Petitioner's Exhibit 1, Tab G)(Report).
36. On page 1 of the Report it states, "The purpose of this critique and analysis was twofold. The first purpose was to determine if the Crooked Creek Shopping Center (the "Subject") was equal in functionality, appeal to the market for retail space, and Tenant Credit Risk to competing shopping centers within its immediate vicinity as of March 01, 2001. The second was to determine the resulting difference, if any, in rental rates achievable and the corresponding valuation difference if the Subject was not equal to competition in the immediate area."
37. Before applying the evidence to reduce the contested assessment, the Board must first analyze the reliability and probity of the evidence to determine what, if any, weight to accord it.

The concept of depreciation and obsolescence

38. Depreciation is an essential element in the cost approach to valuing property. Depreciation is a loss in value from any cause except depletion, and includes physical depreciation and functional and external (economic) obsolescence. International Association of Assessing Officers (IAAO) Property Assessment Valuation, 153 &154 (2nd ed. 1996); *Canal Square Limited Partnership v. State Board of Tax Commissioners*,

694 N.E. 2d 801, 806 (Ind. Tax 1998)(citing Am. Inst. of Real Estate Appraisers, *The Appraisal of Real Estate* (10th ed. 1992)).

39. 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.
40. 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 to the one 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.*
41. 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. See also 50 IAC 2.2-1-24 and 50 IAC 2.2-10-7.
42. Functional obsolescence is a loss of value resulting from changes in demand, design, and technology, and can take the form of deficiency, the need for modernization, or superadequacy. IAAO Property Assessment Valuation at 154 & 155. See also 50 IAC 2.2-1-29 and 50 IAC 2.2-10-7.
43. The elements of functional and economic obsolescence can be documented using recognized appraisal techniques. These standardized techniques enable a knowledgeable person to associate cause and effect to value pertaining to a specific property. *Canal Square*, 694 N.E. 2d 801 (Ind. Tax 1998).
44. Under the cost approach, there are five recognized methods used to measure depreciation, including obsolescence, namely: (1) sales comparison method, (2) the capitalization of income method, (3) the economic age-life method, (4) the modified age-life method, and (5) the observed condition method.

Burden regarding the obsolescence claim

45. “[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 Co. v. State Board of Tax Commissioners*, 745 N.E. 2d 928, 932 (Ind. Tax 2001).
46. “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). Furthermore, 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.
47. “Without a loss of value, there can be no economic obsolescence.” *Pedcor Investments-1990-XIII, L.P. v. State Board of Tax Commissioners*, 715 N.E. 2d 432, 438 (Ind. Tax 1999). “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).
48. It is incumbent on the taxpayer to establish a link between the evidence and the loss of value to obsolescence. After all, the taxpayer is the one who best knows his business and it is the taxpayer who seeks to have the assessed value of his property reduced. *Rotation Products Corp. v. Department of State Revenue*, 690 N.E. 2d 795, 798 (Ind. Tax 1998).
49. 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 the amount of obsolescence sought. *Clark I*, 694 N.E. 2d 1230, 1233 (Ind. Tax 1998).

Evidence submitted regarding the causes for obsolescence

50. The Petitioner submitted into evidence a Report that identifies the following as strengths of the building:
- a. Favorable traffic access (curb cuts on both streets; no medians);
 - b. Unrestricted signage specifications allow prototypical signage over tenant spaces;
 - c. High traffic counts (Michigan Road 25,122 vehicles per day; 79th Street 17,516 vehicles per day);
 - d. Pylon signage is available for increased identity;
 - e. Commonly attractive building exterior; and
 - f. Mechanical components appear to be in good shape.

(Petitioner's Exhibit 1, Tab G).

51. The Report identifies the following as “weaknesses/challenges of the asset”:
- a. Irregular shapes to some of the tenant spaces; often causes difficulty with national prototype layouts and results in a lack of market demand;
 - b. High amount of competing space coming on line, or already vacant within the submarket;
 - c. Morning-Side location as opposed to the preferred Evening-Side;
 - d. Lack of direct visibility from the intersection of Michigan Road and 79th Street (the most important component to retail visibility);
 - e. Courtesy Laundry and Dry Cleaning building, in particular, reduces visibility to the spaces most distant from the intersection;
 - f. V-shaped design of the structure;
 - g. Poor building footprint that produced a large amount of square footage for small shops without the ability to accommodate a grocery or drug store anchor draw;
 - h. With no possibility for an anchor draw, credit tenants will typically not be interested, thereby affecting the CAP rate of the property and residual tenant demand; and
 - i. The building's elevation relative to that of the two streets presents additional identity issues.

