

REPRESENTATIVE FOR PETITIONER: Sandra Bickel
Ice Miller

REPRESENTATIVE FOR RESPONDENT: Marilyn Meighen
Meighen & Associates, P.C.

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

BBR-Vision III, LP,)	Petition Number: 70-011-05-1-4-00004
)	Parcel Number: 0110258300
Petitioner,)	
)	
v.)	
)	Rush County
Rushville Township Assessor,)	Rushville Township
)	2005 Assessment
Respondent.)	

Appeal from the Final Determination of the
Rush County Property Tax Assessment Board of Appeals

January 21, 2009

FINAL DETERMINATION

The Indiana Board of Tax Review (“Board”) has reviewed the evidence and arguments presented in this case. The Board now enters findings of fact and conclusions of law on the following issue: Did the Petitioner prove the 2005 assessment for its new, sixty-unit, Section 42 housing project must be lowered from \$2,451,000 to \$540,000 based on Ind. Code § 6-1.1-4-39, Ind. Code § 6-1.1-4-40, and an appraisal’s income approach to value trended to January 1, 1999?

PROCEDURAL HISTORY

1. The Petitioner initiated an appeal of the 2005 assessment for the subject property with a letter dated May 31, 2005. The Petitioner also provided the first two pages of a Form 130 with the letter.
2. The Rush County Property Tax Assessment Board of Appeals (“PTABOA”) issued its determination not to change the assessment on October 3, 2005. It determined the assessed value is \$2,451,000 (land \$167,300 and improvements \$2,283,700).
3. On November 1, 2005, the Petitioner filed a Form 131 Petition for Review regarding that decision. According to the Form 131, the Petitioner claimed the assessed value should be \$944,900 (land \$117,500 and improvements \$827,400). Subsequently, the Petitioner contended the total assessed value should be \$540,000.
4. Kay Schwade, the designated Administrative Law Judge, held a hearing on the petition in Rushville on August 14, 2008. She did not inspect the property.
5. The following persons were sworn as witnesses at that hearing:
 - For the Petitioner – David Bennett, developer,
 - Elizabeth Mutzl, appraiser,
 - Melanie Reusze,
 - For the Respondent – Frank Kelly, Nexus Group,
 - Jo Ann Herbert, Rush County Assessor.¹
6. The Petitioner presented the following exhibits:
 - Petitioner Exhibit A – Application for Final Allocation of Rental Housing Financing,
 - Petitioner Exhibit B – 2006 and 2007 Audit Reports for BBR-Vision III, LP,

¹ Ms. Herbert was sworn as a witness, but she did not testify.

Petitioner Exhibit C – Appraisal Report for Village at Flatrock Apartments,²
Petitioner Exhibit D and E – Form 131, Form 115, Request for preliminary
conference, Notice of Appearance, and Form 130,³
Petitioner Exhibit F – Appraiser’s revised income, expense, and value calculation
for the subject property,
Petitioner Exhibit G – Property record cards (“PRC”) and Property Maintenance
Report (“PMR”) for the subject property,
Petitioner Exhibit H – PRC and PMR for East Park Limited,
Petitioner Exhibit I – PRC and PMR for Oakwood Manor Limited,
Petitioner Exhibit J – Not offered,
Petitioner Exhibit K – Per unit comparison of assessed values for the subject
property, East Park Limited, and Oakwood Manor Limited.

7. The Respondent presented the following exhibits:

Respondent Exhibit 1 – PRC for Hi-Bred International,
Respondent Exhibit 2 – PRC for SCP 2005-C21-035 LLC,
Respondent Exhibit 3 – PRC for Rushville District United Methodist Church,
Respondent Exhibit 4 – PRC for Fujitsu Ten,
Respondent Exhibit 5 – PRC for Charles and Nancy Farthing,
Respondent Exhibit 6 – Rush County 2002 Ratio Study,
Respondent Exhibit 7 – Analysis of valuation and per unit tax liability for nine
Rushville apartments with over 15 units,
Respondent Exhibit 8 – PRC and PMR for Lower Heights Annex,
Respondent Exhibit 9 – PRC and PMR for Rushville Association For Homes,
Respondent Exhibit 10 – PRC and PMR for Rushville Commons Ltd.,
Respondent Exhibit 11 – PRC and PMR for R&B Unlimited Properties, LLC,
Respondent Exhibit 12 – PRC and PMR for Private Investments, LLC (at 1616
North Main Street),

² The subject property is known as Village at Flatrock Apartments.

³ The Petitioner collectively marked this entire group of documents as Petitioner D and E.

