

REPRESENTATIVE FOR PETITIONER:  
Bradley D. Hasler, Bingham McHale, LLP

REPRESENTATIVE FOR RESPONDENT:  
Mary Beth Lemings, Noble County Deputy Assessor

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**BEFORE THE  
INDIANA BOARD OF TAX REVIEW**

Kendallville Associates, LP	)	Petition No:	57-004-08-1-4-00003
d/b/a Drake Terrace II Senior,	)		
	)		
Petitioner,	)	Parcel No:	57-09-05-100-031.000-004
	)		
v.	)		
	)	County:	Noble
Noble County Assessor,	)	Township:	Allen
	)		
Respondent.	)	Assessment Year:	2008

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

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**January 24, 2011**

**FINAL DETERMINATION**

The Indiana Board of Tax Review (the 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**

### **ISSUE**

1. The issue presented for consideration by the Board is whether the assessed value of the Petitioner's Section 515 apartment complex is overstated for the 2008 tax year based on the property's appraised value.

### **PROCEDURAL HISTORY**

2. Pursuant to Indiana Code § 6-1.1-15-1, the Petitioner's representative Edwin K. DeWald, DeWald Property Tax Services, initiated an appeal by written document dated September 28, 2009. The Noble County Property Tax Assessment Board of Appeals (the PTABOA) issued its determination denying the Petitioner's 2008 appeal on March 2, 2010. On March 29, 2010, Mr. DeWald filed a Form 131 Petition for Review of Assessment with the Board, requesting a review of the PTABOA's determination.

### **HEARING FACTS AND OTHER MATTERS OF RECORD**

3. Pursuant to Indiana Code § 6-1.1-15-4 and § 6-1.5-4-1, Dalene McMillen, the duly designated Administrative Law Judge (the ALJ), conducted a hearing on November 4, 2010, in Albion, Indiana.
4. The following persons were sworn and presented testimony at the hearing:  
For the Petitioner:<sup>1</sup>

Phillip D. Johns, Appraiser, The Value Company, Inc.  
Edwin K. DeWald, DeWald Property Tax Services

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<sup>1</sup> Mr. Robert A. Borgmann, DeWald Property Tax Services, was also in attendance but was not sworn in as witness to give testimony.

For the Respondent:

Mary Beth Lemings, Noble County Deputy Assessor  
Anthony Garrison, Nexus Group, Inc.<sup>2</sup>

5. The Petitioner presented the following exhibit:<sup>3</sup>

Petitioner Exhibit 3 – 2008 summary appraisal report prepared by Phillip D. Johns of The Value Company, Inc., dated October 26, 2010.

6. The Respondent presented the following exhibits:<sup>4</sup>

Respondent Exhibit 1 – Respondent’s income analysis for Drake Terrace II.

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<sup>2</sup> The Petitioner’s counsel objected to Mr. Garrison representing the Respondent because, Mr. Hasler argues, Mr. Garrison is not an attorney, tax representative or county employee. *Hasler argument.* However, he was clearly identified as a witness by the Respondent in her witness and exhibit list. There is no evidence the Petitioner was prejudiced by Mr. Garrison’s actions in testifying at the hearing. Further, the Assessor was properly represented by Ms. Lemings, who is a Deputy Assessor. *See* 52 IAC 2-2-4. To the extent that the Respondent intended Mr. Garrison to represent her at the hearing, the Respondent is reminded that Mr. Garrison must comply with the Board’s representation rules. Thus, he must submit written verification that he is a “professional appraiser” approved by the Department of Local Government as required by 52 IAC 1-1-3.5 and he must file a power of attorney with the Board as required by 52 IAC 2-3-2. *See* 52 IAC 1-1-3.5.

<sup>3</sup> The Petitioner did not submit an Exhibit 1 or Exhibit 2 in this matter. Mr. Hasler requested that the Board take official notice of the proceedings of Albion Limited d/b/a Brandonwood Apartments, Petition Nos. 57-002-07-1-4-00005 and 57-002-08-1-4-00005, as they relate to the qualifications of the appraiser and the concepts and methods he employed to value the property in the appraisal reports which were labeled Petitioner Exhibits 1 and 2 in that matter.

