

REPRESENTATIVE FOR PETITIONER:

Bradley Hasler, Bingham McHale, LLP
Edwin K. DeWald, DeWald Property Tax Services

REPRESENTATIVE FOR RESPONDENT:

Frank Agostino, St. Joseph County Attorney

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

Lakeville Associates, Ltd.	)	Petition No.:	71-028-06-1-4-12144
)		
Petitioner,	)	Parcel No.:	20-1057-0004
)		
v.	)	County:	St. Joseph
)		
St. Joseph County Assessor,	)	Township:	Union
)		
Respondent.	)	Assessment Year:	2006

Appeal from the Final Determination of the
St. Joseph County Property Tax Assessment Board of Appeals

February __, 2010

FINAL DETERMINATION

The Indiana Board of Tax Review (“Board”), having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Introduction

1. In this assessment appeal, the Petitioner relied mainly on the valuation opinion of a contingently paid former appraiser. Because the Board finds that opinion too unreliable to be given probative weight, it upholds the subject property's assessment.

Procedural History

2. On July 31, 2007, the Petitioner filed a Form 130 petition with the St. Joseph County Assessor contesting the subject property's 2006 assessment. On May 28, 2008, the PTABOA issued its determination leaving the assessment unchanged. Two days later, the Petitioner filed a Form 131 petition with the Board. The Board has jurisdiction over the Petitioner's appeal under Ind. Code §§ 6-1.1-15 and 6-1.5-4-1.

Hearing Facts and Other Matters of Record

3. On November 17, 2009, the Board's Administrative Law Judge, Patti Kindler ("ALJ"), held a hearing on the Petitioner's appeal. Neither the Board nor the ALJ inspected the subject property.

4. The following people were sworn in as witnesses:

For the Petitioner:

Edwin K. DeWald, DeWald Property Tax Services
Randall C. Warner, DeWald Property Tax Services

For the Respondent:

David Wesolowski, St. Joseph County Assessor
Ross Portolese, PTABOA member
Ralph Wolfe, PTABOA member

5. The Petitioner submitted the following exhibits:

Petitioner Exhibit 1 – Market Value-In-Use Calculations (Confidential)
Petitioner Exhibit 2 – Photographs of eight Section 515 properties
Petitioner Exhibit 3 – Rural Development Reports (1 page)

Petitioner Exhibit 4 – Form 130 petition, Section IV—“Results of Township Assessor/Petitioner Conference”

Petitioner Exhibit 5 – Randall C. Warner’s resume, and Notice of Appearance for Jeffrey Bennett and Bradley Hasler

6. The Respondent submitted the following exhibits:

- Respondent Exhibit 1 – Form 131 petition
- Respondent Exhibit 2 – Form 130 petition
- Respondent Exhibit 3 – Form 115 determination
- Respondent Exhibit 4 – Power of Attorney for DeWald Property Tax Services
- Respondent Exhibit 5 – PTABOA Record of Hearing
- Respondent Exhibit 6 – PTABOA Notice of Hearing
- Respondent Exhibit 7 – PTABOA Hearing Script
- Respondent Exhibit 8 – Subject property record card

7. The Board recognizes the following additional items as part of the record of proceedings:

- Board Exhibit A – Form 131 petition with attachments
- Board Exhibit B – Notice of Hearing
- Board Exhibit C – Hearing sign-in sheet
- Board Exhibit D – Respondent’s Exhibit Coversheet & Witness List
- Board Exhibit E – Notice of Appearance for Frank Agostino
- Board Exhibit F – Notice of County Assessor Appearance as an Additional Party¹

8. The subject property is located at 100 North Mott Street in Lakeville, Indiana. It is a 36-unit apartment complex that the Petitioner operates under a federal program that the Petitioner’s witness, Randall C. Warner, identified as “Section 515.”² According to Mr. Warner, the United States Department of Agriculture (“USDA”) regulates the Section 515 program, which provides for low-income multi-family housing in rural areas.
Warner testimony.

9. The PTABOA determined the following values for the subject property:

Land: \$80,200 Improvements: \$614,900 Total: \$695,100.

¹ The Assessor did not need to intervene as a party because the appeal statute automatically makes the Assessor a party. *See* Ind. Code § 6-1.1-15-3(b) (“The county assessor is the party to the review under this section to defend the determination of the county board.”).

² Mr. Warner did not cite to the statute under which the Section 515 program operates. The Board assumes that it is Title V, Section 515 of the 1949 Housing Act (42 U.S.C. § 1485).

