

**STATE OF INDIANA
Board of Tax Review**

In the matter of the Petition for Review)
of Assessment, Form 131) Petition No. : 74-010-97-1-4-00001

Parcel No. : 010020430018000

Assessment Year: 1997

Petitioner: LHL Properties
 Box 431
 Dale, Indiana 47523

Petitioner Representative: Paul Kropp
 Kropp & Associates
 15 North Franklin Street
 Suite 210
 Valparaiso, Indiana 46383

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 commercial garage should be valued using the GCK pricing schedule.
2. Whether the physical depreciation applied to the convenience store is correct.

3. Whether obsolescence depreciation should be applied to motel.

Findings of Fact

1. If appropriate, any finding of fact made herein shall also be considered a conclusion of law. Also if appropriate, any conclusion of law made herein shall also be considered a finding of fact.
2. Pursuant to Ind. Code § 6-1.1-15-3, Edwin K. DeWald with Kropp & Associates, on behalf of LHL Properties (Petitioner), filed a Form 131 petition requesting a review by the State. The Form 131 petition was filed on July 25, 1997. The Spencer County Board of Review's (County Board) Assessment Determination on the underlying Form 130 is dated July 15, 1997.
3. Pursuant to Ind. Code § 6-1.1-15-4, a hearing was held on September 18, 2001 before Hearing Officer Paul Stultz. Testimony and exhibits were received into evidence. Mr. Paul Kropp of Kropp & Associates represented the Petitioner. Ms. Sandra Bender, County Assessor, and Mr. Kirk Reller represented Spencer County. No one appeared at the hearing to represent Carter Township.
4. At the hearing, the Form 131 petition was made a part of the record and labeled as Board's Exhibit A. Notice of Hearing on Petition is labeled as Board's Exhibit B. In addition, the following exhibits were submitted:
 - Board's Exhibit C - Withdrawal Agreement
 - Board's Exhibit D - Stipulation Agreement
 - Board's Exhibit F - Copy of subject's property record card (PRC) acquired from
Spencer County Assessor
 - Board's Exhibit G - Copy of subject's PRC acquired from Spencer County
Auditor's Office
 - Board's Exhibit H - Copy of Spencer County check to Petitioner for refund for
overpayment of taxes
 - Board's Exhibit I – Copy of a Form 133 State Board Final Assessment

Determination for the subject property for 1997

Petitioner's Exhibit 1 – Two (2) page statement discussing obsolescence

Petitioner's Exhibit 2 – Copy of pages 42 through 45 of the fee appraisal done on subject property

Petitioner's Exhibit 3 - Copy of article from Journal-Democrat dated February 27, 1997

Petitioner's Exhibit 4 – Four (4) exterior photographs of subject structures

Petitioner's Exhibit 5 – Copy of State Board's Final Determination and Findings for Petition #79-156-98-1-4-00009, Parcel #156056000045

5. The subject property consists of four (4) buildings located at Highway 231 and I-64, Dale, Carter Township, Spencer County.
6. The Hearing Officer did not view the subject property.
7. At the hearing, the parties agreed the year under appeal was 1997 and the Assessed Values of record were:
Land - \$25,630
Improvements - \$344,870
8. It should be noted, that at the hearing there was some discussion concerning the improvement's assessed value for the 1997 assessment. The Form 131 petition showed the assessed value for the improvements to be \$388,670. The County Board's Form 130 determination showed the assessed value for the improvements to be \$366,670. A review of a 1997 State Board Final Determination and property record card (PRC) for a Form 133 petition on the subject property, showed the assessed value for improvements to be \$344,870 (Board's Exhibit I). In the end, it was determined the changes made by the State Board on the Form 133 petition had not been recorded by the County Board.

9. At the hearing, the Hearing Officer requested additional information from Mr. Kropp. The information requested consisted of a disclosure statement and support for national and state occupancy rates for motels. Mr. Kropp was given until September 28, 2001 to submit this evidence. Mr. Kropp submitted the requested information on September 24, 2001. The Hearing Officer's request for additional information and Mr. Kropp's response are entered into the record and labeled as Board's Exhibit E and Petitioner's Exhibit 6, respectively.

Issue No. 1 - Whether the commercial garage should be valued using the GCK pricing schedule.

10. At the hearing, Mr. Kropp and Ms. Bender stipulated that the commercial garage should receive a grade factor of "D". Mr. Kropp and Ms. Bender signed a Stipulation Agreement agreeing to change the grade factor of the commercial garage to a "D" (Board's Exhibit D).

Issue No. 2 - Whether the physical depreciation applied to the convenience store is correct.

11. At the hearing, Mr. Kropp stated that this issue was resolved as a result of action taken by the State Board based on the filing of a Form 133 petition (Board's Exhibit I) for the subject property. Mr. Kropp then signed a Withdrawal Agreement withdrawing this issue from review at this hearing (Board's Exhibit C).

Issue No. 3 - Whether obsolescence depreciation should be applied to motel.