<sup>4</sup> The Petitioner’s counsel objected to page 2 of Respondent’s Exhibit 1 as being irrelevant because the Respondent failed to present any testimony on the page. *Hasler argument.* The Board, however, admits page 2 of Respondent’s Exhibit 1 over objection and will determine the relevance and weight to be assigned. 52 IAC 2-7-2 (c). Mr. Hasler also objected to page 2 of Respondent’s Exhibit 1, citing Rule 408 of the Indiana Rules of Evidence. *Hasler argument.* Mr. Hasler argues that page 2 of Respondent’s Exhibit 1 was used as part of the settlement negotiations in prior appeals to the county. *Hasler argument; Respondent Exhibit 1 at 2.* Indiana Rules of Evidence, Rule 408, states “Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offer or promising to accept a valuable consideration in compromising or attempting to compromise a claim, which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.” Here page 2 of Respondent’s Exhibit 1 is the county’s 2001 through 2005 income analysis reconstructed from the Petitioner’s operating statements. *Respondent Exhibit 1 at page 2.* There is no evidence of a settlement offer being made to the Petitioner or negotiations occurring between the Petitioner and the Respondent for the assessment year of 2008. Thus, the Petitioner’s objection is over-ruled.

7. The following additional items are officially recognized as part of the record of proceedings and labeled Board Exhibits:
  - Board Exhibit A – Form 131 petition with attachments,
  - Board Exhibit B – Notice of Hearing, dated September 21, 2010,
  - Board Exhibit C – Hearing sign-in sheet.
8. The subject property is an eighteen-unit apartment complex on 2.622 acres of land located at 636 Berry Lane, Kendallville, Allen Township in Noble County.<sup>5</sup>
9. The ALJ did not conduct an on-site inspection of the subject property.
10. For 2008, the PTABOA determined the assessed value of the property to be \$50,500 for the land and \$362,900 for the improvements, for a total assessed value of \$413,400.
11. The Petitioner requested a total assessed value of \$236,300.

#### **JURISDICTIONAL FRAMEWORK**

12. The Indiana Board is charged with conducting an impartial review of all appeals concerning: (1) the assessed valuation of tangible property, (2) property tax deductions, and (3) property tax exemptions, that are made from a determination by an assessing official or a county property tax assessment board of appeals to the Indiana Board under any law. Ind. Code § 6-1.5-4-1(a). All such appeals are conducted under Indiana Code § 6-1.1-15. *See* Ind. Code § 6-1.5-4-1(b); Ind. Code § 6-1.1-15-4.

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<sup>5</sup> The Petitioner's appraisal report also lists an address of 721 Briarwood Drive, Kendallville, Indiana, for the subject property. It is unclear, however, whether this was an error or whether the property is identifiable by either address.

## ADMINISTRATIVE REVIEW AND THE PETITIONER'S BURDEN

13. 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 Township Assessor*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also, Clark v. State Board of Tax Commissioners*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998).
14. 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 Township 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”).
15. 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 case. *Id; Meridian Towers*, 805 N.E.2d at 479.

## PETITIONER’S CONTENTIONS

16. The Petitioner’s counsel contends the assessed value of the Petitioner’s eighteen-unit apartment complex is over-stated for 2008, based on the property’s appraised value. *Hasler argument*. In support of its contention, the Petitioner presented an appraisal report prepared by Phillip D. Johns, of The Value Company, an Indiana Certified General Real Property Appraiser. *Petitioner Exhibit 3*. The appraiser certified that his report was prepared in conformance with the Uniform Standards of Professional Appraisal Practice (USPAP) of the Appraisal Foundation and the Code of Professional Ethics and Standards of Professional Appraisal Practice of the Appraisal Institute. *Id*. In his appraisal, Mr. Johns developed the depreciated replacement cost approach and the

income capitalization approach to value the property. *Johns testimony; Petitioner Exhibit 3*. According to Mr. Johns, he considered the sales comparison approach unreliable because there are few sales of subsidized apartments in rural markets and because it was difficult to make meaningful adjustments for financing. *Id.*

