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IN THE
INDIANA TAX COURT

PEDCOR INVESTMENTS-1995-XXIII, L.P.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cause No. 49T10-0206-TA-66
	)	
PORTAGE TOWNSHIP ASSESSOR,	)	
	)	
Respondent.	)	

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

NOT FOR PUBLICATION
May 9, 2007

FISHER, J.

Pedcor Investments-1995-XXIII, L.P. (Pedcor) appeals from a final determination of the Indiana Board of Tax Review (Indiana Board) valuing its real property for the March 1, 1998 assessment date. The sole issue for the Court to decide is whether the Indiana Board erred in denying Pedcor's low-income housing project an obsolescence depreciation adjustment.

FACTS AND PROCEDURAL HISTORY

Pedcor owns the Port Crossing apartment complex in Portage, Indiana. A portion of this complex, known as "Phase III," is low-income housing and qualifies for tax credits pursuant to Section 42 of the Internal Revenue Code (the LIHTC Program).[1]

Under the LIHTC program, Pedcor received approximately $1.9 million in tax credits to award to investors, over a ten-year period, who provided financing for Phase III. In exchange for these tax credits, Pedcor agreed to rent 96 of the 176 units in Phase III to individuals whose income was 60% or less of the area's median gross income (adjusted for family size) and subject to Indiana Housing Finance Authority (IHFA) rental guidelines. Pedcor agreed to abide by these rental restrictions for a period of 30 years.

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[1] Federal law provides numerous tax incentives to encourage the production of affordable housing for low-income individuals, including the Low Income Housing Tax Credit (LIHTC) Program at issue here. *See generally,* 26 U.S.C. § 42 (2005). The LIHTC Program authorizes individual states to issue federal income tax credits to developers as an incentive for the acquisition, rehabilitation, or new construction of affordable rental housing. In Indiana, this program is administered by the Indiana Housing Finance Authority (IHFA).

To qualify for LIHTCs, a project must reserve a portion of its rental units for use by low-income households only, with rents on those units limited to a percentage of qualifying income. Furthermore, the use of the property is restricted by deed to low-income housing for at least fifteen years. In the event that a project does not comply with such restrictions, the credits are subject to recapture.

After the state allocates the tax credits to a project's developers, the credits are usually sold to private investors in a limited partnership. The money paid for the credits is used as equity financing to make up the difference between a project's development costs and the non-tax credit financing expected from rental income. In turn, the private investors are able to use the tax credits to offset their federal income tax liabilities, claiming the credits for each year of a ten-year period as long as the imposed rental restrictions are met. If a property eligible for § 42 credits is sold, the subsequent owner of the property is entitled to the future tax credits associated with the property.

For the March 1, 1998 assessment date, the Portage Township Assessor (Assessor) assigned an assessed value of $1,088,530 to the improvements in Phase III. Believing this value to be too high, Pedcor appealed the assessment, first to the Porter County Property Tax Assessment Board of Appeals (PTABOA) and then to the State Board of Tax Commissioners (State Board), claiming that Phase III was suffering from economic obsolescence.

On February 8, 2001, the State Board conducted an administrative hearing on Pedcor's appeal. On April 23, 2002, the Indiana Board issued a final determination denying Pedcor's request for economic obsolescence.[2]

Pedcor filed an original tax appeal on June 4, 2002. The Court heard the parties' oral arguments on November 21, 2003. Additional facts will be supplied as necessary.

STANDARD OF REVIEW

This Court gives great deference to final determinations of the Indiana Board when it acts within the scope of its authority. *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 only reverse a final determination of the Indiana Board if it is:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (2) contrary to constitutional right, power, privilege, or

[2] On December 31, 2001, the legislature abolished the State Board of Tax Commissioners (State Board). 2001 Ind. Acts 198 § 119(b)(2). Effective January 1, 2002, the legislature created the Indiana Board of Tax Review (Indiana Board) as "successor" to the State Board. IND. CODE ANN. §§ 6-1.5-1-3; 6-1.5-4-1 (West 2007); 2001 Ind. Acts 198 § 95. Consequently, when a final determination was issued on Pedcor's appeal in April of 2002, it was issued by the Indiana Board.

> immunity;
>
> (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory jurisdiction, authority, or limitations;
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> (4) without observance of procedure required by law; or
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> (5) unsupported by substantial or reliable evidence.

