ATTORNEY FOR PETITIONER:
MARILYN S. MEIGHEN
MEIGHEN & ASSOCIATES, PC
Carmel, IN

ATTORNEYS FOR RESPONDENT:
MATTHEW S. CARR
ADAM C. SHIELDS
KRIEG DEVAULT LLP
Indianapolis, IN

IN THE INDIANA TAX COURT

SHELBY COUNTY ASSESSOR,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cause No. 49T10-1004-TA-17
	)	
SHELBY'S LANDING-II, LP,	)	
	)	
Respondent.	)	

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

NOT FOR PUBLICATION
December 6, 2010

FISHER, J.

The Shelby County Assessor (the Assessor) appeals the final determination of the Indiana Board of Tax Review (Indiana Board) valuing Shelby's Landing - II, LP's (hereinafter, "Shelby LP") two apartment complexes at $3,742,500 for the 2006 tax year (the year at issue). The issue for the Court to decide is whether the Indiana Board's final determination is arbitrary and capricious or not supported by substantial evidence.

FACTS AND PROCEDURAL HISTORY

During the year at issue, Shelby LP owned two low-income housing

developments, Shelby's Crest Apartments (hereinafter, "the Crests") and Shelby's Landing Apartments (hereinafter, "the Landings"), in Shelbyville, Indiana (Addison and Madison Townships, respectively). The Crests was a newly constructed multi-family apartment complex consisting of ninety-eight rental units (each with one to four bedrooms), a clubhouse, swimming pool, and other recreational areas. (*See* Cert. Admin. R. at 1554, 1574-75.) The Landings was a recently renovated senior housing apartment complex with twenty-two rental units, each with one or two bedrooms.[1] (*See* Cert. Admin. R. at 1652, 1657 (footnote added).)

Both complexes were designed as low-income housing in order to qualify for tax credits pursuant to Section 42 of the Internal Revenue Code (the LIHTC program).[2] Under the LIHTC program, Shelby LP received tax credits to award to investors, over a period of ten years, who provided financing for the Crests and the Landings. In exchange for these tax credits, Shelby LP agreed to rent all of the units in each of the complexes to individuals whose income was 60 percent or less of the county's median gross income (adjusted for family size) and subject to Indiana Housing Finance Authority rental guidelines. In addition, Shelby LP agreed to abide by these rental restrictions for a period of thirty years.

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[1] The complexes were completed in early 2006; each commenced operations shortly thereafter. (*See* Cert. Admin. R. at 1995, 2008.)

[2] 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. *See generally*, 26 U.S.C. § 42 (2006). 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. *Hometowne Assocs., L.P. v. Maley*, 839 N.E.2d 269, 271 n.2 (Ind. Tax Ct. 2005). (*See also* Cert. Admin. R. at 2051-52, 2122-27.) The Indiana Housing Finance Authority administers this program. *Hometowne Assocs.*, 839 N.E.2d at 271 n.2.

For the year at issue, the Assessor assigned the Crests an assessed value of $7,434,600; the Landings was assessed at $1,761,200. (*See* Cert. Admin. R. at 1602-39, 1699-1700.) Believing these values to be too high, Shelby LP filed petitions for review of its assessments, first with the Shelby County Property Tax Assessment Board of Appeals, and then with the Indiana Board.

On October 27, 2009, the Indiana Board held a hearing on the matter. During the hearing, Shelby LP presented an appraisal on each complex, prepared by Jay Allardt (an Indiana certified general appraiser) and completed in conformance with the Uniform Standards of Professional Appraisal Practice (USPAP). The first appraisal utilized the income approach to value[3] and estimated that as of January 1, 2005, the market value-in-use of the Crests was $3,100,000.[4] (*See* Cert. Admin. R. at 1536-96, 1714-16 (footnote added).) In arriving at this value, Allardt applied a capitalization rate

[3] The income approach "converts an estimate of income, or rent, [a] property is expected to produce into value through a mathematical process known as capitalization." 2002 REAL PROPERTY ASSESSMENT MANUAL (2004 Reprint) (hereinafter, "Manual") (incorporated by reference at 50 IND. ADMIN. CODE 2.3-1-2 (2002 Supp.)) at 3.