17. The subject property is a Section 515 apartment complex constructed under a federal United States Department of Agriculture (USDA) sponsored program providing loans for rural rental housing. *Johns testimony; Petitioner Exhibit 3*. According to the Petitioner's witness, the property is restricted to qualified low-income tenants and the government sets the maximum allowable rents under a restricted use agreement.<sup>6</sup> *Id.* According to Mr. Johns, when an insufficient number of qualified low-income tenants are available, the owner may rent the units to higher income tenants, but any rent collected by the owner above the basic rent level must be repaid to the government as an overage payment. *Id.* Thus, Mr. Johns argues, there is no benefit to the owner to charge above the basic rent level. *Id.* In addition, Mr. Johns testified, there are compliance reporting requirements and the property owner is restricted to earning a maximum profit of eight percent on a five percent investment.<sup>7</sup> *Id.*
18. Mr. Johns testified that he developed an income valuation for the property using an effective gross income of \$77,950 and a net income of \$28,600. *Johns testimony; Petitioner Exhibit 3*. According to Mr. Johns, he estimated the property's income from its actual rental income in 2005, 2006, and 2007, because the property is rent restricted. *Id.* He then analyzed the subject property's actual expenses for 2005, 2006, and 2007 and compared those expenses to expense data published by the Institute of Real Estate Management. *Id.* The appraiser also considered expense data from twelve Section 515

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<sup>6</sup> The units are also equipped with amenities geared toward senior citizens such as grab bars and medical alert systems. *Johns testimony*. Therefore, Mr. Johns testified, low-income seniors are the market for the Petitioner's property. *Id.*

<sup>7</sup> Mr. Johns testified that the subject property does not qualify for any type of loan prepayment option because it was constructed after 1991. *Johns testimony; Petitioner Exhibit 3*.

projects in northern Indiana. *Id.* Based on this information, Mr. Johns projected reasonable expenses to be \$3.83 per gross square foot area and \$2,742 per rental unit. *Id.*

19. Next the appraiser developed the overall capitalization rate (OAR) using conventional apartment data, including actual sales, investor survey data, the mortgage equity band of investment technique and the debt coverage ratio technique. *Johns testimony; Petitioner Exhibit 3.* According to Mr. Johns, he gave the most weight to the OAR indicated by the extraction of sales method which ranged from 8.00% to 8.50%. *Id.* Because the property suffers from use restrictions, Mr. Johns testified that he applied an adjustment for illiquidity, offset by the rental assistance provided by the government which reduces the risk to the investor. *Id.* Based on his analysis, Mr. Johns determined that an OAR of 8.5% was a reasonable capitalization rate for the subject property for 2008, which when the effective tax rate was added resulted in an adjusted OAR of 11.00%. *Id.* Mr. Johns testified that he considered the below-market mortgage provided by the federal government to be a “benefit to the tenant, not the property owner” and therefore he did not consider the 1% mortgage in his capitalization rate. *Id.* In response to questioning, however, Mr. Johns admitted that nothing specified that the capitalization rate of conventional apartments should be used to value Section 515 or government subsidized apartments. *Johns testimony.*
20. Capitalizing the net operating income of \$26,800 at 11.00%, Mr. Johns estimated the value of the property to be \$243,600 as of March 1, 2008. *Johns testimony; Petitioner Exhibit 3.*
21. Next, the appraiser estimated the property’s value using the cost approach. *Johns testimony; Petitioner Exhibit 3.* Mr. Johns testified that he used the Marshall Valuation Service’s cost data for apartments to value the buildings. *Id.* For 2008, the appraiser estimated a value of \$226,761 for the improvements after adjusting for external obsolescence due to the property’s location and rent restrictions. *Id.* Finally, the

appraiser added the \$89,300 assessed value of the land to the improvement value, resulting in an estimated value of \$316,100 for the March 1, 2008, assessment date. *Id.*

22. Mr. Johns argues that, under Indiana Code § 6-1.1-4-39, real property regularly rented for residential accommodations, and having more than four units, must be assessed at the lowest value determined by the three appraisal approaches to value: the cost approach, the sales comparison approach and the income approach. *Johns testimony; Petitioner Exhibit 3.* Because he determined the income capitalization approach to be the lowest value, Mr. Johns argues that the value of the property as of March 1, 2008, was \$243,600. *Id.* Further, Mr. Johns argues, the property's March 1, 2008, value must be trended to the January 1, 2007, valuation date. *Id.* Based on the Consumer Price Index for the Midwest Region Housing-Shelter, published by the United States Department of Labor's Bureau of Labor Statistics, Mr. Johns argues, the property's March 1, 2008, value should be reduced by 3.01%, resulting in a true tax value of \$236,300. *Id.*