10. At hearing, the Petitioner requested an assessment of \$360,000.³

Administrative Review and the Parties' Burdens

11. A taxpayer seeking review of an assessing official's determination must make a prima facie case proving both that the current assessment is incorrect and what the correct assessment should 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).
12. In making its case, the taxpayer must explain how each piece of evidence relates to its 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”).
13. If the taxpayer makes a prima facie case, the burden shifts to the respondent to offer evidence to rebut or impeach the taxpayer's evidence. *See American United Life Ins. Co. v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004); *Meridian Towers*, 805 N.E.2d at 479.

Analysis

A. Parties' Contentions

1. The Petitioner's contentions

14. The Petitioner claimed that the subject property was over-assessed and that its market value-in-use was only \$360,000. To support its claim, the Petitioner offered Mr. Warner's "Market Value-In-Use Calculations." *Pet'r Ex. I*. Mr. Warner has a real estate broker's license. He is also certified by the Department of Local Government Finance as a Level I and II assessor-appraiser and as a tax representative. He has worked in various

³ On its Form 131 petition, the Petitioner requested values of \$80,200 for the land and \$41,100 for the improvements, for a total assessment of \$121,300.

fields, including commercial lending and real estate appraisal. From 1983-87, he worked for the United States Department of Housing and Urban Development valuing low-income apartment complexes. He also worked as an Indiana Certified General Appraiser for a number of years, but he gave up his license in 1998. *Warner testimony; Pet'r Ex. 5.*

15. Mr. Warner identified Dewald Property Tax Services as his place of employment, although Mr. Dewald testified that Mr. Warner was an independent contractor. *Warner testimony; Dewald testimony.* In any event, Mr. Warner signed the power of attorney that the Petitioner gave to Dewald Property Tax Services. *Resp't Ex. 4.* And both Messrs Warner and Dewald answered “yes” to the following question from Petitioner’s counsel: “Pursuant to the IBTR disclosure rules under 52 IAC 1-2-4, . . . does a contingent fee arrangement exist with respect to this property in this case?” *Dewald testimony; Warner testimony.* According to Mr. Dewald, under that agreement, “we share in the savings that we are able to obtain for the taxpayer.” *Dewald testimony.*
16. In his analysis, Mr. Warner used two generally accepted valuation methods—the sales-comparison and income approaches. *Warner testimony; Pet'r Ex. 1.* He did not use the cost approach because it is difficult to estimate depreciation in older buildings and the subject property was built in 1985. *Warner testimony.*

a. Mr. Warner’s sales-comparison analysis

17. In his sales-comparison analysis, Mr. Warner looked at all the Section 515 complexes that sold in Indiana between 2005 and 2008. He found eight such properties. *Warner testimony; Pet'r Ex. 1.* Because section 515 properties (1) are subject to rent and expense restrictions, (2) must stay in the Section 515 program for 50 years, and (3) cannot be sold outside the program without the USDA’s approval, Mr. Warner did not look at any non-Section-515 properties. Thus, under his market-value-in-use analysis, Mr. Warner valued the property as a rent-restricted Section 515 property. *Warner testimony.*

18. Mr. Warner identified six relevant characteristics—(1) property rights conveyed, (2) conditions of sale, (3) market conditions (time), (4) location, (5) economic conditions, and (6) physical characteristics (average bedrooms per unit, year built, design, construction, central HVAC, and parking)—and compared each comparable property to the subject property based on those characteristics. For each characteristic, Mr. Warner ranked the comparable property as inferior, similar, or superior to the subject property. He then “netted” those rankings to determine an overall comparability rating for each property. *Warner testimony; Pet’r Ex. 1*. He summarized the results in a table as follows:

Comparable Sales	Price/Unit	Overall Comparability
Sale 8	\$6,129	Inferior
Sale 7	\$7,667	Inferior
Sale 2	\$7,813	Inferior
Sale 5	\$9,781	Similar
Subject	\$10,000	Equal
Sale 6	\$13,916	Superior
Sale 1	\$14,737	Superior
Sale 4	\$14,830	Superior
Sale 3	\$18,657	Superior

Pet’r Ex. 1 at 2.