12. One (1) of the four (4) structures on the subject parcel is a two (2)-story brick motel consisting of 51 units, built in 1976 and remodeled in 1981.
13. The occupancy rate for the subject motel was below national and state occupancy rates. The low occupancy was due solely to the obsolescence of the subject motel. *Kropp testimony.*

14. The Petitioner testified that the subject motel occupancy rate during January 1995 through March 1997 was 38.7%. The national and state averages, for the same time period, were 65%. The subject motel had an income shortfall \$143,992 per year due to the above. A State Board Final Determination for Petition No. 79-156-98-1-4-00009, Parcel No. 156056000045, granted obsolescence based on an industry average occupancy rate minus the subject property occupancy rate. *Kropp testimony & Petitioner's Exhibit 5.*
15. A fee appraisal for the subject property applied external obsolescence of 30% due to the possibility of U.S. Highway #231 being relocated in the future. However, as of the time of this hearing (September 18, 2001) U.S. Highway #231 has not been relocated. *Kropp testimony.*
16. The Respondent stated that the State Board determination on Petition No. 79-156-98-1-4-00009 (Petitioner's Exhibit 5) was held and resolved after the filing of the subject petition. Evidence occurring after the March 1, 1997 assessment date cannot be used. *Reller testimony.*
17. The Respondent testified that the Petitioner is comparing a nursing home from a previous State Board appeal (Petitioner's Exhibit 5) to the structure presently under review, which is a motel. The previous State Board determination used an occupancy rate for all of Tippecanoe County. In the case at bar, Mr. Kropp used national and state occupancy rate averages and failed to recognize local occupancy rates. Such a use of this information is misleading. *Reller testimony.*
18. The Respondent testified that there are a number of flaws within the Petitioner's presentation of the obsolescence issue. The fee appraisal stated obsolescence was due to a theoretical relocation of U.S. Highway #231. The appraisal does not address the occupancy rate issue. If the occupancy rate affects value as claimed by Mr. Kropp, the appraiser would have addressed it. There is also no stated purpose for the appraisal. *Reller testimony.*

Other Findings

19. Mr. Reller objected to the admission of the evidence presented by Mr. Kropp. Mr. Reller claimed that the evidence was not presented at the County Board's Form 130 hearing, and that he had not seen this evidence until this hearing.
20. Mr. Kropp indicated a willingness to withdraw the fee appraisal from evidence submitted on the obsolescence issue.

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. See also the Forms 130 and 131 petitions authorized under Ind. Code §§ 6-1.1-15-1, -2.1, and -4. 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. See 50 IAC 17-6-3. “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.
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. One manner for the taxpayer to meet its burden in the State's administrative proceedings is to: (1) identify properties that are similarly situated to the contested property, and (2) establish disparate treatment between the contested property and other similarly situated properties. *Zakutansky v. State Board of Tax Commissioners*, 691 N.E. 2d 1365, 1370 (Ind. Tax 1998). 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 commercial garage should be valued using the GCK pricing schedule.

18. At the hearing, Mr. Kropp and Ms. Bender stipulated that the commercial garage should receive a grade factor of "D". Mr. Kropp and Ms. Bender signed a Stipulation Agreement agreeing to change the grade factor of the commercial garage to a "D" (Board's Exhibit D).
19. The agreement between the County and the Petitioner is a decision among these parties and the State will accept the agreement. The State's acceptance of the agreement should not be construed as a determination regarding the propriety of the grade factor agreed to by the parties.
20. A change in the assessment is made as a result of this agreement.

Issue No. 2 - Whether the physical depreciation applied to the convenience store is correct.

21. At the hearing, Mr. Kropp stated that this issue was resolved as a result of action taken by the State based on the filing of a Form 133 petition (Board's Exhibit I) on the subject property. Mr. Kropp then signed a Withdrawal Agreement withdrawing this issue from review by the State (Board's Exhibit C).
22. No change in the assessment is made as a result of this issue.

Issue No. 3 - Whether obsolescence should be applied to Motel.

a. The concept of depreciation and obsolescence

23. Depreciation is an essential element in the cost approach to valuing property. Depreciation is the loss in value from any cause except depletion, and includes physical depreciation and functional and external (economic) obsolescence. IAAO Property Assessment Valuation, 153 & 154 (Second Edition, 1996); *Canal Square Limited Partnership v. State Board of Tax Commissioners*, 694 N.E. 2d 801, 806 (citing Am. Inst. of Real Estate Appraisers, *The Appraisal of Real Estate*, 321 (Tenth Edition, 1992)).
24. 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.
25. 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.*

26. Functional obsolescence means obsolescence caused by factors inherent in the property itself. 50 IAC 2.2-1-29. Functional obsolescence is the loss 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.
27. Economic obsolescence means 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. IAAO Property Assessment Valuation at 154.
28. Under the cost approach, there are five recognized methods used to measure depreciation, including obsolescence, namely: (1) the sales comparison method, (2) the capitalization of income method, (3) the economic age-life method, (4) the modified economic age-life method, and (5) the observed condition (breakdown) method. IAAO Property Assessment Valuation at 156.
29. The use of any singular technique of method identified above without the use of other approaches to value would be considered unethical and incomplete.

b. Burden regarding the obsolescence claim

30. 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).