See IND. CODE ANN. § 33-26-6-6(e)(1) - (5) (West 2007). 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).

DISCUSSION

Pedcor argues on appeal that the Indiana Board improperly denied the improvements in Phase III an economic obsolescence adjustment. Specifically, Pedcor contends that it presented a prima face case at the administrative hearing that it was entitled to a 17.19% economic obsolescence adjustment for the year at issue and that the Assessor failed to rebut this prima facie case. As a result, Pedcor maintains that the Indiana Board's final determination is not supported by substantial evidence and therefore invalid.

Real property in Indiana is assessed on the basis of its "true tax value." IND. CODE ANN. § 6-1.1-31-6(c) (West 2007). During the year at issue, a commercial improvement's true tax value was equal to its reproduction cost (as calculated under the State Board's assessment regulations) less any physical and/or obsolescence depreciation present therein. *See* 50 IND. ADMIN. CODE 2.2-10-7(f) (1996) (repealed 2002). Obsolescence depreciation was defined as either the functional or economic loss of value to a property. 50 I.A.C 2.2-10-7(e). For instance, functional obsolescence

(or a loss of value resulting from factors internal to the property) could be caused by the fact that an improvement had limited use due to an irregular or inefficient floor plan, inadequate or unsuited utility space, or an excessive/deficient load capacity. *See id.* In contrast, economic obsolescence (or a loss of value resulting from factors external to the property) could be caused by the fact that an improvement was located in an inappropriate area, subject to inoperative or inadequate zoning ordinances or deed restrictions, or that the improvement was constructed for a need which has subsequently been terminated due to actual or probable changes in economic or social conditions. *Id.*

This Court has previously held that in order to make a prima facie case for obsolescence at the administrative level, a taxpayer must present probative evidence that 1) identifies the causes of the obsolescence from which its property suffers and 2) quantifies the amount of obsolescence to which it believes it is entitled. *See Clark v. State Bd. of Tax Comm'rs,* 694 N.E.2d 1230, 1238 (Ind. Tax Ct. 1998). More specifically, however, the Court has explained that when identifying causes of obsolescence, the taxpayer's probative evidence must show how the alleged causes result in an actual loss of value to its property (i.e., how the property's ability to generate income is affected). *See Miller Structures, Inc. v. State Bd. of Tax Comm'rs*, 748 N.E.2d 943, 953-54 (Ind. Tax Ct. 2001). The Court has also explained that, in quantifying obsolescence, the taxpayer must use generally recognized appraisal methods for calculating the market value of an improvement, converting the obsolescence as determined thereunder into a percentage to be applied against the

property's true tax value.[3] *See Clark,* 694 N.E2d 1230, 1242 n.18 (footnote added). *See also Lacy Diversified Indus., Ltd. v. Dep't of Local Gov't Fin.,* 799 N.E.2d 1215, 1223 (Ind. Tax Ct. 2003); *Inland Steel Co. v. State Bd. of Tax Comm'rs,* 739 N.E.2d 201, 211 (Ind. Tax Ct. 2000), *review denied*; *Canal Square Ltd. P'ship v. State Bd. of Tax Comm'rs,* 694 N.E.2d 801, 806-07 (Ind. Tax Ct. 1998).

During the administrative hearing in this case, one of Pedcor's vice-presidents, Ms. Maureen Hougland, testified that the rental restrictions imposed on the units in Phase III were causing obsolescence because they negatively impacted Phase III's ability to generate income.[4,5] To support this claim, Hougland testified that while

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[3] One method in particular has been frequently utilized by Indiana taxpayers – and approved by this Court – to quantify obsolescence: determine the property's market value under the cost approach; determine the property's market value under the income capitalization approach; convert the difference (which typically represents obsolescence) to a percentage to be applied against the property's true tax value. *See Hometowne Assocs., L.P. v. Maley,* 839 N.E.2d 269, 275 (Ind. Tax Ct. 2005) (citations omitted).

[4] This Court has held that rental restrictions like the ones at issue in this case may very well cause economic obsolescence. *See Pedcor Investments-1990-XIII, L.P. v. State Bd. of Tax Comm'rs,* 715 N.E.2d 432, 437 (Ind. Tax Ct. 1999). Nevertheless, the Court has also held that any economic obsolescence occurring as a result of such rental restrictions must be measured in light of the value of the federal tax credits awarded to the project's investors. *See id.* *See also Hometowne Assocs.,* 839 N.E.2d at 279 n.17 (Court advocates an approach whereby the burdens of participating in the LIHTC program are balanced against the benefits).