19. As shown in his table, Mr. Warner bracketed the subject property between Sale #5—the sole “similar” property—and Sale #6, the lowest priced “superior” property. *Pet’r Ex. 1 at 2*. In reaching his estimate for the subject property, Mr. Warner rounded the “similar” property’s per-unit value from \$9,781 to \$10,000. *Warner testimony; Pet’r Ex. 1 at 2*. Mr. Warner then multiplied that \$10,000-per-unit price by the subject property’s 36 apartment units to arrive at an estimated market value-in-use of \$360,000. *Id.*

b. Mr. Warner's income-approach analysis

20. Mr. Warner began his income-approach analysis by estimating the subject property's net operating income. To reach that estimate, he looked at the property's actual income and expenses for 2005-2007. *Warner testimony; Pet'r Ex. 1 at 3.* He gave the most weight to the 2007 data because the subject property's ratio of expenses to potential gross income and its expense per unit in that year were in line with published data for Section 515 properties in the Midwest. *Warner testimony; Pet'r Ex. 3.* Mr. Warner then extracted capitalization rates from three of the eight sales that he had used in his sales-comparison analysis. *Warner testimony; Pet'r Ex. 1 at 4.* Those capitalization rates ranged from 10.23% to 12.05%, with a median of 11.54% and a mean of 11.27%. *Id.* Mr. Warner settled on a rate of 11.5% to capitalize his estimated net operating income, which yielded a total value of \$361,739. *Id.*

c. Reconciliation

21. Mr. Warner's conclusions under the sales-comparison and income approaches were very close to each other. He therefore settled on \$360,000 as indicated in his sales-comparison approach. *Warner testimony.* Also, Indiana's assessment rules call for apartment buildings with more than four rental units to be assessed at the lowest value determined under the three generally accepted appraisal approaches. *See Pet'r Ex. 1 at 5.*
22. While Mr. Warner had estimated the subject property's value as of March 1, 2006, he testified that the local market for properties of its type did not change between the assessment date and the valuation date. He therefore believed that the subject property was worth \$360,000 as of both dates. *Warner testimony.*

d. Agreement between the Petitioner and the Union Township Assessor

23. Finally, the Petitioner pointed to an agreement between the Petitioner and the Union Township Assessor as support for Mr. Warner's value estimate. To show that agreement,

the Petitioner offered one page from the Petitioner's Form 130 petition. *Pet'r Ex. 4*. The page includes "Section IV: Results of Township Assessor/Petitioner Conference," and it contains boxes for the parties to list the amounts for which they contend that the property should be assessed. The same amounts are listed for each party: Land at \$80,200 and improvements at \$246,100. And the page is signed by both the Petitioner and the Union Township Assessor. *Id.* The PTABOA, however, did not accept that agreement.

2. The Respondent's contentions

24. The Respondent claimed that the Petitioner failed to meet its burden of proof. Rather than offering a USPAP appraisal or a realtor's market analysis, the Petitioner offered Mr. Warner's "Market Value-In-Use Calculations." Mr. Warner, however, did not prepare those calculations in accordance with USPAP. *Agostino argument; Warner testimony*. And because Mr. Warner's appraisal license expired in 1998, the Respondent claimed that his expertise was limited to being a Level I and II assessor-appraiser and a real estate broker. *Agostino argument*.
25. Regardless, the Respondent argued that Mr. Warner's sales-comparison analysis was flawed. Mr. Warner did not adjust his comparable properties' sale prices to reflect relevant differences between those properties and the subject property. For example, Mr. Warner did not quantify adjustments for differences in time of sale, design and construction type, number of stories, or number of bedrooms. *Agostino argument; Wesolowski testimony*. The Respondent, who is a trainee appraiser, testified that USPAP requires an appraiser to make such adjustments. *Wesolowski testimony*. According to the Respondent, Mr. Warner's estimate of \$10,000 per unit was simply a number that he picked rather than the product of applying generally accepted appraisal principles. *Agostino argument*.
26. The Respondent also questioned the rating that Mr. Warner assigned to his third comparable property. That property sold for \$653,004—an amount close to the subject

property's assessment. Mr. Warner rated that property as "superior" on grounds that it was located in Tippecanoe County near Purdue University, Interstate 65, and a large auto plant. *Warner testimony; Pet'r Ex. 1*. But the subject property is also located near a university and Mr. Warner acknowledged that it was possibly relatively close to an interstate bypass. *Warner testimony*. Similarly, while Mr. Warner rated one-story apartments as superior to two-story apartments, he did not support that opinion other than to say that he based it on practical convenience to owners and tenants. *Id.*

27. The Respondent also took issue with Mr. Warner's decision to focus solely on Section 515 properties. In his sales-comparison analysis, Mr. Warner used only Section 515 sales even though a Section 515 property can be sold outside of that program. *Agostino argument; Warner testimony*. He similarly ignored non Section 515 apartment complexes both in estimating the subject property's market rent and in extracting a capitalization rate. Indeed, that narrow focus left him with only three sales for extracting his capitalization rate. And he did not use any other market indices to develop that rate. *Warner testimony*.
28. Finally, the Respondent contends that the agreement between the Petitioner and the township assessor was not binding and was subject to review by the PTABOA.