52. A review of the weaknesses identified above in ¶51 shows that these characteristics resulted from business decisions made by the Petitioner during the construction of the subject structure. The Petitioner chose to build the subject structure in a V-shape on the Morning-Side. The Petitioner selected and built the subject structure in its current floor plan and at its current elevation to the intersection. The Petitioner did not identify how any of these factors have changed to cause the subject to suffer a loss in value.
53. It should be noted, that only “b” in the list of weaknesses (“high amount of competing space coming on line, or already vacant within the submarket”) is something that may have changed over time. The Petitioner must show how the competing space is causing the subject property to suffer a loss in value. The Petitioner submitted no such evidence for review.
54. On page 5 of the Report, it classifies the subject property as a “Class ‘B’ Convenience Center located in the Suburban Northwest retail market.” On page 10 of the Report, it defines Convenience Centers as “the subject’s niche within shopping centers as best catering to impulse or ‘routine’ purchases made by residents or employees within the immediate area, typically coming from not more than two (2) miles away.”
55. The Report defines three (3) classes of shopping centers:
1. Class A Shopping Center: A recently built, attractive, and usually anchored center adhering to current design principles where a vast majority of the tenants are national companies or national franchises.
 2. Class B Shopping Center: A shopping center that exhibits some functional obsolescence, needing moderate to substantial capital improvements to become more competitive with Class A properties and possessing a tenant base of reduced quality.
 3. Class C Shopping Center: A shopping center that exhibits profound functional obsolescence, usually with high vacancy and tenants of poor quality.

56. The Report attempts to compare the subject shopping center with two (2) other shopping centers near the subject property, Crooked Creek Shoppes (located across 79th Street from the subject) and Michigan Road Shoppes (located across Michigan Road from the subject).
57. The Petitioner did not submit any analysis regarding the class of property the purported comparables actually were. In fact, the only items the Report does identify, besides location of the purported comparables, is the quoted rental rates and the fact that neither of the purported comparables have a daily needs anchor store. For the Crooked Creek Shoppes, the quoted asking price was \$13.50 per square foot. For the Michigan Road Shoppes, the quoted asking price was \$14.00 per square foot. There was no information in the Report and no other evidence provided, indicating the vacancy or actual rents received for either of the two (2) properties. Likewise, there was no analysis or comparison on the quality of construction and amenities of the purported two (2) comparables to that of the subject.
58. The Crooked Creek Shoppes Center was still under construction as of the assessment date of this appeal (March 1, 2001) and no space was immediately available for lease. The asking price was \$13.50, and it is pure speculation whether or not the center would be able to lease at that price, and what amount of vacancy would then result. If the Crooked Creek Shoppes' space had been leased prior to the assessment date under appeal, the information regarding the actual per square foot price would be more credible and carry more weight.
59. There were no rent rolls submitted for the Michigan Road Shoppes. There was no information provided regarding the tenants, length of leases, actual rents, or vacancy. Without this information, it is not possible for this Board to determine the true comparability of the subject property with the Michigan Road Shoppes.

60. Furthermore, the analysis done by the Petitioner analyzed only a *single month's rent roll* for the subject property. The Petitioner did not submit the current full years report or reports for any past years that would enable the Board to analyze the purported loss in value.

61. For all the reasons set forth above, the Board determines that the Petitioner did not identify any causes of obsolescence that would have been responsible for the subject property to suffer a loss in value. Thus, the Petitioner failed in its first prong of its two-prong burden.

Quantifying obsolescence

62. Assuming *arguendo* that the Petitioner was successful in identifying the causes of obsolescence, the Petitioner would still have been required to quantify the amount of obsolescence requested.

63. The Report concludes: “Based on all of the market, technical, and historical factors considered, the summary range [of cap rates] is as follows:

Crooked Creek Shoppes: 10.25% - 10.75% (Projected upon substantial lease-up)

Michigan Road Shoppes: 9.85 – 10.15%

The Subject: 10.85% - 11.15%

64. There is not enough information provided to determine whether the above capitalization rates are true indicators to be used in property tax calculations. There was no information provided regarding the factors considered, markets observed, or other information necessary to determine the reliability of the conclusion put forth by the Report.