[5] The Court notes that, at one point in its brief to this Court, Pedcor claimed that vacancies and higher operating costs were also contributing causes of obsolescence in Phase III. (*See* Pet'r Br. at 1.) Nevertheless, the remaining portion of Pedcor's brief provides no further explanation or analysis of that claim. (*See* Pet'r Br.) Furthermore, the administrative record reveals that Pedcor provided no evidence during the administrative hearing demonstrating that its vacancies and operating costs were higher than those in non-restricted apartment complexes. In fact, Maureen Hougland actually testified during the administrative hearing that "these are our most successful [apartments], there is []100% occupancy[.]" (Cert. Admin. R. at 528.) As a result, the Court deems the claim waived.

Pedcor was able to charge rents of $555, $672, and $740 for the non rent-restricted one-bedroom, two-bedroom, and three-bedroom units in Phase III, it only charged $435, $525, and $635 per month for the identical rent-restricted units in Phase III. (*See* Cert. Admin. R. at 271, 527.) In turn, Pedcor explains that Hougland then presented a quantification "done in accordance with standard principles of appraisal" which converted this loss of income to an obsolescence adjustment of 17.19% for the 1998 assessment year. (Pet'r Br. at 9-10.) Pedcor maintains that because the Assessor did not dispute or challenge this evidence at the administrative hearing, the Indiana Board improperly denied Pedcor the relief to which it claims it is entitled. (*See* Pet'r Br. at 7, 13-14.) The Court, however, must disagree.

The Court has repeatedly reminded taxpayers that, as part of making a prima facie case, "[i]t is the taxpayer's duty to walk the [State Board, the] Indiana Board and this Court through every element of its analysis." *See Fidelity Fed. Sav. & Loan v. Jennings County Assessor,* 836 N.E.2d 1075, 1082 (Ind. Tax Ct. 2005) (quoting *Clark v. Dep't of Local Gov't Fin.,* 779 N.E.2d 1277, 1282 n.4 (Ind. Tax Ct. 2002)). *See also Davidson Indus. v. State Bd. of Tax Comm'rs,* 744 N.E.2d 1067, 1071 (Ind. Tax Ct. 2001). Consequently, this Court has rejected, as non-probative, evidence such as mathematical calculations and photographs that have not been accompanied by an explanation. *See Indian Indus., Inc. v. Dep't of Local Gov't Fin.,* 791 N.E.2d 286, 289-90 (Ind. Tax Ct. 2003); *Heart City Chrysler v. State Bd. of Tax Comm'rs,* 714 N.E.2d 329, 333 (Ind. Tax Ct. 1999). Likewise, the Court has frequently reminded taxpayers that, in making their presentations, conclusory statements do not constitute probative evidence. *See, e.g., Whitley Prods., Inc. v. State Bd. of Tax Comm'rs,* 704 N.E.2d

1113, 1119 (Ind. Tax Ct. 1998), *review denied.* To its detriment, Pedcor has failed to heed these reminders.

During the administrative hearing, Hougland presented a three-page worksheet quantifying the obsolescence present in Phase III for the 1998 tax year at 17.19%. (Cert. Admin. R. at 271-73.) Hougland arrived at the 17.19% after she:

> 1) multiplied the difference in rental income between the non rent-restricted apartments in Phase III and the rent-restricted apartments in Phase III by the total number of rent-restricted units in Phase III to arrive at an annual rent loss of $151,440;
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> 2) reduced the annual rent loss of $151,440 to $137,394 to account for a "standard industry" vacancy of 5% and a management fee of 4.5%;
>
> 3) converted the annual rent loss of $137,394 to "a present value" of $1,575,940 by applying a "10.5[% capitalization rate] for the entire [30 year] period;"
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> 4) reduced the $1,575,940 by $1,126,191 (Hougland's valuation of the unused tax credits)[6] to arrive at an obsolescence figure for the 1998 assessment year of $449,749;
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> 5) divided the $449,749 by $6,923,853 (Hougland's "estimated appraised value" of the property) to arrive at an obsolescence adjustment of 6.5% for the 1998 assessment year;
>
> 6) repeated steps 3, 4, and 5 for each of the years remaining on the 30 year term of deed restrictions (1999 through 2027); and then

[6] In calculating the value of the tax credits, Hougland indicated that while Pedcor initially received $1.9 million in tax credits over the course of a ten-year period, as of the March 1, 1998 assessment date, eight and a half years of those credits remained for use. (*See* Cert. Admin. R. at 270-71.) Hougland's indicated that the credits were purchased for $0.70 on the dollar and therefore were only worth $1,126,191 as of March 1, 1998. (See Cert. Admin. R. 271.)

