

ATTORNEY FOR PETITIONER:
MARILYN S. MEIGHEN
MEIGHEN & ASSOCIATES, P.C.
Carmel, IN

ATTORNEYS FOR RESPONDENTS:
STEVE CARTER
ATTORNEY GENERAL OF INDIANA
Indianapolis, IN
ROBERT B. WENTE
DEPUTY ATTORNEY GENERAL
Indianapolis, IN

**IN THE
INDIANA TAX COURT**

WESTSIDE RACEWAY, INC.,)	
)	
Petitioner,)	
)	
v.)	Cause No. 49T10-0302-TA-11
)	
MARION COUNTY PROPERTY TAX)	
ASSESSMENT BOARD OF APPEALS and)	
ASSESSOR OF WAYNE TOWNSHIP,)	
MARION COUNTY,)	
)	
Respondents.)	
)	

ON APPEAL FROM A FINAL DETERMINATION OF
THE INDIANA BOARD OF TAX REVIEW

NOT FOR PUBLICATION

April 25, 2006

FISHER, J.

Westside Raceway, Inc. (Westside) appeals the final determination of the Indiana Board of Tax Review (Indiana Board) denying it a 95% obsolescence adjustment for the 2001 tax year (year at issue). The issue for the Court to decide is whether the Indiana Board erred in denying the requested adjustment. The Court AFFIRMS the Indiana Board's final determination for the following reasons.

FACTS AND PROCEDURAL HISTORY

Westside owns a multi-recreational facility located at 6430 West 37th Street (near the intersection of 37th Street and High School Road) in Marion County, Indiana. The subject property, which was constructed in 1997, consists of the following: three go-cart racetracks; six batting cages; a 3,956 square foot arcade building; a 4,320 square foot pole-barn type garage for the go-carts; and a 400 square foot maintenance garage. For the year at issue, the Wayne Township Assessor (Assessor) valued the subject property at \$521,500 (\$144,200 for the land and \$377,300 for the improvements).

Believing this value to be too high, Westside appealed to the Marion County Property Tax Assessment Board of Appeals (PTABOA) requesting a 40% obsolescence adjustment. The PTABOA, however, denied Westside's request for relief. Westside subsequently filed a Petition for Review of Assessment (Form 131) with the Indiana Board, arguing, among other things, that its property was entitled to a 95% obsolescence adjustment. The Indiana Board held an administrative hearing on October 17, 2002 and issued its final determination denying Westside's petition on January 6, 2003.

Westside initiated an original tax appeal on February 18, 2003. The Court heard the parties' oral arguments on February 5, 2004. Additional facts will be supplied as necessary.

ANALYSIS AND OPINION

Standard of Review

This Court gives great deference to final determinations of the Indiana Board. *Wittenberg Lutheran Vill. Endowment Corp. v. Lake County Prop. Tax Assessment Bd.*

of Appeals, 782 N.E.2d 483, 486 (Ind. Tax Ct. 2003), *review denied*. Consequently, the Court will reverse a final determination of the Indiana Board only if it is:

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) contrary to constitutional right, power, privilege, or immunity;
- (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory jurisdiction, authority, or limitations;
- (4) without observance of procedure required by law; or
- (5) unsupported by substantial or reliable evidence.

IND. CODE ANN. § 33-26-6-6(e)(1)-(5) (West 2006).

The party seeking to overturn the Indiana Board's final determination bears the burden of proving its invalidity. *Osolo Twp. Assessor v. Elkhart Maple Lane Assocs., L.P.*, 789 N.E.2d 109, 111 (Ind. Tax Ct. 2003). In order to meet that burden, the party seeking reversal must have submitted, during the administrative hearing process, probative evidence regarding the alleged assessment error. *Id.* (footnote omitted). If that party meets its burden of proof and prima facie establishes that the Indiana Board's final determination is erroneous, the burden then shifts to the opposing party to rebut the challenging party's evidence. See *Meridian Towers E. & W. v. Washington Twp. Assessor*, 805 N.E.2d 475, 479 (Ind. Tax Ct. 2003).

Discussion

"Obsolescence, which is a form of depreciation, is defined as a loss of [property] value and classified as either functional or economic." *Freudenberg-NOK Gen. P'ship v. State Bd. of Tax Comm'rs*, 715 N.E.2d 1026, 1029 (Ind. Tax Ct. 1999), *review denied*. See also IND. ADMIN. CODE tit. 50, r. 2.2-10-7(e) (1996). Functional obsolescence is

caused by factors internal to the property and is evidenced by conditions within the property itself. See 50 IAC 2.2-10-7(e). Economic obsolescence is caused by factors external to the property. *Id.*

To establish a claim for obsolescence, a taxpayer must make a two-pronged showing: 1) it must identify the causes of the alleged obsolescence; and 2) it must quantify the amount of obsolescence to be applied to its improvement(s). See *Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230, 1238, 1241 (Ind. Tax Ct. 1998). Each of these prongs, however, requires a connection to an actual loss in property value. *Id.* at 1238. For example, when identifying factors that cause obsolescence, a taxpayer must show through the use of probative evidence that those causes of obsolescence are causing an actual loss of value to its property. See *Miller Structures, Inc. v. State Bd. of Tax Comm'rs*, 748 N.E.2d 943, 954 (Ind. Tax Ct. 2001). In the commercial context, this loss of value usually means a decrease in the property's income generating ability. See *id.* at 953. In turn, when the taxpayer quantifies the amount of obsolescence to which it believes it is entitled, it is required to convert that actual loss of value (shown in the first prong) into a percentage reduction and apply it against the improvement's overall value. See *Clark*, 694 N.E.2d at 1238.

Westside contends that its property suffers from functional and economic obsolescence because: (1) the go-cart facility is so unique that the property is not marketable; (2) the property is vacant three to four months a year due to its seasonal business; (3) the surrounding neighborhood negatively affects its income-generating

ability.¹ To support its claim, Westside presented the following evidence: an appraisal of the land; income and expense statements from the subject property and two other go-cart facilities; property record cards, copies of the Notification of Final Assessment Determination, Form 115 (Forms 115) and a Petition to the Property Tax Assessment Board of Appeals for Review (Form 130) of other properties receiving obsolescence adjustments; a copy of “Standards For The Application of Obsolescence” for Marion County; and testimony of one of Westside’s owners, Robert Murphy and Westside’s representative, Dr. Frank Kelly. The Court will address each argument in turn.

(A) Causes of Obsolescence

(1) Marketability of the property

Westside claims that its property is so uniquely designed and adapted for its business that probable buyers would not want the improvements and would demolish them; thus, the improvements should receive economic obsolescence.² (See Pet’r Br.

¹ Nevertheless, because Westside’s arguments do not include factors internal to the property to indicate causes of functional obsolescence or present evidence concerning such obsolescence, the Court construes these arguments as a claim for economic obsolescence. (See Oral Argument Tr. at 40-41.)

² Westside relies on an appraisal of the subject property to support its position. (See Cert. Admin. R. at 109-177; Pet’r Br. at 6-7.) The appraisal, however, was conducted at the request of a bank as part of a refinancing process. Consequently, the appraisal states:

Per agreement with the client, we are appraising the subject site under the extraordinary assumption that the subject improvements add no contributory value. We believe that the subject improvements may have limited contributory value for an alternative use but it is beyond the scope of this assignment to determine their value.

(Cert. Admin. R. at 117.) Furthermore, while the appraisal explains that “significant [economic] obsolescence is thought to be applicable to the subject property[,]” the appraisal did not apply any methods for calculating such obsolescence, (i.e., the cost

at 5-6 (footnote added).) Nonetheless, this Court has held that arguments about market acceptability and what a willing buyer would pay for a property do nothing to support a claim for economic obsolescence in a tax system that is not based on market value. *Lake County Trust Co. No. 1163 v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1253, 1258 (Ind. Tax Ct. 1998) (stating that the opinion that a willing buyer would not pay as much for the subject property as that buyer would pay for another property is not determinative of the obsolescence claim), *review denied*. See also *Damon Corp. v. State Bd. of Tax Comm'rs*, 738 N.E.2d 1102, 1108 n.5 (Ind. Tax Ct. 2000).

Indiana's assessment regulations acknowledge that economic obsolescence may be caused by "[d]ecreased market acceptability of the *product* for which the property was constructed or is currently used." 50 IAC 2.2-10-7(e)(2)(D) (emphasis added). This regulation, however, lends no support to Westside's argument. See *Lake County Trust Co. No. 1163*, 694 N.E.2d at 1257 (stating that "it is the marketability of the product or device that the property was constructed or used for that is important – not the property itself"). More specifically, Westside has not argued or presented evidence to show a decrease in the marketability of the recreational go-cart business. In fact, Westside submitted income and expense statements from two other go-cart facilities in central Indiana that are profitable. (See Cert. Admin. R. at 239-249; Pet'r Br. at 8.) In addition, Westside's owner, Robert Murphy, testified during the Indiana Board hearing that there are approximately seven to eight similar facilities in central Indiana alone.

approach, income capitalization approach, or sales comparison approach). (See Cert. Admin. R. at 133, 142.) Because the appraisal does not provide an analysis as to the value of the improvements or obsolescence, it lacks probative value in this case. See *Simmons v. State Bd. of Tax Comm'rs*, 642 N.E.2d 559, 562 (Ind. Tax Ct. 1994) (stating that obsolescence is applicable when valuing commercial *improvements*).

(Cert. Admin. R. at 311.) Given this evidence as well as the lack of evidence of a decrease in marketability of the go-cart business, Westside's argument does not indicate a cause of economic obsolescence. *Cf. Loveless Constr. Co. v. State Bd. of Tax Comm'rs*, 695 N.E.2d 1045, 1049 (Ind. Tax Ct. 1998) (explaining that the product at issue, leases, were proven to be less valuable in the market; thus, the market acceptability of the leases decreased), *review denied*; *Lake County Trust Co. No 1163*, 694 N.E.2d at 1257 ("a cigarette producer could argue that its manufacturing plant is entitled to an economic obsolescence deduction because of the unacceptability of cigarettes in the current market").

(2) Vacancy

Westside claims that due to weather restrictions, its business is a seasonal business, and the property is therefore vacant approximately four months per year. Westside argues that because other properties in Marion County receive obsolescence for vacancy and weather restrictions, its property is also entitled to an obsolescence reduction. (See Pet'r Br. at 9-10.) The Court, however, disagrees.

To support its claim, Westside presented six Forms 115, two property record cards, and a final determination for various properties in Marion County, which have received a reduction in assessed value due to vacancy or weather restrictions. (Cert. Admin R. at 190-224; 281-289.) Nonetheless, Westside failed to compare its property with these other properties or even describe the other properties. Moreover, Westside did not explain why any of the properties received the adjustments. (See Cert. Admin R. at 281-289.) Indeed, most of the properties received obsolescence as part of an agreement between the township assessor and the taxpayer; therefore, no explanation

or analysis was given as to why the obsolescence was applied.³ (Cert. Admin R. at 190-224 (footnote added).) According to the final determination Westside submitted, the remaining property received an influence factor on its land due to weather restrictions based on the parties' stipulation and agreement. (Cert. Admin. R. at 213-224.) Nevertheless, the issue of obsolescence in that case was withdrawn. (Cert. Admin R. at 224.) As such, none of the Forms 115, property records or the final determination are probative as to whether Westside suffers from obsolescence.

Westside also submitted a copy of the "Standards For the Application of Obsolescence" document, but it too lacks probative value. That document is used by assessors to help determine the amount of obsolescence an apartment or office complex should receive if it is vacant or has uncommitted space. (Cert. Admin R. at 188.) Clearly, Westside is not an apartment or office complex, nor is it used in such a manner. Furthermore, the document states that "[m]anagement decisions regarding what should remain vacant do not merit consideration in determining obsolescence." (Cert. Admin R. at 188.) Here, Westside chooses to operate as a seasonal business. While Westside claims that it could not "pay the light bills" if it stayed open the entire year, it made the decision to close for a portion of the year, nonetheless.⁴ (Cert. Admin R. at 330 (footnote added).)

³ Some of the Forms 115 gave a brief explanation such as "[t]he industrial warehouse should receive a total [of] 75% economic and functional obsolescence based on blight, location, inaccessibility, outdated construction and pending demolition." (Cert. Admin. R. at 203.) Beyond these conclusory statements, no explanations or reasons were given as to *why* the improvements received obsolescence (i.e., why the location was considered blight or the construction outdated, or how that affected the property's value).

⁴ Furthermore, Westside has not put forth evidence to establish that year-round operation of its business would not be profitable.

Finally, and most importantly, Westside has not shown that its property is actually vacant. A vacant property is empty or unoccupied. See BLACK'S LAW DICTIONARY 1584 (8th ed. 2004). Here, Westside has not shown that its space is empty – the property still houses the go-carts and other equipment necessary for running the business. (See Cert. Admin. R. at 298-99, 317-18; Pet'r. Br. at 5.) Consequently, vacancy is not a cause of economic obsolescence in this case.

(3) Neighborhood

Westside claims that the neighborhood surrounding its property serves as a source of economic obsolescence because the neighborhood is “in decline.” (Pet'r Br. at 8.) The owners of Westside also own two other similar businesses in Anderson and Kokomo, Indiana. (Cert. Admin. R. at 307-09.) Robert Murphy, part owner of Westside, claims that the other two facilities are profitable, while Westside is not because Westside does not “have the neighborhood.” More specifically, Westside claims:

[t]here have been numerous break-ins at the property and a fence topped with barbed wire surrounds it. One enters Westside's property from the intersection of 37th Street and High School Road. There is an abandoned property at the corner of the intersection. The property has been vacant for several years and is generally unsightly. A semi-vacant strip mall occupied by a bar and church is located directly to the east of the property. A Days Inn Motel is located at 38th Street and High School Road. “It is a pain” keeping the prostitutes and drug addicts from the motel off of Westside's property. A Shell Station is also located at 38th Street and High School Road. A Shell Station employee was murdered recently. Westside abuts an interstate ramp, with a four or five foot buffer between Westside's property and the ramp. The buffer is full of weeds and blocks Westside's property. The immediate neighborhood is in decline and Westside has experienced the effects of the decline, e.g., break-ins, required daily security, alcohol consumption in the parking lot, and the like.

(Pet'r Br. at 7-8 (summarizing Murphy's testimony) (internal citations omitted).) (See also Cert. Admin. R. at 292-93, 295-98, 328-29.) Furthermore, Mr. Murphy testified that a low-income apartment complex also makes the neighborhood less desirable: "[w]e have some good customers from that facility. Primarily they are Spanish speaking. But we also have some bad customers, and it requires more supervision and we have to pay to have security here every day. We don't have to do that at the other facilities[.]" (Cert. Admin. R. at 316-17.)

Westside's income and expense statements reveal that it incurred a security expense of approximately \$8,500 in 2001 and that the other two facilities did not. (Cert. Admin. R. at 179, 181, 241, 247.) Beyond this expense, Westside's alleged actual loss results from the fact that it is operating at a loss.⁵ This Court has previously held that a property's surrounding neighborhood should be considered when determining whether an economic obsolescence adjustment is warranted. See generally *Simmons v. State Bd. of Tax Comm'rs*, 642 N.E.2d 559 (Ind. Tax Ct. 1994). Given that holding and the

⁵ Westside did not put forth sufficient evidence of a loss resulting from the alleged break-ins. Specifically, when asked how many break-ins Westside had during March 2, 2000 to March 1, 2001 and what costs it incurred from the break-ins, Mr. Murphy testified:

[we lost a] couple of hundred dollars each time, plus we were threatened. We had to make some other changes with the pop machines inside the arcade building rather than having them outside[.] . . . [W]e had one [pop machine] actually taken out, so I can't tell you in terms of lost revenue what that cost us. . . . [T]hey ripped the front off the pop machine and ripped a hole in the fence, it cost us to get the fence repaired and the pop machines that were outside [repaired].

