INDIANA BOARD OF TAX REVIEW
Small Claims
Final Determination
Findings and Conclusions

Petition #:	**71-026-02-1-4-00179**
	71-026-02-1-4-00180
Petitioner:	**South Bend Leased Housing Associates LTD Partnerships**
Respondent:	**Portage Township Assessor (St. Joseph County)**
Parcel #:	**18-3030-1107**
	18-3027-1021
Assessment Year:	**2002**

The Indiana Board of Tax Review (the Board) issues this determination in the above matter, and finds and concludes as follows:

Procedural History

1. The Petitioner initiated an assessment appeal with the Madison County Property Tax Assessment Board of Appeals (PTABOA) on January 12, 2004.

2. The PTABOA issued notice of its decision on November 13, 2004.

3. The Petitioner filed its Form 131 Petition to the Indiana Board of Tax Review for Review of Assessment (Form 131 petition) on December 14, 2004. The Petitioner elected to have this case heard under the Board's procedures for small claims.

4. The Board issued a notice of hearing to the parties dated January 24, 2007.

5. On April 11, 2007, the Board held a consolidated administrative hearing on the above captioned petitions before its duly appointed administrative law judge, Alyson Kunack (ALJ).

6. Persons present and sworn in at hearing:

    a) For the Petitioner: Rex Hume, Uzelac & Associates

    b) For the Respondent: Rosemary Mandrici, Portage Township Assessor
    Ross Portolese, St. Joseph County PTABOA
    Kevin Klaybor, St. Joseph County PTABOA
    Dennis Dillman, St. Joseph County PTABOA
    David Wesolowski, St. Joseph County Assessor

c) Terrance Wozniak appeared as counsel for the Respondent. Sue Tranberg, Secretary for the PTABOA, was present as an observer.

Facts

7. The Petitioner operates the subject parcels as a low-income apartment complex under Section 42 of the Internal Revenue Code. The parcels are located at 512 Monroe, South Bend, Indiana. Unless otherwise indicated, the Board refers to the two parcels collectively as the "subject property."

8. The ALJ did not inspect the property.

9. The PTABOA determined the assessed value of the subject property as follows:

Parcel 18-0030-1107		
Land: $34,000	Improvements: $1,750,900	Total: $1,784,900
Parcel 18-3027-1021		
Land: $10,600	Improvements: $232,500	Total: $243,100

10. The Petitioner requested a total assessment of $1,212,300.[1]

Objections

11. The Petitioner objected to the Respondent introducing any testimony or exhibits. *Hume objection*. According to the Petitioner, the Respondent failed to respond to the Petitioner's April 2, 2007, facsimile letter requesting: (1) any documents the Respondent intended to offer at the hearing; (2) the identity of any witnesses the Respondent planned to call at the hearing; and (3) summaries of the Respondent's witness's testimony. *Pet'r Ex. 6; Hume testimony.*

12. The Respondent argued that the Petitioner submitted its request "just before" the scheduled hearing date and that it would have provided the requested information if the Petitioner had acted earlier. *Wozniak argument*; *Mandrici testimony*. Rosemary Mandrici testified that she was on vacation from March 30 to April 10, 2007, and that she was therefore unable to respond to the Petitioner's request. When she returned from vacation, she contacted the Board in an attempt to continue the hearing, but the Petitioner insisted that the hearing proceed as scheduled. *Mandrici testimony.*

[1] That is the assessment the Petitioner requested at the administrative hearing. On its Form 131 petition, the Petitioner requested the following assessment:

Parcel 18-0030-1107		
Land: $34,000	Improvements: $1,750,900	Total: $1,784,900
Parcel 18-3027-1021		
Land: $10,600	Improvements: $137,200	Total: $147,800

13. The Board's small-claims procedural rules state that "parties shall make available to all other parties copies of any documentary evidence and the names and addresses of all witnesses intended to be presented at the hearing at least five (5) days before the day of a small claims hearing." 52 IAC 3-1-5(f). Failure to comply with this provision "*may* serve as grounds to exclude evidence or testimony that has not been timely provided." 52 IAC 3-1-5(h)(emphasis added).

14. Assuming one day for overnight delivery, the Petitioner's request gave the Respondent only one business day to reply and still be timely under the Board's rules. Had the Respondent replied a day or two late, the timing of the Petitioner's request might justify overruling the Petitioner's objection. But the Respondent did not even attempt to respond to the Petitioner's request until the day before the scheduled hearing. The fact that Ms. Mandrici's was on vacation does not excuse the Respondent's failure.