B. Discussion

1. Objections

29. Before turning to the merits, the Board addresses two objections that the ALJ took under advisement. First, the Respondent objected to the Petitioner's proffer of Mr. Warner as an expert on "generally accepted appraisal principles." *Hasler proffer; Agostino objection*. More specifically, the Respondent objected to Mr. Warner testifying as an appraiser because he did not have an appraisal license. The Respondent, however, did not object to Mr. Warner testifying as a Level I and II assessor-appraiser or as a real estate broker. In response, the Petitioner's attorney, Mr. Hasler, said "I don't disagree with that characterization." *Hasler response*.

30. Thus, the record is unclear whether the Respondent actually objected to Mr. Warner testifying as an expert on generally accepted appraisal principles and giving a valuation opinion as long as he did not refer to himself as an appraiser or to his valuation opinion as an appraisal. To the extent that the Petitioner did object to such testimony, the Board overrules that objection. Mr. Warner's knowledge, experience, and training qualified him as an expert in generally accepted appraisal principles. While Mr. Warner has not had an appraiser's certificate or license since 1998, that fact goes to his testimony's weight rather than to its admissibility.
31. For its part, the Petitioner objected to Mr. Agostino's statement in his closing argument that, when a Section 515 property is sold outside the program's restrictions, the money from the sale goes to the USDA. The Petitioner correctly noted that no testimony had been offered on that point. *Hasler objection*. The Respondent countered that the Board can take notice of what Section 515 says about selling properties outside of that program's restrictions. Interestingly, Mr. Agostino did not actually cite the Board to the statutory language at issue or even to the section of the United States Code where the Section 515 program is codified. Nonetheless, to the extent that Mr. Agostino simply intended to direct the Board to the provisions of a statute, the Board overrules the Petitioner's objection.

2. The Petitioner's case

32. Indiana assesses real property based on its true tax value, which the 2002 Real Property Assessment Manual defines 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 at 2 (incorporated by reference at 50 IAC 2.3-1-2). Appraisers traditionally have used three methods to determine a property's market value: the cost, sales-comparison, and income approaches. *Id.* at 3, 13-15.

Indiana assessing officials generally use the mass-appraisal version of the cost approach set forth in the Real Property Assessment Guidelines for 2002 – Version A.

33. A property's market value-in-use, as determined using the Guidelines, 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 rebut that presumption with evidence that is consistent with the Manual's definition of true tax value. MANUAL at 5. A market-value-in-use appraisal prepared according to USPAP often will suffice. *Id.*; *Kooshtard Property VI*, 836 N.E.2d at 506 n.6. A taxpayer may also offer actual construction costs, sales information for the subject or comparable properties, and any other information compiled according to generally accepted appraisal principles. MANUAL at 5.
34. The Petitioner relied primarily on Mr. Warner's expert valuation opinion. Before turning to the content of Mr. Warner's opinion, the Board notes two significant points that affect his credibility. First, although Mr. Warner had sufficient training and experience to testify about generally accepted appraisal practices, he has not been licensed as an appraiser for more than 10 years. That fact seriously detracts from the reliability of his valuation opinion.
35. Second, Mr. Warner testified that he was employed by Dewald Property Tax Services and he signed the Petitioner's power of attorney as one of the Petitioner's tax representatives. Both Messrs. Warner and Dewald testified that "a contingent fee arrangement exist[ed] with respect to [the subject] property," which Mr. Dewald described as providing that "we share in the savings that we are able to obtain for the taxpayer." *Dewald testimony* (emphasis added). *Warner testimony*; *Dewald testimony*. The Board therefore finds that Mr. Warner's compensation was tied to the outcome of this appeal. While Mr. Dewald testified that Mr. Warner was actually an independent

contractor, he did not say anything about how Mr. Warner was compensated that would negate that finding.