65. Capitalization rates are critical in the valuation process, and must be supported. “The understanding and proper selection of rates used in the income approach are necessary if valid estimates of value are to be made. A small difference in the capitalization rate will result in estimates differing by thousands of dollars.” See IAAO Property Assessment Valuation, 233 (2nd ed. 1996).

66. “The assessor can estimate an overall capitalization rate by using several methods. The methods used depend on the quantity and quality of information available. Acceptable methods for developing the overall capitalization rate include derivation from the following:
1. comparable sales
 2. gross income multipliers (net income ratio method)
 3. band-of-investment method – using land and building components
 4. band-of-investment method – using mortgage and equity techniques
 5. debt coverage formula

IAAO Property Assessment Valuation at 243.

67. The Report did not identify any of the above methods as a method in which the rate was determined. The Report does identify a method of taking the Net Operating Income dividing it by the Purchase Price to determine a Capitalization Rate; however, there was no Net Operating Income or Purchase Price listed for other properties. If this were the method used, income and sales price information would be crucial to the analysis of whether the capitalization rate was reliable in this case.
68. Only in Exhibit C to the Report is there any information regarding capitalization rates. These rates were figured from two (2) other properties in Indianapolis. However, there was no information provided as to the type of properties, or their comparability to the subject. The two (2) samples of capitalization rates are not helpful in determining the appropriate capitalization rate specific to the subject property.
69. The Report also purports to analyze the subject as of the March 1, 2001 assessment date. However, the diagram of the subject structure, and the listing of tenants, indicates that this may not be correct. The listing of tenants reveals numerous differences from the rent roll submitted, including tenants such as State Farm, Play it Again, Global Gifts, and Chico’s Recycle Shop. The diagram also shows two (2) vacant spaces, and the rent roll and all testimony at the hearing only disclosed one (1) vacant space.

70. Furthermore, the Petitioner's obsolescence calculation relied on the comparable annual rent per square foot average and capitalization rate determined by the Report. (Petitioner's Exhibit 1, Tab F). The Petitioner's calculation arrived at an obsolescence adjustment for the subject structure of 93.5%. Under any conditions, the amount of obsolescence petitioned for is exceptional, let alone when it is requested for a structure that is only 14 years old and has a 98% occupancy rate.
71. A high occupancy level does not mean that obsolescence could not exist. However, such evidence does not assist Petitioner in making its prima facie case.
72. The Petitioner's obsolescence calculation may be flawed for other reasons as well. The largest tenant of the subject property, Michigan Road Ace Hardware, is also owned by one (1) of the principle owners of the subject property. The lease agreement between the two (2) entities cannot be considered an arms length transaction. Also, exactly one (1) month after the lease for the Ace Hardware store was signed, the Harmon Glass Company signed a lease that was seventy-five (75) cents per square foot higher.
73. There is also the question of the rent charged to Tienda Morelos. According to the rent roll provided by the Petitioner, Tienda Morelos is paying \$24.00 per square foot. The Petitioner claims this is a mistake and that Tienda Morelos actually signed a two (2) year lease for \$12.00 per square foot. The rent roll shows the Tienda Morelos lease beginning on August 15, 2000 and ending on December 31, 2005.
74. The Petitioner did not provide any information from the leasing company or an updated rent roll indicating the \$24.00 is an error. This error, if it is an error, is of little consequence because the Petitioner actually used the \$24.00 per square foot in its calculation.
75. There is another interesting lease agreement for the subject property. Upscale Beauty Salon signed a lease beginning January 1, 1999 that charged \$7.50 per square foot. Hart Financial Corporation signed a lease beginning on October 1, 1998 that charged \$13.00

per square foot. Sunny's signed a lease beginning on September 21, 1998 that also charged \$13.00 per square foot. Finally, Sherezz Fashions signed a lease beginning on January 25, 1999 that charged \$11.25 per square foot. This raises some concerns with the lease signed by Upscale Beauty Salon at \$7.50 per square foot when the other leases ranged from \$11.25 to \$13.00 per square foot.