(Cert. Admin. R. at 313-14.) The Court cannot discern from this testimony how many break-ins occurred during the relevant time period or the actual loss.

aforementioned evidence, Westside's surrounding neighborhood may be considered a cause of obsolescence.

(B) Quantification of Obsolescence

Once the causes of obsolescence have been established, the taxpayer bears the burden of quantifying the amount of obsolescence to be applied to its improvements. See *Meridian Towers E. & W.*, 805 N.E.2d at 478. To quantify the amount of obsolescence to which it believes it is entitled, a taxpayer may use professional appraisal techniques. *Id.* (citations omitted). Westside's tax representative, Dr. Frank Kelly, testified concerning his method of quantification. Specifically, Dr. Kelly stated:

[a]s far as the growth revenue, I simply took the average for those two years [2000, 2001] as suggested by . . . standard appraisal practice. . . . So I took the average of those two, and then again on the allowable expenses, the operating expenses, which are all valid expenses per the IAAO assessment valuation manual; took the average of those and also subtracted an average for the reserves for these short-lived assets which you would have to replace to keep the facility functional at some point . . . to develop an estimate of net operating income, which as we see here is negative. Typically, one would then capitalize net operating income by a cap[italization] rate. There didn't seem to be any point to that here since there wasn't anything to capitalize.

(Cert. Admin. R. at 339-40.) (See *also* Cert. Admin. R. at 228.)

When asked to tie the negative operating income to obsolescence, Dr. Kelly stated that "it basically means the property would have no value from an income point of view in that sense. If there was an assessment greater than that zero value, then obsolescence would have to be applied to get that value." (Cert. Admin. R. at 341-42.) As evidenced from this testimony, Westside assumes that because its property is "losing money," obsolescence must apply. (See Cert. Admin. R. at 309.) This

assumption, however, is incorrect. See *Lake County Trust Co. No. 1163*, 694 N.E.2d at 1257-58 (economic obsolescence was not warranted where taxpayer executed unfavorable leases resulting in a failure to realize as much net income from the subject property).

Furthermore, an attempt to quantify obsolescence must correlate to the causes of obsolescence. *Heart City Chrysler v. State Bd. of Tax Comm'rs*, 714 N.E.2d 329, 334 (Ind. Tax Ct. 1999). Indeed, “[a] taxpayer cannot quantify its obsolescence depreciation without relating the causes of obsolescence, and the actual loss in value to the improvement incurred as a result of those causes, to the amount of obsolescence it seeks.” *Heart City Chrysler/Lockmandy Motors v. Dep’t of Local Gov’t Fin.*, 801 N.E.2d 215, 218 (Ind. Tax Ct. 2004) (citations omitted). Westside’s claim of 95% economic obsolescence does not correlate with its cause of obsolescence, (i.e., the surrounding neighborhood) nor the actual losses resulting therefrom. In other words, Westside has not shown how the actual costs incurred as a result of its neighborhood translate into a 95% adjustment of its property value.

This Court has held that it will not consider taxpayer complaints concerning obsolescence unless the taxpayer has identified the causes of the alleged obsolescence and presented probative evidence that would support a quantification of obsolescence at the administrative level. See *Clark*, 694 N.E.2d at 1241. Westside has not made the appropriate showing.

CONCLUSION

Because Westside failed to make a prima facie case concerning its claim for 95% obsolescence, the Court AFFIRMS the Indiana Board's final determination.