[4] In 2006, Indiana's real property tax assessments were to reflect a property's "market value-in-use" (i.e., the value of the property "for its current use, as reflected by the utility received by the owner or a similar user, from the property") as of January 1, 2005. *See* IND. ANN. CODE § 6-1.1-31-6(c) (West 2006); Manual at 2; 50 IND. ADMIN. CODE 21-3-3(b) (2006) (*see* http://www.in.gov/legislative/iac/). In turn, Indiana Code § 6-1.1-4-41 provided that the market value-in-use of Section 42 rental property was equivalent to the greater of the value determined under the income approach or that "results in a gross annual tax liability equal to five percent (5%) of the total gross rent received from the rental of all units in the property for the most recent taxpayer fiscal year that ends before the assessment date." IND. CODE ANN. § 6-1.1-4-41(a)-(b) (West 2006). In ascertaining the value of such property, however, the value of the federal tax credits were not to be considered. IND. CODE ANN. § 6-1.1-4-40 (West 2006).

of 11.05 percent to the Crests' estimated net operating income (NOI) of $368,048.[5] (Cert. Admin. R. at 1593, 2023-24 (footnote added).) That rate, explained Allardt, was derived from the capitalization rates of several recently sold conventional apartment complexes and a 2.3 percent local tax rate adjustment.[6] (Cert. Admin. R. at 1588-93, 2023-24 (footnote added).) Allardt also deducted "lease-up" expenses from the capitalized NOI. (Cert. Admin. R. at 1593-95, 1714-15, 2025-26.) The second appraisal estimated the market value-in-use of the Landings during the year at issue was $642,500. (*See* Cert. Admin. R. at 1651-1716.) In arriving at that estimate, Allardt applied the same overall methodology as applied to the Crests, but utilized a 10.28 percent capitalization rate.[7] (*See* Cert. Admin. R. at 1651-1716, 2030-38 (footnote added).)

In response, the Assessor argued that the appraisals were unreliable. More specifically, the Assessor's witness, Jeffrey Wuensch (an Indiana certified Level II assessor-appraiser), claimed that Allardt's capitalization rates were flawed because they were derived from conventional apartment complexes and were therefore not

[5] To arrive at the NOI, Allardt applied a 7 percent vacancy and collection loss to the Crests' potential gross income, added other miscellaneous income, and deducted the operating expenses (excepting real estate taxes). (*See* Cert. Admin. R. at 1577-87, 2017-23.)

[6] Allardt also developed an alternative capitalization rate under the band of investment method to verify that his market comparison capitalization rate of 8.75 percent was accurate. (Cert. Admin. R. at 1591-92, 2023-24.)

[7] The capitalization rate applied to the Landings was based on the rate derived from the sale of the same conventional apartment complexes used in valuing the Crests and a 1.53 percent local tax rate adjustment. (Cert. Admin. R. at 1687-91, 2032-36.)

actually comparable to the Crests or the Landings.[8,9] (*See* Cert. Admin. R. at 1782, 2083-86 (footnotes added).) Wuensch further explained that the application a 4.8 percent capitalization rate (derived from the properties' NOIs and their construction costs) clearly demonstrated that both of Shelby LP's properties were assessed correctly. (*See* Cert. Admin. R. at 1767, 2075-79, 2088.)

On February 18, 2010, the Indiana Board issued its final determination in favor of Shelby LP. Consequently, the Indiana Board determined that for year at issue the Crests should be assessed at $3,100,000 and the Landings should be assessed at $642,500. (Cert. Admin. R. at 313 ¶ 52.)

On April 5, 2010, the Assessor initiated this original tax appeal. The Court heard the parties' oral arguments on September 20, 2010. Additional facts will be supplied as necessary.