31. 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*, 694 N.E. 2d at 1233.

c. The evidence submitted

32. It is the Petitioner's contention the subject motel suffers from economic obsolescence. The Petitioner requested the application of 25% obsolescence depreciation.
33. Petitioner's evidence for obsolescence consisted of an income loss statement for March 1995 through March 1997 based on an occupancy rate of 38.7% and a fee appraisal.
34. Before applying the evidence to reduce the contested assessment, the State must first analyze the reliability and probity of the evidence to determine what, if any, weight to accord it.
35. Mr. Kropp represented the motel had an income loss of \$143,992 per year for March 1995 through March 1997. This income loss was based on the contention that the subject motel's occupancy rate was 38.7% while the industry average, for the same time period, was 65% (Petitioner's Exhibit 1). Petitioner submitted evidence to indicate that the State used occupancy rates to grant obsolescence in its' Final Determination for another appeal, Petition No. 79-156-98-1-4-00009 (Petitioner's Exhibit 5).
36. No documentation or evidence supported the 38.7% occupancy rate claimed for the subject motel during January 1995 and March 1997 was presented. Nor was any evidence of what the occupancy rate trend had been since March 1997 for the subject. The appeal under review is for the assessment date as of March 1, 1997.

37. No testimony or evidence was presented to explain potential causes for the low occupancy for the subject motel. Mr. Kropp testified regarding the national and state occupancy averages and compared them to the subject's occupancy average.
38. No local occupancy rates for the specific geographic area of either Spencer County or Carter Township were presented nor was any analysis of condition offered.
39. The State is unable to conclude that obsolescence exists based only on unsupported allegations.
40. Petitioner's Exhibit 5 was a State Determination that involved an analysis of local data in its consideration of the obsolescence in that case. The analysis in that appeal compared the occupancy rate for a nursing home under appeal to that of occupancy rates for nursing homes in Tippecanoe County.
41. National and state occupancy rates alone cannot be relied upon as persuasive evidence of obsolescence in Spencer County.
42. Petitioner presented a copy of pages 42 through 45 of what was referred to as a fee appraisal. This selected portion of the appraisal, addressed the four (4) buildings on the subject parcel and determined the total amount of obsolescence depreciation due to the possible relocation of U. S. Highway #231. The amount of obsolescence determined was 30%.
43. This partial fee appraisal does not serve as sufficient and reliable evidence. The appraisal did not:
 - a. include all the necessary information required by the Uniform Standards of Professional Appraisal Practice (USPAP). These are qualifications and standards adopted by all states for the appraisal profession;
 - b. include requirements found in Standards Rule 2. Standard 2 states, "In

reporting the results of a real property appraisal an appraiser must communicate each analysis, opinion, and conclusion in a manner that is not misleading”;

- c. define the cause of obsolescence;
 - d. identify the use/purpose of the appraisal. Was it for a real estate appeal, refinancing or change in ownership;
 - e. include a “highest and best” use analysis done;
 - f. explain why only the Cost Approach to value was utilized; and
 - g. include any discussion of how the low occupancy rates contributed to 30% obsolescence determination
44. The Petitioner offered no evidence supporting the allegation that the subject motel’s assessment as of March 1, 1997 was adversely affected by the potential future relocation of Highway 231.
45. Petitioner has not proven the existence of obsolescence for the subject motel as of the March 1, 1997 assessment date. Nor has Petitioner presented evidence quantifying obsolescence to be either the 30% amount of obsolescence depreciation shown on the appraisal segment or the 25% obsolescence depreciation that was requested at the hearing.
46. For all the reasons set forth above, the request for the application of obsolescence is denied. No change in the assessment is made as a result of this issue.

Other Conclusions

47. As previously stated in Findings of Fact ¶19, Mr. Reller objected to evidence being presented at the hearing that was not presented at the County Board hearing. The State has accepted this type of evidence at State hearings, on a regular basis on petitions filed prior to April 1, 2000. However, effective April 1, 2000, 50 IAC 17 was added to establish procedural rules to govern

administrative proceedings before the State.

48. Specifically, 50 IAC 17-7-1 under “Evidence not previously presented”, states, “Documentary evidence that was not presented at the Property Tax Assessment Board of Appeals (PTABOA) hearing may not be presented by a party at a proceeding before the appeals division unless the evidence directly relates to an issue specifically expressed at the PTABOA hearing of the matter, or in the PTABOA’s final determination. Any evidence that was not presented at the PTABOA hearing, which a party intends to introduce at a hearing before the appeals division, must be filed with the appeals division within thirty (30) days following the filing of the original appeal petition. However, in the event a hearing scheduled within the thirty (30) day period following the filing of the petition, any evidence not presented at the PTABOA hearing must be filed with the approval of the appeals division not less than five (5) days prior to the hearing.”

49. Since the Form 131 petition under review, was filed prior to April 2000, the evidence submitted by the Petitioner will be accepted by the State and will be considered within the scope of this review.

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