15. Nonetheless, the Board overrules the Petitioner's objection. Unlike the Board's rules for non-small claims, the Board's small-claims rules do not require parties to exchange summaries of witnesses' anticipated testimony. *Compare* 52 IAC 2-7-1 with 52 IAC 3-1-5(f). Thus, the failure to provide such summaries does not justify excluding a witness from testifying.

16. A party's failure to respond to a request to identify its witnesses, however, may be grounds for excluding their testimony. But Respondent did not offer any witnesses other than Ms. Mandrici in her official capacity as the Respondent. The Petitioner can hardly claim surprise that the opposing party planned to testify at the hearing. And Ms. Mandrici's testimony went solely to impeaching and rebutting the appraisal that the Petitioner submitted in its case-in-chief rather than to any independent claims or defenses.

17. The Respondent's failure to provide the Petitioner with copies of its documentary evidence is similarly harmless. The Respondent's exhibits consist entirely of procedural documents, excerpts from the appraisal that the Petitioner itself submitted, income information provided by the Petitioner's own representative, and a copy of the Board's written findings in an unrelated case. *See Resp't Exs. 1-11*. The first two groups are already in the record as Board exhibits or Petitioner's exhibits. And the Petitioner was well aware of the third group of documents, given that its own representative submitted them to the Respondent.

Parties' Contentions

18. The Petitioner offered the following evidence and arguments:

    a) The subject property operates as a low-income housing complex under Section 42 of the Internal Revenue Code. *Pet'r Ex. 4 at 8*. Under that program, the rents that the Petitioner can charge are restricted to below-market-value levels. *Id. at 8, 44*. In exchange for agreeing to charge restricted rents, the subject property's original developer, like other program participants, was offered low-income-housing tax

credits, which could be used to offset federal income-tax obligations. *Pet'r Ex. 4 at 8, 85*. The developer then sold the property and tax credits to Nationwide Housing Group (NHG). *Id. at 8*. Although the Petitioner did not explain its relationship to NHG, it appears that the Petitioner now owns the subject property and that the tax credits are owned by either the Petitioner or its partners.

b) The Petitioner submitted an appraisal of the subject property prepared by Michael F. Amundson, a certified appraiser. *Pet'r Ex. 4.* Glasier Financial Group commissioned the appraisal for mortgage-financing purposes. *Id. at cover letter*. Mr. Amundson followed the Uniform Standards of Professional Appraisal Practice (USPAP) and estimated the subject property's market value as of November 9, 1999. *Pet'r Ex. 4 at cover letter, certification*.

c) Mr. Amundson performed his appraisal under two different scenarios. First, he estimated the property's value as though it were not part of the Section 42 program and therefore had no rent restrictions or access to tax credits. Under that scenario, Mr. Amundson considered the cost, sales-comparison, and income approaches to value. *Pet'r Ex. 4 at 34-85*. In applying the sales-comparison approach, Mr. Amundson examined sales of comparable properties that were not part of the Section 42 program. *Id. at 75-76.* Similarly, in applying the income approach, Mr. Amundson used market-rents rather the subject property's actual restricted rents. *Id. at 59-60.* Mr. Admundson gave the greatest weight to his conclusions under the income approach, and reconciled to a non-section 42 value of $1,930,000. *Id. at 85*. Out of that, he allocated $85,500 to personal property such as appliances and equipment needed to operate the apartment complex. *Id. at cover letter, 85*.

d) Next, Mr. Admundson estimated the market value of the subject property taking into account the benefits and burdens imposed by the Section 42 program. Once again, he considered all three generally recognized approaches to value. He gave no weight to the sales-comparison approach, however, due to the dissimilarity between the subject property and non-subsidized market-rate apartments that had sold recently. *Pet'r Ex. 4 at 83*. In applying the income approach, Mr. Admundson used the subject property's actual restricted rents. *Id at 52, 56*. Mr. Admundson gave the greatest weight to his conclusions under the income approach and estimated the real estate's value at $1,2695,000. *Id. at 84*.

e) Mr. Admundson, however, recognized that the project's market value as a whole included the value of the tax credits. Because Mr. Amundson viewed those credits as intangible property, he valued them separately from the real estate and tangible personal property. *Pet'r Ex. 4 at 4*. Mr. Amundson calculated the present value for each year's tax credit from 1999 through 2009 and arrived at a total present value of $1,800,000 as of November 1999. *Id. at 86-89*. After adding the tax credits' present value to his estimates concerning the value of the real estate and tangible personal property, Mr. Amundson estimated the value of the Section 42 project at $3,155,000. *Id. at 84*.

f) The Petitioner contends that the subject property's true tax value is $1,212,300. *Hume testimony; Pet'r Ex. 1.* The Petitioner arrived at the figure by taking Mr. Amundson's estimate of the real estate's value as a Section 42 property and using the consumer expenditure survey from the U.S. Department of Labor, Bureau of Labor Statistics to trend that value to January 1, 1999. *Id.; Pet'r Ex. 5.* The Petitioner did not include tax credits in its calculation, because the tax credits are intangible property, and Indiana's property taxes apply only to tangible property. *Pet'r Ex. 1.* The Petitioner also points to Ind. Code § 6-1.1-4-40, which provides Section 42 tax credits cannot be considered in valuing low-income property. *Hume testimony.* The Petitioner likewise excluded the $85,000 that Mr. Amundson allocated to personal property, because Indiana assesses and taxes business personal property separately from real property. *Id.*

19. The Respondent presented the following evidence and arguments:

a) The PTABOA lowered parcel 18-3030-1107's assessment from $2,203,800 to $1,784,900 after analyzing information the Petitioner submitted at the PTABOA hearing. *Mandrici testimony.*

b) The Petitioner's appraisal contains information about personal property. The Respondent was unable to find any personal property returns from the Petitioner. And the Respondent searched for those returns under both the Petitioner's name and the names of various related entities. *Mandrici testimony.*

c) The statute prohibiting assessors from considering tax credits in assessing Section 42 properties — Indiana Code § 6-1.1-4-40 — applies only to assessments 2004 forward. *Mandrici argument.* In a case involving a Section 42 property's 2002 assessment, the Board previously held that tax credits associated with the property should be considered in determining the property's market value. *Wozniak argument.*

Record

20. The official record for this matter is made up of the following:

a) The Form 131 petition.

b) The digital recording of the hearing.

c) Exhibits:

Petitioner Exhibit 1: Statement of Issues[2]
Petitioner Exhibit 2: Cover Letter for Pet'r Ex. 1

[2] The Petitioner submitted separate exhibits for each petition. Because the two sets of exhibits are virtually identical, the Board lists the exhibits only once.

Petitioner Exhibit 3: UPS shipping documents for Pet'r Exs. 1-2
Petitioner Exhibit 4: Appraisal of subject property dated November 9, 1999
Petitioner Exhibit 5: Bureau of Labor Statistics Consumer Expenditure Survey data
Petitioner Exhibit 6: Pre-hearing submissions and request for information

Respondent Exhibit 1: Form 131 petition
Respondent Exhibit 2: Form 115
Respondent Exhibit 3: Form 130 PTABOA appeal
Respondent Exhibit 4: Letter from Todd Shebesta of Easley, McCaleb & Associates, Inc., and income statements for the subject property
Respondent Exhibit 5: Summary of salient data from Petitioner's appraisal
Respondent Exhibit 6: Information regarding five (5) 'comparable' properties
Respondent Exhibit 7: Income Capitalization Approach to Value
Respondent Exhibit 8: Power of Attorney
Respondent Exhibit 9: Letter from PTABOA to Dominum Development & Acquisition LLC
Respondent Exhibit 10: Authorization of Petitioner's representative
Respondent Exhibit 11: IBTR Final Determination, *Camby Crossing Apartments, LP, v. Decatur Township Assessor,* petition no. 49-200-02-1-4-00366

Board Exhibit A: Form 131 Petition
Board Exhibit B: Notice of Hearing
Board Exhibit C: Hearing Sign-In sheet

d) These Findings and Conclusions.

Analysis

21. The most applicable governing cases are:

a) A petitioner seeking review of a determination of an assessing official has the burden to establish a prima facie case proving that the current assessment is incorrect, and specifically what the correct assessment would be. *See Meridian Towers East & West v. Washington Twp. Assessor*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also Clark v. State Bd. of Tax Comm'rs,* 694 N.E.2d 1230 (Ind. Tax Ct. 1998).

b) In making its case, the taxpayer must explain how each piece of evidence is relevant to the requested assessment. *See Indianapolis Racquet Club, Inc. v. Washington Twp. Assessor*, 802 N.E.2d 1018, 1022 (Ind. Tax Ct. 2004) ("[I]t is

the taxpayer's duty to walk the Indiana Board . . . through every element of the analysis").

c) Once the petitioner establishes a prima facie case, the burden shifts to the assessing official to rebut the petitioner's evidence. *See American United Life Ins. Co. v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004). The assessing official must offer evidence that impeaches or rebuts the petitioner's evidence. *Id; Meridian Towers*, 805 N.E.2d at 479.

22. The Petitioner did not provide sufficient evidence to support its contentions. The Board reaches this conclusion for the following reasons:

a) The 2002 Real Property Assessment Manual (Manual) defines the "true tax value" of real property as "the market value-in-use of a property for its current use, as reflected by the utility received by the owner or a similar user, from the property." 2002 REAL PROPERTY ASSESSMENT MANUAL 2 (incorporated by reference at 50 Ind. Admin. Code, r. 2.3-1-2). As related in the Manual, the appraisal profession traditionally has used three methods to determine a property's market value: the cost approach, the sales comparison approach, and the income approach. *Id*. at 3, 13-15. In Indiana, assessing officials generally assess real property using a mass-appraisal version of the cost approach, as set forth in the Real Property Assessment Guidelines for 2002 – Version A (Guidelines).

b) A property's market value-in-use, as determined by applying the Guidelines' cost approach, is presumed to be accurate. *See* MANUAL at 5; *Kooshtard Property VI, LLC v. White River Twp. Assessor*, 836 N.E.2d 501, 505 (Ind. Tax Ct. 2005) *reh'g den. sub nom. P/A Builders & Developers, LLC,* 842 N.E.2d 899 (Ind. Tax 2006). But a taxpayer may offer evidence to rebut that presumption, provided such evidence is consistent with the Manual's definition of true tax value. MANUAL at 5. A professional appraisal prepared in accordance with the Manual's definition of true tax value generally will suffice. *Id.*; *Kooshtard Property VI*, 836 N.E.2d at 505, 506 n.1.

c) The Petitioner submitted an appraisal prepared by Mr. Amundson, a licensed professional appraiser. *Pet'r Ex. 4*. Mr. Amundson prepared his appraisal in accordance with USPAP. And the appraisal estimates the subject property's value as of November 9, 1999, only 10 months removed from the valuation date of January 1, 1999. The Petitioner, however, relies on Mr. Amundson's estimate of the subject property's value as limited by the Section 42 rent restrictions while ignoring the benefits from the tax credits provided as a counterbalancing incentive for those rent restrictions. The Petitioner justifies its position, in part, on grounds that the tax credits are intangible property.

d) The Indiana Tax Court, however, has squarely rejected similar claims by other Section-42-property owners. *Hometowne Associates, L.P., v. Maley*, 839 N.E.2d 269, 280 n. 17 (Ind. Tax Ct. 2005); *Pedcor Invs.-1990-XIII, L.P. v. State Bd. of Tax Comm'rs,* 715 N.E. 2d 432, 437-39 (Ind. Tax Ct. 1999).

e) In *Pedcor*, the court characterized as "wholly unmeritorious" the taxpayer's claim that Section 42 tax credits could not be considered in determining the degree to which its property suffered from obsolescence. *Pedcor*, 715 N.E.2d at 438. The taxpayer premised its claim, in part, on grounds that its partners, rather than the taxpayer, used the credits. But as the court explained: "The deed restrictions created financial benefits, and these benefits cannot be ignored simply because they pass through to the partners (who, incidentally are jointly and severally liable with Pedcor for any unpaid property tax. . . .)" *Id*. The court similarly rejected the taxpayer's claim that the tax credits could not be considered in valuing its property because they were subject to recapture if the property were to cease serving low-income tenants. In so holding, the court noted that the taxpayer did not consider the tax credits speculative when it actively sought them in building its apartment complex. *Id*. As of the assessment date at issue, the taxpayer had the tax credits "firmly in hand," and the court was unwilling to ignore those credits simply because the taxpayer might release its grip on them in the future. *Id.* The court also cited with approval out-of-state cases in which courts generally held that the benefits to a property from a governmental program must be considered along with any burdens imposed by that program. *Id*. at 437 n. 10.[3]