STANDARD OF REVIEW

The party seeking to overturn an Indiana Board final determination bears the burden of its demonstrating its invalidity. *Osolo Twp. Assessor v. Elkhart Maple Lane Assocs.*, 789 N.E.2d 109, 111 (Ind. Tax Ct. 2003). Accordingly, the Assessor must demonstrate to the Court that the Indiana Board's final determination is:

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[8] Wuensch is also a certified instructor for the International Association of Assessing Officials (IAAO), "an educational and research association of individuals in the assessment/property taxation profession." (*See* Cert. Admin. R. at 2068-69.) *See also Meridian Towers E. & W. v. Washington Twp. Assessor*, 805 N.E.2d 475, 480 n.8 (Ind. Tax Ct. 2003). Approximately six months before the administrative hearing, Wuensch taught an IAAO class on the income approach to value. (*See* Cert. Admin. R. at 2070-71.)

[9] More specifically, Wuensch claimed that the differences between these properties' economic lives, income streams, financing terms, and terms of sale rendered them incompatible. (*See* Cert. Admin. R. at 1782, 2083-86.)

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) contrary to constitutional right, power, privilege, or immunity;

(3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory jurisdiction, authority, or limitations;

(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 2010). In reviewing the Indiana Board's final determination, this Court will defer to its factual findings (if they are supported by substantial evidence[10]) but will review any questions of law arising therefrom *de novo*. *Cedar Lake Conf. Ass'n v. Lake County Prop. Tax Assessment Bd. of Appeals*, 887 N.E.2d 205, 207 (Ind. Tax Ct. 2008) (citations omitted) (footnote added), *review denied*. The Court will not reweigh the evidence or judge the credibility of the witnesses. *See Freudenberg-NOK Gen. P'ship v. State Bd. of Tax Comm'rs*, 715 N.E.2d 1026, 1030 (Ind. Tax Ct. 1999) (citations omitted), *review denied*.

ANALYSIS AND OPINION

On appeal, the Assessor claims that the Indiana Board's final determination must be reversed because it ignored her evidence and failed to address her challenges to Shelby LP's evidence in a "meaningful way." (*See* Pet'r Br. at 1-3.) Had the Indiana Board actually considered her challenges, complains the Assessor, it would have realized that Shelby LP's appraisals had no probative value whatsoever for two main reasons. First, the estimated NOIs were not based on aggregate market data. (*See*

[10] "[E]vidence will be considered substantial if it is more than a scintilla and less than a preponderance or if it would be accepted as adequate to support a conclusion by a reasonable mind." *French Lick Twp. Tr. Assessor v. Kimball Int'l, Inc.*, 865 N.E.2d 732, 739 n.14 (Ind. Tax Ct. 2007) (citation omitted).

Pet'r Br. at 1-2, 8-10.) Second, the appraisals' capitalization rates were unreliable: they were based on incomparable market rent apartment complexes and they failed to reflect the value of Shelby LP's property tax abatements. (*See* Pet'r Br. at 2-3, 10-12, 16.) The Assessor also claims that the Indiana Board's final determination is arbitrary and capricious because it conflicts with two other Indiana Board cases. (*See* Pet'r Br. at 3, 15-16.) The Court will address these arguments in turn.

With respect to the Assessor's first argument (i.e., the unreliability of the estimated NOIs), the Indiana Board's final determination reveals that it found the argument unpersuasive for two reasons. First, the Indiana Board explained that the Assessor's argument was inconsistent with its own witness' testimony: Wuensch had indicated during the hearing that the NOIs were valid. (*See* Cert. Admin. R. at 310-11 ¶ 44.) (*See also* Cert. Admin. R. at 1931-33 (where the Assessor's post-hearing brief challenges the NOIs), 2088 (where Wuensch applied his capitalization rate of 4.8 percent to the same NOIs).) The Indiana Board also explained that the Assessor "presented absolutely no probative evidence that the potential income from rents allowed at [the] Crests and [the] Landings was inaccurate or would be different if other Section 42 rents were considered." (Cert. Admin. R. at 310-11 ¶ 44.) The certified administrative record in this case supports that finding. (*See* Cert. Admin. R. at 1931-33, 2067-96.)