> 7) averaged those yearly obsolescence calculations to arrive at an obsolescence percentage of 17.19% to be applied to the 1998 assessment.[7]

(*See* Cert. Admin. R. at 271-73 (footnote added).) In presenting this quantification, however, Hougland failed to adequately explain every element of her analysis.

For instance, Hougland stated that her quantification was made pursuant to "generally accepted appraisal methods." (Cert. Admin. R. at 529.) Nevertheless, Hougland was required *to lay some foundation* at the administrative hearing that her methodology was indeed pursuant to generally accepted appraisal methods, especially considering that the methodology in her quantification differed from that typically used in Indiana to quantify obsolescence (*see* fn. 3 *supra*).[8] Without laying such foundation, Hougland's statement is nothing more than a conclusion, and conclusory statements do not constitute probative evidence. *See Whitley Prods.,* 704 N.E.2d at 1119. *See also Inland Steel,* 739 N.E.2d at 220 (stating that in applying a discount factor in a

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[7] In two companion cases issued today, this Court has rejected Pedcor's attempts to measure obsolescence for the 1998 tax year by averaging the obsolescence alleged to be present in the property over an extended period of time in the future. *See Pedcor Investments-1996-XXV, L.P. v. Jackson Twp. Assessor,* Cause No. 49T10-0205-TA-56, slip op. at 8 (Ind. Tax Ct. filed May 9, 2007) (rejecting an obsolescence calculation based on an average of obsolescence allegedly present in the subject property during the ten years the property was eligible to receive the tax credits); *Pedcor Investments-1994-XVII, L.P. v. Portage Twp. Assessor,* Cause No. 49T10-0206-TA-65, slip op. at 8 (Ind. Tax Ct. filed May 9, 2007) (rejecting an obsolescence calculation based on an average of obsolescence allegedly present in the subject property during the 30 years the property was subject to the rental restrictions). Accordingly, Pedcor's attempt to do the same in this case (*see* steps 6 and 7 in the above calculation) is rejected. As a result, the remainder of this opinion will evaluate whether Pedcor presented evidence sufficient to establish that it was entitled to a 6.5% obsolescence adjustment (see step 5 of the above calculation) for the year at issue.

[8] To that end, Hougland could have (as an example) referred the State Board to copies of appraisal articles, treatises, etc., that validated the use of her methodology.

calculation, the taxpayer did not explain what the factor represented, how it was calculated or why it was the appropriate factor to use; as a result, taxpayer's "testimony does not prove that the use of the [discount factor] is a generally accepted appraisal technique[and e]ven though [the taxpayer] is a recognized appraisal expert, his testimony, without explanation, is conclusory and therefore lacks probative value as to quantification").

In another example, Hougland states that, in step three of her quantification, she converted the annual rent loss of $137,394 into "a present value at 10.5%" of $1,575,940. At no point during the administrative hearing, however, did Hougland provide an explanation as to how this was done. Indeed, the only testimony she provided with respect to this mathematical calculation was that

> I had to do a present value of the rent loss, because I am trying to calculate how this is affecting us via the term of the deed restrictions and the tax credit plan. This is done at a 10.5% cap rate, which is standard in the industry. We start at 98 with the $137,394, which is our obsolescence from the previous page. We take it at 10.5% cap rate with a 3% rent growth which is shown on our market study update, then we get a present value at 10.5[%] for the entire period for which the deed restrictions caused by the tax credits operate, which is 30 years.

(Cert. Admin. R. at 528.) (*See also* Pet'r Br. at 9-10 (providing even less explanation).) This does little to assist the Court in evaluating whether Pedcor's quantification sufficiently establishes its claim.

In a similar fashion, Hougland stated that, in step 5 of her quantification, she used a 9.5% capitalization rate to reach her "estimated appraised value" of the property of $6,923,853. (*See* Cert. Admin. R. at 271, 529.) When questioned about her use of the 9.5% capitalization rate, she testified that "10.5% is standard[; w]e just picked low so

there wouldn't be any question." (Cert. Admin. R. at 530.) Later, when Hougland was asked if she had any industry studies to support that rate, she replied: "No, I don't, but feel free to call any account[ant] or appraiser to ask what a standard cap rate is." (Cert. Admin. R. at 534-35.) It was not, however, the responsibility of the State Board (or, subsequently, the Indiana Board) to determine whether either a 9.5% capitalization rate was appropriate – that duty rested with Pedcor.[9] Again, because Hougland failed to lay a proper foundation as to the appropriate capitalization rate to be applied to her quantification, her testimony is conclusory and not probative of Pedcor's claim.[10] *See*

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[9] Furthermore, Hougland never explained why, in step three of her quantification, she used a 10.5% capitalization rate (converting the annual rent loss of $137,394 to "a present value" of $1,575,940) and then, in step five of her quantification, she used a 9.5% capitalization rate (in ascertaining the "estimated appraised value" of the property).

[10] Pedcor asserts that "[i]If the [Assessor] or the [State] Board found such testimony without basis, there was some obligation to challenge the testimony at the time of the hearing." (Pet'r Br. at 13.) Consequently, "[e]ven if the evidence we offer . . . is subject to attack, subject to objection, subject to exclusion . . . if it gets into evidence, then it is evidence, and it's evidence sufficient to make a prima facie case." (Oral Argument Tr. at 16-17.) The Court, however, disagrees.

Administrative hearings, unlike judicial proceedings, are conducted in an informal manner without recourse to Indiana's Rules of Evidence. IND. CODE ANN. § 4-21.5-3-25(b) (West 2007). Nevertheless, an administrative agency's findings "must be based upon the kind of evidence that is substantial and reliable." IND. CODE ANN. § 4-21.5-3-27(d) (West 2007). *See also* IND. CODE ANN. § 33-26-6-6(e)(5) (West 2007). To that end, an administrative law judge may use its "experience, technical competence, and specialized knowledge" in evaluating whether or not the admitted evidence is indeed substantial and reliable. A.I.C. § 4-21.5-3-27(d).

It is clear from the transcript of the State Board hearing that the State Board's hearing officer did in fact challenge – albeit not as succinctly as "I object" – Pedcor's capitalization rate. (*See* Cert. Admin. R. at 530, 534-35.) To the extent the testimony was allowed, it was still up to the Indiana Board, as trier-of-fact, to determine its probative value. This Court cannot say the Indiana Board erred when it deemed Hougland's testimony was insufficient to establish the propriety of her capitalization rates: it was nothing more than a conclusory statement.

CDI, Inc. v. State Bd. of Tax Comm'rs, 725 N.E.2d 1015, 1021 (Ind. Tax Ct. 2000) (stating that the Court will not rely on unsupported opinions) (footnote added).

CONCLUSION

This Court will find that an Indiana Board final determination is supported by substantial evidence if a reasonable person could view the record in its entirety and find enough relevant evidence to support the determination. *See Amax Inc. Through Amax Coal Co. v. State Bd. of Tax Comm'rs,* 552 N.E.2d 850, 852 (Ind. Tax Ct. 1990) (stating that "[s]ubstantial evidence is more than a scintilla[; i]t means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion") (citation omitted). Here, the Court cannot say, after reviewing the administrative record in its entirety, that the Indiana Board erred in denying Pedcor an obsolescence adjustment for 1998.[11] Accordingly, the Indiana Board's final determination is AFFIRMED.

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[11] Because Pedcor's evidence was not probative in the first instance (*i.e.,* it did not sufficiently establish that it was entitled to an obsolescence adjustment for the 1998 tax year), the burden to rebut or contradict that evidence never shifted. *See Osolo Twp. Assessor v. Elkhart Maple Lane Assocs. L.P.*, 789 N.E.2d 109, 111 (Ind. Tax Ct. 2003); *Lacy Diversified Indus., Ltd. v. Dep't of Local Gov't Fin.*, 799 N.E.2d 1215, 1218-19 (Ind. Tax Ct. 2003) (citation omitted); *Meridian Towers E. & W. v. Washington Twp. Assessor,* 805 N.E.2d 475, 479 (Ind. Tax Ct. 2003).