f) In *Hometowne Associates*, the Tax Court reaffirmed its holding in *Pedcor*. *Hometowne Associates*, 839 N.E.2d at 280 n. 17. The court further expressly rejected the taxpayer's argument that its tax credits could not be considered in determining the extent to which its property suffered from obsolescence because the credits themselves were intangible personal property. *Id.* As in *Pedcor*, the court cited to a number of decisions from other jurisdictions to support its holding. *Id.*[4]

g) While the assessments at issue in *Pedcor* and *Hometowne Associates* occurred before Indiana switched to a market value-in-use system, the court noted that obsolescence determinations under the State Board of Tax Commissioners' regulations necessarily incorporated market value concepts. And the cases upon which the court relied were from jurisdictions where property was taxed based upon market value. Thus, both *Pedcor* and *Hometowne Associates* are applicable under Indiana's current market value-in-use system.

h) In an apparent attempt to avoid the Tax Court's holdings in *Hometowne Associates and Pedcor*, the Petitioner points to Ind. Code § 6-1.1-4-40, which provides: "The value of federal income tax credits awarded under Section 42 of

[3] Citing *Kankakee County v. Property Tax Appeal Bd*., 131 Ill. 2d 1, 544 N.E.2d 762, 769, 136 Ill. Dec. 76 (1989); *Glenridge Dev. Co. v. City of Augusta*, 662 A.2d 928, 931 (Me. 1995); *Meadowlanes Ltd. Dividend Housing Ass'n v. City of Holland*, 437 Mich. 473, 473 N.W.2d 636, 649 (1991)*; Alta Pac. Assocs. Ltd. v. State Tax Comm'n*, 931 P.2d 103, 119 (Utah 1997).

[4] Citing *Rainbow Apartments v. Illinois Property Tax Appeal Bd*., 326 Ill. App. 3d 1105, 762 N.E.2d 534, 537, 260 Ill. Dec. 875 (2001); *Pine Pointe Housing, L.P. v. Lowndes County Bd. of Tax Assessors*, 254 Ga. App. 197, 561 S.E.2d 860, 863-65 (2002); *In the Matter of Ottawa Housing Assoc., L.P*., 27 Kan. App. 2d 1008, 10 P.3d 777, 780 (2000); *Parkside Townhomes, Assocs. v. Bd. of Assessment Appeals*, 711 A.2d 607, 611 (Pa. Commw. Ct. 1988).

the Internal Revenue Code may not be considered in determining the assessed value of low income housing tax credit property." I.C. § 6-1.1-4-40 (2006). That statute, however, was added by Public Law 81-2004, section 58, and did not become effective until March 1, 2004. P.L. 81-2004, SEC. 58. Consequently, the law, as it existed prior to that date, and which is embodied in *Hometowne Associates* and *Pedcor*, controls the March 1, 2002, assessment at issue in this appeal.

i) Thus, because the Petitioner ignored all benefits from the Section 42 tax credits, it failed to make a prima facie case that the current assessment is incorrect and that the subject property should be assessed for $1,212,300. In fact, if one simply adds to the Petitioner's request the value of the remaining tax credits tied to the subject property, the property's total value would be $2,030,043.[5] That number is slightly more than the property's current assessment of $2,028,000. The Board takes no position on whether there might be a different way to value the tax credits' effect on the subject property's market value-in-use — one that would result in something less than a dollar-for-dollar increase. To the extent the Petitioner wished to rely on such an alternate approach, however, it was required to offer supporting evidence. The Petitioner did not do so, resting instead on its mistaken belief that the tax credits were irrelevant to the subject property's true tax value.

Conclusion

j) The Petitioner failed to make a prima facie case showing an error in the assessment. The assessment set forth by the PTABOA shall remain.

Final Determination

In accordance with the above findings and conclusions the Indiana Board of Tax Review now determines that the assessment should be affirmed.

ISSUED: **July 9, 2007**

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Commissioner,
Indiana Board of Tax Review

[5] Mr. Amundson calculated the present value of each year's tax credit. The November 1999 present values of the tax credits from 2002 forward total $817,743.39. *Pet'r Ex. 4 at 88.*

IMPORTANT NOTICE

- Appeal Rights -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5, as amended effective July 1, 2007, by P.L. 219-2007, and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice. The Indiana Tax Court Rules are available on the Internet at <http://www.in.gov/judiciary/rules/tax/index.html>. The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>. P.L. 219-2007 (SEA 287) is available on the Internet at <http://www.in.gov/legislative/bills/2007/SE/SE0287.1.html>