76. Should the leases signed by Ace Hardware and Upscale Beauty Salon be taken out of the equation, the average per square foot for the subject is \$11.40, not \$10.80.
77. In addition, in the Petitioner's obsolescence calculation, there was no deduction for or discussion of vacancy or collection loss. There was no analysis of miscellaneous income, like signage rental or other forms of income included. There was no indication of the operating expenses incurred or their comparison to the market. All of this information is required when performing an income approach to estimate a property value. See IAAO Property Assessment Valuation, 204 (2nd ed. 1996).
78. Per the PRC, the True Tax Value of the subject structure is \$1,362,700. In the Other Buildings & Yard Improvements section of the PRC, paving is listed. If the value of the paving were removed from the Petitioner's calculation, the result would have the Petitioner seeking 98.4% obsolescence. According to 50 IAC 2.2-10-7(f), "obsolescence depreciation can range from zero percent (0%) to ninety-five percent (95%)." A 98.4% figure would be outside the maximum allowable range.
79. One would have to conclude from the Petitioner's arguments that the subject building is nearly worthless as of the assessment date under appeal. The high occupancy rate, lease renewals and competitive rents do not support this conclusion.
80. Though the Petitioner requests the application of a 93.4% obsolescence factor to the subject structure, the Petitioner fails to distinguish between the amount sought for economic obsolescence and the amount sought for and functional obsolescence. The two (2) types of obsolescence are not synonymous.

81. “Taxpayers are required to specify whether they are seeking economic or functional, or both. The Court will not accept creative ambiguity that leaves it to the taxing authorities or this Court to determine what type of obsolescence is being sought and whether the evidence identifies and quantifies it.” *See Davidson Industries v. Indiana State Board of Commissioners*, 744 N.E. 2d 1067, 1071 9Ind. Tax 2001)(holding that the Court will not make a Taxpayer’s case for it); see also *Clark I*, 694 N.E. 2d at 1241 (holding that taxpayers must identify and quantify obsolescence to make a prima facie case).
82. The Petitioner stated they were seeking both types of obsolescence, however, the Petitioner did not submit any detailed breakdown of how much would be attributable to each type of obsolescence. In fact, during the majority of the hearing, the Petitioner did not distinguish between either types of obsolescence, nor did the Petitioner identify what type of obsolescence was attributable to each of the stated weaknesses (See ¶51).
83. In their post-hearing brief, the Respondent claims that the Petitioner’s theory “is a flimsy house of cards that is dependant on all three of the following assumptions:
1. That the rent roll for a single month (April 2001) is the best or only important measure of the maximum average rental obtainable by the Petitioner from the subject property on the March 1, 2001 assessment date;
 2. That the *asked* rental rates for space in competing strip malls in March 2001 (averaged at \$13.75) was the best or only important measure of the maximum average obtainable for comparable properties as of the assessment date; and
 3. That 11% is the appropriate capitalization rate.”

Respondents Exhibit 32, page 14.

84. The Respondent is correct in saying that a single month’s rent roll is not enough rental information to determine the average rent of the subject property to conclude if a loss in value has occurred. In fact, several years of income and expense data would be required to determine whether the subject structure is in fact suffering a loss in value.

85. The asking price of competing strip malls is insufficient to establish the market rate. Rent rolls of comparable properties should be submitted in order to establish whether there is an actual difference with the market, not just a difference in the asking price of other strip malls (including one that is under construction) and the actual rents of the subject.
86. Finally, no support, other than an opinion in the Report, was given for the selection of the 11% capitalization rate. See ¶62 - 67.
87. For all the reasons set forth above, the Petitioner failed in its burden to present probative evidence that either determined the causes of obsolescence or quantified the amount of obsolescence it sort. No change in the assessment is made as a result of this issue.

Summary of Final Determination

Whether the subject property warrants an adjustment for obsolescence.

88. The Petitioner failed to present probative evidence to support its contention that the subject property suffered a loss in value due to obsolescence depreciation.. The Petitioner failed to submit probative evidence determining the causes for obsolescence as well as submitting probative evidence quantifying the amount of obsolescence it requested. No change in the assessment was made.

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

Chairman, Indiana Board of Tax Review

IMPORTANT NOTICE

- APPEAL RIGHTS ON REMANDED CASE -

You may petition for judicial review of this final determination of corrected assessment pursuant to the provisions of Indiana Code § 6-1.1-15-9. The action shall be taken to the Indiana Tax Court under Indiana Code § 4-21.5-5. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice.