ATTORNEYS FOR PETITIONER:
JAMES W. BEATTY
STEPHEN M. TERRELL
LANDMAN & BEATTY
Indianapolis, IN

ATTORNEYS FOR RESPONDENT:
STEVE CARTER
ATTORNEY GENERAL OF INDIANA
JOEL SCHIFF
DEPUTY ATTORNEY GENERAL
Indianapolis, IN

IN THE
INDIANA TAX COURT

PEDCOR INVESTMENTS-1994-XVII, L.P.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cause No. 49T10-0206-TA-65
	)	
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NOT FOR PUBLICATION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-1994-XVII, 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 economic 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 II," 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 $4.26 million in tax credits to award to investors, over a ten-year period, who provided financing for Phase II. In exchange for these tax credits, Pedcor agreed to rent all 96 units in Phase II 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.

For the March 1, 1998 assessment date, the Portage Township Assessor (Assessor) assigned an assessed value of $756,870 to the improvements in Phase II.

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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.

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 II 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 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;
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> (2) contrary to constitutional right, power, privilege, or immunity;
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> (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory jurisdiction, authority, or limitations;

[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.

(4) without observance of procedure required by law; or

(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 II an economic obsolescence adjustment. Specifically, Pedcor contends that it presented a prima facie case at the administrative hearing that it was entitled to a 28.28% 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. *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 the 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 at 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 II were causing obsolescence because they negatively impacted Phase II's ability to generate income.[4,5] To support this claim, Hougland testified that in another section of its complex, Pedcor was able to charge market rate rents of approximately

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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 II. (*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 Phase II's vacancies and operating costs were higher than those in non-restricted apartment complexes. (*See* Cert. Admin. R. at 550-606.) As a result, the Court deems the claim waived.

$555, $672, and $740 for one-bedroom, two-bedroom, and three-bedroom units; in Phase II, however, Pedcor only charged $435, $499, and $625 per month for identical units. (*See* Cert. Admin. R. at 408, 571-72.) In turn, Pedcor explains that Hougland then presented a quantification done in accordance "with generally accepted appraisal methods" which converted Phase II's loss of income to an obsolescence adjustment of 28.28% for the 1998 assessment year. (*See* Cert. Admin. R. at 573, 576-77.) 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 5, 10.) The Court, however, must disagree.

As indicated earlier, Pedcor bore the burden at the administrative hearing to present evidence *sufficient* to establish its claim that it was entitled to a 28.28% obsolescence adjustment for the 1998 tax year. *See Osolo Twp. Assessor,* 789 N.E.2d at 111; *Lacy Diversified Indus.,* 799 N.E.2d at 1218-19 (citation omitted). Here, the Court cannot conclude, after reviewing the administrative record in its entirety, that Pedcor presented evidence sufficient to establish that claim.

In its most elemental form, Pedcor's quantification arrives at the 28.28% figure by averaging the amount of obsolescence it asserts is present in the property from 1998 through 2027.[6] (*See* Cert. Admin. R. at 410 (footnote added).) As Hougland testified during the administrative hearing, "we have chosen to [] take an average obsolescence over the deed restriction term to avoid coming [to an administrative hearing] every

[6] In other words, Pedcor's quantification identifies the amount of obsolescence it alleges will be present in its property during each of the 30 years it is subject to the rent restrictions, and then computes the average for the entire term. (*See* Cert. Admin. R. at 410.)

single year[.]" (Cert. Admin. R. at 576.) In its effort to make things easier for itself, however, Pedcor, failed to provide a quantification that complied with the rule of law.

In Indiana, "[p]roperty is to be assessed on the basis of its condition on the assessment date" of the year at issue.[7] *Pedcor Investments-1990-XIII, L.P. v. State Bd. of Tax Comm'rs,* 715 N.E.2d 432, 435 n.5 (Ind. Tax Ct. 1999) (citation omitted) (footnote added). To the extent that Pedcor's quantification measures the obsolescence present in its property as of the March 1, 1998 assessment date as an average of the obsolescence allegedly present in the property from 1998 through 2027, it does not accurately reflect the amount of obsolescence present in Phase II *as of March 1, 1998.*[8]

Moreover, when Pedcor's quantification is broken down on an annual basis, it indicates that there was no obsolescence present in Phase II whatsoever during the year at issue. (*See* Cert. Admin. R. at 409-10.) Indeed, Pedcor's quantification reveals that the value of the tax credits it received in 1998 completely outweighed any loss in income resulting from the imposed rental restrictions that year. (*See* Cert. Admin. R. at 409.)

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[7] Consequently, in appeals to this Court, each tax year (and each appeals process) stands alone. *Barth, Inc. v. State Bd. of Tax Comm'rs,* 699 N.E.2d 800, 805 n. 14 (Ind. Tax Ct. 1998). While Pedcor asserts that the principle "each tax year stands alone" applies only to issue preclusion arguments, and not to the propriety of the methodology used to quantify obsolescence (*see* Pet'r Reply Br. at 2-3), this is clearly not the case. *See Pedcor,* 715 N.E.2d at 435 n.5 (stating that a property's assessment is to reflect the condition of the property as of the March 1 assessment date of the year at issue).

[8] Furthermore, assuming Pedcor prepared its quantification in 2001 (in preparation for its administrative hearing), determining how much obsolescence would be present in the property during the next 26 years is speculative at best.

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. 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.[9] Accordingly, the Indiana Board's final determination is AFFIRMED.

[9] 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).