#### **RESPONDENT'S CONTENTIONS**

23. The Respondent's witness, Mr. Garrison, similarly developed an income approach valuation using data from the Petitioner's property and data from four other senior living apartment complexes to calculate a value for the property under appeal. *Garrison testimony; Respondent Exhibit 1.* Mr. Garrison testified that he compared the Petitioner's effective gross income with four other properties and estimated an income of \$77,177. *Id.* He similarly compared the Petitioner's expenses to the expenses of four comparable properties and estimated the expenses to be \$52,603. *Id.* According to Mr. Garrison, this results in a net operating income of \$24,574. *Id.* When he removed the highest value for income and expenses, Mr. Garrison calculated an income of \$73,243 and expenses of \$50,000 resulting in an estimated net operating income of \$23,243. *Id.*



24. Mr. Garrison testified that he “used a 6.7% cap rate” which he “developed the same way” as he did in the prior case, Albion Limited d/b/a Brandonwood Apartments, Petition Nos. 57-002-07-1-4-00005 and 57-002-08-1-4-00005. *Garrison testimony; Respondent Exhibit 1.* Mr. Garrison multiplied the estimated net operating incomes of \$23,243 and \$24,574 by his weighted capitalization rate and determined the value of the subject property to be between \$347,118 and \$366,773 or approximately \$350,000 for the March 1, 2008, assessment date. *Id.*
25. Mr. Garrison testified that the cost approach value of the property, as shown on the property record cards, was \$413,400 for 2008. *Garrison testimony.* Because the lowest value for the property resulted from the income approach, Mr. Garrison testified that he gave the greatest weight to that approach. *Garrison testimony.* In response to questioning, however, Mr. Garrison admitted that he was not an appraiser and that his estimates of the property’s value were not prepared in compliance with the Uniform Standards of Professional Appraisal Practice. *Id.*

#### ANALYSIS

26. 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 (MANUAL) (incorporated by reference at 50 IAC 2.3-1-2). 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 to value. *Id.* at 3, 13-15.
27. Indiana assessing officials generally use a mass appraisal version of the cost approach, as set forth in the REAL PROPERTY ASSESSMENT GUIDELINES FOR 2002 – VERSION A (the GUIDELINES). However, for assessment dates after February 28, 2005, the legislature promulgated specific rules for the valuation of rental property and mobile homes. *See*

Ind. Code § 6-1.1-4-39. Under Indiana Code § 6-1.1-4-39(a), a rental property with more than four units is to be assessed according to the lowest valuation determined from the three generally accepted approaches to value. Ind. Code § 6-1.1-4-39(a).

28. A party must also explain how its evidence relates to the subject property's market value-in-use as of the relevant valuation date. *O'Donnell v. Department of Local Government Finance*, 854 N.E.2d 90, 95 (Ind. Tax Ct. 2006); *see also Long v. Wayne Township Assessor*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005). For the March 1, 2008, assessment date, the valuation date is January 1, 2007. 50 IAC 21-3-3.
29. Here, the Petitioner contends its property's assessment is over-valued for the March 1, 2008, assessment year based on the property's appraised value. *Johns testimony*. In support of this contention, the Petitioner presented an appraisal report prepared by Phillip Johns. *Petitioner Exhibit 3*. Mr. Johns is an Indiana Certified Appraiser who testified that he prepared his appraisal in accordance with the Uniform Standards of Professional Appraisal Practices (USPAP). *Id.* In addition, Mr. Johns is experienced in the valuation of Section 515 housing. *Johns testimony*.
30. Mr. Johns testified that he valued the subject property using both the cost approach and the income approach and determined that the income approach produced the lowest value for the Petitioner's property.<sup>8</sup> *Johns testimony; Petitioner Exhibit 3*. After adjusting the value to the correct valuation date, Mr. Johns calculated the market value-in-use of the property to be \$236,300 for 2008. *Id.* Appraisals performed in accordance with generally recognized appraisal principles are often sufficient to establish a prima facie case. *See Meridian Towers*, 805 N.E.2d at 479. The Board therefore finds that the Petitioner raised a prima facie case that the property is over-valued for the March 1, 2008, assessment year.