As to the Assessor's second set of challenges (i.e., her capitalization rate arguments), the Indiana Board explained that they too were ineffective, given that Shelby LP's overall evidentiary presentation was consistent with how the properties were to be valued under Indiana Code § 6-1.1-4-41, while the Assessor's evidentiary

presentation was not. (*See* Cert. Admin. R. 311-13 ¶¶ 45-51.) More specifically, the Indiana Board found that Shelby LP had determined the market values-in-use of its apartment complexes through the statutorily mandated income approach, *see supra* note 4, while the Assessor valued the properties using a "repackaged" version of the cost approach. (*See* Cert. Admin. R. at 312 ¶¶ 49-50.) This finding is supported by the evidence in the certified administrative record as well. (*Cf., e.g.*, Cert. Admin. R. at 2075-79 *with* Cert. Admin. R. at 2122-27, 2136-39.)

Lastly, the Assessor claims that the Indiana Board's final determination is arbitrary and capricious because it determined the deduction of "lease-up" expenses was improper in two other cases, but found them to be proper in this instance. (*See* Pet'r Br. at 3, 15-16 (*citing BBR-Vision III, LP v. Rush County Assessor*, Pet. No. 70-011-05-1-4-00004, ¶¶ 29-32 (Ind. Bd. Tax Review Jan. 21, 2009), *available at* http://www.in.gov/ibtr; *Bedford Apartments, LP v. Shawswick Twp. Assessor*, Pet. No. 47-011-01-4-00008 (Ind. Bd. Tax Review Sept. 15, 2003), *available at* http://www.in.gov/ibtr).) The Assessor's claim simply misses the mark.

In *BBR-Vision*, the assessment of a Section 42 apartment complex that was largely unfinished as of the assessment date was at issue. *See BBR-Vision*, Pet. No. 70-011-05-1-4-00004 ¶ 13. The taxpayer presented an appraisal that valued the completed portion of the property only. *See id.* ¶ 29. Contrary to the Assessor's claim therefore, the Indiana Board's rejection of that appraisal was not based on improperly deducted "lease up" expenses; rather, it was based on the fact that there were three other buildings, in unspecified stages of construction, that had been assigned no value at all. *Id.* ¶¶ 30-31. In turn, the issue presented in *Bedford Apartments* mainly involved

the propriety of an obsolescence adjustment; not the propriety of "lease up" expense deductions. *See Bedford Apartments*, Pet. No. 47-011-01-4-00008 ¶ 26. The Indiana Board ultimately determined that the taxpayer failed to *prima facie* establish that it was entitled to the adjustment. *Id.* ¶¶ 36-65. This Court subsequently affirmed the Indiana Board's final determination in that case in an unpublished decision. *See Bedford Apartments, LP v. Shawswick Twp. Assessor*, Cause No. 49T10-0310-TA-51 (Ind. Tax Ct. Apr. 27, 2006), *available at* http://www.in.gov/judiciary/tax.

The act of valuing real property requires the formulation of an opinion; it is not an exact science. When there are competing opinions as to how a property should be valued, the Indiana Board determines which opinion is more probative. That determination is, essentially, the result of how effectively each party has persuaded the Indiana Board that its evidence is more credible and reliable than that of the other. Here, the Indiana Board's final determination plainly evidences that it found Shelby LP's overall evidentiary presentation to be more persuasive than that of the Assessor's. In presenting her arguments on appeal, the Assessor essentially asks the Court to reweigh the evidence and find in her favor. This, however, the Court cannot do. Given that the Indiana Board's final determination is supported by substantial evidence, this Court cannot say that it erred in valuing Shelby LP's two apartment complexes at $3,742,500 for the year at issue.

CONCLUSION

For the foregoing reasons, the final determination of the Indiana Board is AFFIRMED.