36. Contingently paid expert witnesses are not absolutely prohibited from testifying in Indiana. *Wirth v. State Bd. of Tax Comm'rs*, 613 N.E.2d 874, 877 (Ind. Tax Ct. 1993). Thus, “the contingent nature of an expert witness’s fee goes to the weight, not the admissibility, of the expert’s testimony.” *Id.* Nonetheless, it is generally inappropriate to pay an expert witness a contingent fee. *Id.* at 876; *see also* Ind. Professional Conduct Rule 3.4(b) (“The common law rule in most jurisdictions is that . . . it is improper to pay an expert witness a contingent fee.”). Some states have even held certain contracts for paying expert witnesses contingent fees void as against public policy. *Wirth*, 613 N.E.2d at 876 (*citing, e.g. Dupree v. Malpractice Research, Inc.* 179 Mich. App. 254, 445 N.W.2d 498 (1989)). As the Indiana Tax Court explained, the rationale underlying that strong judicial disfavor goes to the heart of the judicial process. A contingent witness fee “raises the specter of an auctioning of the truth and casts a pall over the entire fact finding process.” *Id.* at 876-77. While the potential for abuse is less in a bench trial than in a jury trial (*Wirth*, 613 N.E.2d at 877), it is still significant.
37. With those points in mind, the Board turns to Mr. Warner’s opinion. Mr. Warner employed two generally accepted methodologies to estimate the subject property’s market value-in-use—the sales-comparison and income approaches. While Mr. Warner testified that he applied generally accepted appraisal principles, he also acknowledged that he did not follow USPAP. And in many instances, Mr. Warner did not explain his calculations in any detail. While he identified the characteristics upon which he compared the subject property to the eight Section 515 properties that sold from 2005 to 2008, Mr. Warner was largely conclusory in explaining why he rated various properties as superior or inferior to the subject property. For example, he rated the two largest properties—sales numbers 4 and 6—as superior to the subject property under the category of “economic” because he believed that those two properties had what he described as the advantage of “economies of scale.” *Warner testimony*. But he did not explain how he arrived at that conclusion. When pressed by the Respondent on other

points, Mr. Warner largely gave similarly conclusory answers. Thus, he simply asserted that one-story buildings were superior to two-story buildings without pointing to any data to support that conclusion.

38. Granted, the amount of detail that Mr. Warner gave to support his opinion may not have differed greatly from what is found in some appraisal reports. But in those reports, appraisers normally certify that they have complied with USPAP. The Board therefore can infer that the appraiser used objective data in making his quantitative or qualitative adjustments, or if objective data was not available, that the appraiser relied on his education, training, and experience. Here, by contrast, Mr. Warner has not been licensed as an appraiser for over 10 years. And he had a financial interest in the Board lowering the subject property's assessment. His assurances therefore are not as persuasive as similar assurances made by a non-contingently paid licensed appraiser.
39. Thus, in light of (1) Mr. Warner's lack of an appraisal license or recent appraisal experience, and (2) his financial interest in this appeal's outcome, his largely conclusory opinion is insufficiently reliable to show the subject property's market value-in-use.
40. Finally, the Board gives no weight to the agreement between the Petitioner and the Union Township Assessor concerning the subject property's assessment. While that agreement may have been enforceable against the Union Township Assessor, he is not a party to this appeal. In any event, the Petitioner did not seek to enforce the agreement, but rather offered it as proof of the subject property's market value-in-use. That agreement, however, lacks probative value. First, there are policy reasons for disregarding the agreement as evidence. The law encourages parties to engage in settlement negotiations by, among other things, "prohibiting the use of settlement terms or even settlement negotiations to prove liability for or invalidity of a claim or its amount." *Dep't of Local Gov't Fin. v. Commonwealth Edison*, 820 N.E.2d 1222, 1227 (Ind. 2005) (citing Ind. Evidence Rule 408). Second, the fact that the Union Township Assessor was willing to settle the appeal by agreeing to an assessment of \$326,300 does nothing to show the

subject property's market value-in-use.⁴ Even if the agreement somehow represented the Union Township Assessor's opinion of the subject property's value, that opinion would be entirely conclusory.

SUMMARY OF FINAL DETERMINATION

41. Because Mr. Warner's opinion was too unreliable to be given any probative weight and the Petitioner offered no other probative market value-in-use evidence, the Petitioner failed to meet its burden. The Board finds for the Assessor and orders that the subject property's March 1, 2006, assessment remain unchanged.

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

Chairman, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

⁴ The Petitioner did not claim that the PTABOA lacked authority to reject the agreement between the Petitioner and the Union Township Assessor. Indiana Code § 6-1.1-1-15(h), as it existed when the PTABOA issued its determination, allowed the PTABOA to accept or reject a joint settlement recommendation made by a taxpayer and township assessor. Ind. Code § 6-1.1-15-1(h) (2007 supp.); *see also* P.L. 219-2007 § 156 (applying amendments to Ind. Code § 6-1.1-15-1 to appeals where a notice of review was filed after June 30, 2007).

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>.