Respondent Exhibit 13 – PRC and PMR for Private Investments, LLC (at 1102 North Benjamin Street).

8. The following additional items are recognized as part of the record of proceedings:
 - Board Exhibit A – The 131 Petition with attachments,
 - Board Exhibit B – Notice of Hearing,
 - Board Exhibit C – Hearing Sign in Sheet,
 - Board Exhibit D – Notice of Representation,
 - Board Exhibit E – Notice of Appearance.

SUMMARY OF CONTENTIONS

9. The Petitioner contends the assessment must be based on the income approach because among the cost, sales, and income approaches, the income approach establishes the lowest value, which is what Ind. Code § 6-1.1-4-39(a) allows for the assessment. Additionally, the Petitioner contends that using the cost approach is prohibited by Ind. Code § 6-1.1-4-40 because it gives consideration to the value of federal tax credits.
10. The Respondent contends that the Petitioner is relying on an appraisal that does not accurately reflect market value-in-use and the value established using cost approach is the most appropriate value because the subject property is newly constructed. The Respondent also contends that the income approach values the subject property at 20% of its value and such an assessment would be unconstitutional because it would not be uniform and equal.

FINDINGS OF FACT

11. The subject property is an apartment complex located at 157 W. Foster Heights Road in Rushville. It is a sixty-unit, low income housing project funded through the federal tax credit program under Section 42 of the Internal Revenue Service Code. The tax credits are allocated through the Indiana Housing Finance Authority. *Bennett testimony; Pet'r Ex. A.*

12. The subject property is required to operate under a 30-year rent restriction agreement. The rent restriction agreement is recorded with the Rush County Recorder. The rents may not exceed the maximum allowable rent determined by the Department of Housing and Urban Development (“HUD”). HUD determines the maximum allowable rents based on an area’s average median income with adjustments for family size. *Bennett testimony; Ruesze testimony.*

13. The subject property consists of four new apartment buildings and a new clubhouse, but on the assessment date much of the project was not finished. As of March 1, 2005, only the clubhouse and building 1 were completed. At that time 23% of the project was rentable. In April 50% was rentable. In May 73% was rentable. And in June 100% of the project was rentable. The following chart shows the apartment buildings and the dates they got occupancy permits.

Building 1	February 24, 2005
Building 2	March 30, 2005
Building 3	April 27, 2005
Building 4	May 25, 2005

Mutzl testimony; Pet’r Ex. C at 22.

14. Mitchell Appraisals, Inc. appraised the subject property. Elizabeth Mutzl and Bonnie Mitchell, MAI, did the work. They certified their appraisal was performed according to the instructions and rules provided by the International Association of Assessing Officials (“IAAO”) and it conforms to the Uniform Standards of Professional Appraisals Practice (“USPAP”). *Mutzl testimony; Pet’r Ex. C at 54.*

15. The appraisal states that it represents the retrospective market value-in-use as of March 1, 2005, trended to January 1, 1999. Its purpose is for the ad valorem property tax assessment appeal. *Mutzl testimony; Pet’r Ex. C at 2, 7.*

16. The appraisal considered all three approaches to value. It states that the cost approach was not developed because the result would have been substantially the same as the

assessor's cost value. It states that the sales comparison approach was not applicable because of the lack of Section 42 housing sales. While there were sales of properties purchased for the purpose of rehabbing for Section 42 housing, the appraiser did not analyze those sales because the properties were not Section 42 housing when they sold. The appraisal uses only the income approach for its ultimate conclusion about value. And it does not reflect any analysis of the income statements of other Section 42 housing. *Mutzl testimony; Pet'r Ex. C at 6.*

17. The appraisal concludes that the value of the subject property with one apartment building complete was \$790,000 as of March 1, 2005. *Mutzl testimony; Pet'r Ex. C at 47.* The appraisal recognizes that the value must be trended back to January 1, 1999. But before doing so, the appraisal deducted \$62,700 for furniture, fixtures, and equipment to reach a value of \$727,300 for the real property. Then the appraisal concludes the trended value was \$600,000 as of January 1, 1999. *Mutzl testimony; Pet'r Ex. C at 51.*
18. In June 2005, HUD reduced the utility allowance applicable to the subject property's rents. That action reduced the maximum allowable rents for the subject property. The overage in rents charged was then refunded to the tenants. Using the adjusted maximum allowable rents, the appraisal's indicated value would have been \$540,000. *Mutzl testimony; Pet'r Ex. F.*
19. For the 2005 assessment all new construction in Rush County was valued in the same manner as any other commercial property—starting with the cost approach from the Guidelines. *Kelley testimony; Resp't Ex. 1, 2, 3, 4, 5.*
20. Nexus Group performed the sales ratio study for Rush County in 2002. As part of the assignment, Nexus reviewed a sampling of properties which included improved commercial properties. The review entailed conducting a field inspection of the selected property, valuing the property using the Guidelines, and comparing that value to the value established by the assessor's office. The subject property was not included in the

Ratio Study as an improved commercial property because it did not exist as improved in 2002. *Kelley testimony; Resp't Ex. 6.*

21. The Department of Local Government Finance approved Rush County's 2002 Ratio Study. It met state standard with a median of .98 to 1.03 and a COD of less than 20. *Kelley testimony; Resp't Ex. 6.*
22. Additional facts will be supplied as necessary.

STATUTES

23. Two statutes are particularly relevant to this dispute:

Indiana Code § 6-1.1-4-39(a)

For assessment dates after February 28, 2005, ... the true tax value of real property regularly used to rent or otherwise furnish residential accommodations for periods of thirty (30) days or more and that has more than four (4) rental units is the lowest valuation determined by applying each of the following appraisal approaches:

- (1) Cost approach that includes an estimated reproduction or replacement cost of buildings and land improvements as of the date of valuation together with estimates of the losses in value that have taken place due to wear and tear, design and plan, or neighborhood influences.
- (2) Sales comparison approach, using data for generally comparable property.
- (3) Income capitalization approach, using an applicable capitalization method and appropriate capitalization rates that are developed and used in computations that lead to an indication of value commensurate with the risks for the subject property use.

Indiana Code § 6-1.1-4-40

The value of federal income tax credits awarded under Section 42 of the Internal Revenue Code⁴ may not be considered in determining the assessed value of low income housing tax credit property.

⁴ 26 U.S.C.A. § 42.

CONCLUSIONS OF LAW

24. 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).
25. Real property in Indiana is assessed on the basis of its “true tax value.” *See* Ind. Code § 6-1.1-31-6(c). “True tax value” is defined as “[t]he market value-in-use of a property for its current use, as reflected by the utility received by the owner or similar user, from the property.” 2002 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.3-1-2). There are three generally accepted techniques to calculate market value-in-use: the cost approach, the sales comparison approach, and the income approach. The primary method for assessing officials to determine market value-in-use is the cost approach. *Id.* at 3. To that end, Indiana promulgated a series of guidelines that explain the application of the cost approach. The value established by use of those guidelines, while presumed to be accurate, is merely a starting point. A taxpayer is permitted to offer evidence relevant to market value-in-use to rebut that presumption. MANUAL at 5.
26. A residential rental property with more than four rental units gets the benefit of specific valuation alternatives authorized by Ind. Code § 6-1.1-4-39(a) because the true tax value is the lowest valuation determined by applying each of the three generally accepted approaches to value. The subject property is clearly the type of property to which this provision applies. Consequently, this statute permits the Petitioner to make a case based on the lowest value from the cost approach, the comparable sales approach, and the income approach.⁵

⁵ The Respondent claimed that applying the lowest value derived from the three approaches would result in an assessment that does not meet the Department of Local Government Finance’s standard for an acceptable sales/assessment ratio study or satisfy constitutional requirements for uniformity and equality of assessment. Disposition of this case, however, does not require the Board to make a determination about those claims.

27. The valuation date for a 2005 assessment is January 1, 1999. Regardless of the approach used to prove the market value-in-use of a property, the assessment must reflect its value as of January 1, 1999. *Long v. Wayne Twp. Assessor*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005); MANUAL at 4. Consequently, a party relying on market value evidence to establish the market value-in-use must provide some explanation as to how the evidence demonstrates or is relevant to the property's value as of January 1, 1999. *Id.*
28. The Tax Court has stated “the most effective method to rebut the presumption that an assessment is correct is through the presentation of a market value-in-use appraisal, completed in conformance with the Uniform Standards of Professional Appraisal Practice (USPAP).” *O'Donnell v. Dep't of Local Gov't Fin.*, 854 N.E.2d 90, 94 (Ind. Tax Ct. 2006); *Kooshtard Prop. VI, LLC v. White River Twp. Assessor*, 836 N.E.2d 501, 506 n.6 (Ind. Tax Ct. 2005).
29. On the surface, the Petitioner appears to have presented such a case with the appraisal and Appraiser Mutzl's related testimony. The appraisal for the subject property purportedly provides a retrospective market value-in-use as of March 1, 2005, trended to January 1, 1999. *Pet'r Ex. C*. Using only the income approach, the appraiser determined the market value-in-use for the subject property would have been \$1,630,000 if it were 100% rentable on March 1, 2005. But because the subject property had only one of four buildings ready for occupancy on March 1, 2005, the appraiser adjusted the income to reflect only the income of the rentable building for the time period available. The appraisal determined the market value-in-use of the subject property as of March 1, 2005, trended to January 1, 1999, would be \$600,000. *Id.* Updated income information and revised calculations that are not part of the appraisal purport to establish an even lower value at \$540,000.
30. While Ind. Code § 6-1.1-4-39(a) permits market value-in-use to be determined on the income approach for a sixty-unit apartment complex, closer examination of the manner in which that approach was applied in both the appraisal and Ms. Mutzl's updated calculations for this particular case reveals that they are not consistent with the concept

that all real property must be assessed as it existed as of the assessment date, March 1, 2005. *See* Ind. Code § 6-1.1-2-1.

31. The way the income approach was applied in this case effectively gives no value whatsoever to the three apartment buildings that were still under construction on the assessment date. *Pet'r Ex. C at 47-48*. There is no evidence to establish how far along construction had progressed on buildings 2, 3, and 4 as of March 1, 2005. The occupancy permits, however, were obtained shortly thereafter in March, April, and May. Consequently, it is reasonable to conclude that some substantial portion of those new buildings existed on the assessment date. A proper assessment—even one based entirely on the income approach to value—cannot ignore such property. Ind. Code § 6-1.1-2-1.

32. The income approach “considers the subject property as an investment and, to that end; its value is based on the rent it will produce for the owner.” *MANUAL* at 14. How much rent the subject property will produce is a critical component for the income approach. According to the appraisal, if all the apartments had been available for the entire year, the potential gross income from rental units would have been \$347,904. *Pet'r Ex. C at 34*. But the appraisal calculates a “loss” of \$102,438 because none of the buildings could be occupied in January or February, only one building was available in March, two in April, three in May, and finally all four were available in June. It concludes that “[t]he value derived from applying 100% income for all units for 12 months is overstating the assessment.” *Pet'r Ex. C at 47*. The Board, however, does not accept that conclusion. The Petitioner failed to establish that such a major reduction of anticipated income (approximately 30%) for circumstances that are unique to the year of construction is in accordance generally accepted appraisal principles. Furthermore, this appraisal’s methodology is not consistent with the Assessment Manual’s description of the income approach because once the buildings are finished there is no reason to anticipate that they will not produce full rent for the owner. Consequently, the Petitioner’s evidence related to the income approach has no probative value in this case. It does not overcome the presumption that the existing assessment on the subject property is correct.

33. The Petitioner also attempted to make its case based on Ind. Code § 6-1.1-4-40, which prohibits consideration of federal income tax credits in determining the assessed value of this type of property. Ms. Reusze's testimony established that the tax credits are used to pay for most of the construction costs for the subject property. Therefore, the Petitioner concludes that the Respondent's assessment based on the cost approach is a "backdoor way of undoing the statute." The Petitioner cited no other authority in support of this argument. Section 40 is a relatively new provision that was added by P.L.81-2004, SEC.58. This case appears to pose a question of first impression about exactly what this statute means and how far the prohibition against considering federal tax credits extends. Neither party provided much cogent argument on this point.
34. The Petitioner did not establish the tax credits were directly considered in determining the existing assessment. The fact that tax credits were a source of funds for the construction costs is only an indirect connection. Even though the Petitioner wants a valuation based on the income approach, the same kind of connection probably could be made between the funding for the construction and the anticipated income from the project.
35. The Petitioner established a connection between the tax credits and the construction costs, but it failed to prove that the existing assessment violates the prohibition contained in Ind. Code § 6-1.1-4-40.
36. The Petitioner failed to make a case for any reduction of the current assessment. When a taxpayer fails to provide substantial evidence to support a claim, the Respondent's duty to support the assessment is not triggered. *See Lacy Diversified Indus. v. Dep't of Local Gov't Fin.*, 799 N.E.2d 1215, 1221-1222 (Ind. Tax Ct. 2003); *Whitley*, 704 N.E.2d at 1119 (Ind. Tax Ct. 1998).

SUMMARY OF FINAL DETERMINATION

37. The Petitioner failed to make a credible case with the appraisal that it offered or any of its other evidence. The Board finds in favor of the Respondent and determines the assessed value of the subject property should not be changed.

This Final Determination of the above captioned matter is issued by the Indiana Board of Tax Review on the date first written above.

Commissioner, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

- 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>