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<sup>8</sup> Mr. Johns explained that because there were very few sales of Section 515 apartment complexes, he did not develop the sales comparison approach. *Johns testimony; Petitioner Exhibits 1 and 2*.

31. 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 Insurance Co. v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004). To rebut or impeach the Petitioner's case, the Respondent has the same burden to present probative evidence that the Petitioner faced to raise its prima facie case. *Fidelity Federal Savings & Loan v. Jennings County Assessor*, 836 N.E.2d 1075, 1082 (Ind. Tax Ct. 2005).
  
32. Here, the Respondent's witness submitted an income analysis estimating the property's value to be between \$347,118 and \$366,773 for 2008. *Garrison testimony; Respondent Exhibit 1*. In his analysis, Mr. Garrison used an average of the property's income and expenses and the income and expenses of four comparable senior living apartments. *Id.* Mr. Garrison also testified that he "used a 6.7% cap rate" which he "developed the same way" as he did in Albion Limited d/b/a Brandonwood Apartments matter, Petition Nos. 57-002-07-1-4-00005 and 57-002-08-1-4-00005. The Board notes, however, that in the Albion Limited cases, Mr. Garrison calculated a band of investments capitalization rate using a 1% mortgage rate for 95% of the project's cost and an 8% return on the 5% of the project's cost that was invested for the subsidized units and an OAR of 10.81% based on the capitalization rate for conventional apartments for the non-subsidized apartments, resulting in a weighted capitalization rate of 6.21%. Even if the Board only considered Mr. Garrison's "subsidized" capitalization rate in that case, Mr. Garrison calculated that capitalization rate to be 5.22%. Thus, there is no evidence in the record how Mr. Garrison reached his 6.7% capitalization rate. Statements that are unsupported by probative evidence are conclusory and of no value to the Board in making its determination. *Whitley Products, Inc. v. State Bd. of Tax Comm'rs*, 704 N.E.2d 1113, 1118 (Ind. Tax Ct. 1998). Mr. Garrison also failed to explain how his income analysis estimates the property's value as of the January 1, 2007, valuation date for the March 1, 2008, assessment. *See Long v. Wayne Township Assessor*, 812 N.E.2d 466, 469-471 (Ind. Tax Ct. 2005).

33. Mr. Garrison's income valuation, however, raises a troubling issue with the Petitioner's appraisal. Because Mr. Johns assigned the benefit of owning the property – the 1% subsidized mortgage – to the tenant, he ignored the impact of the subsidized mortgage on the property's value. Thus, Mr. Johns chose to value the detriment of owning and operating a Section 515 housing project – namely the restricted rents – but he failed to consider the benefit of owning subsidized property – the mortgage subsidy – on the property's value. In a previous order, the Board cautioned against such a parsing of interests. In *Schooler v. Boone County Assessor*, Petition No. 06-003-071-5-00044 (May 7, 2010), the Board determined that a property should be valued based on its fee simple interest and held that ignoring the lessee's interest in a "below market" lease was not the best evidence of the property's value. It appears the same analysis would apply here. The better evidence in this case would have been to value the property as a whole, rather than to assign the mortgage subsidy to the tenant and ignore it in the property's valuation. However, the Petitioner's appraiser is a licensed appraiser. He is experienced in valuing Section 515 apartments and he certified that he prepared his analysis according to USPAP standards. Thus, while the Board would have found an appraisal that considered the below market financing in its analysis more persuasive, the Respondent's arguments fail to impeach the Petitioner's case.
34. In the end, Mr. Garrison testified that he is not an appraiser and his income analysis was not prepared in conformance with USPAP standards. Even with Mr. Johns' failure to consider the subsidized mortgage in his capitalization rate, the Board finds the Petitioner's appraised value to be more persuasive than the Respondent's income analysis.

#### **SUMMARY OF FINAL DETERMINATION**

35. The Petitioner raised a prima facie case that the 2008 assessed value of its property was overstated. The Respondent presented rebuttal evidence. The Board finds the weight of

the evidence supports the Petitioner's case and holds that the property's true tax value is \$236,300 for 2008.

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

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Chairman,  
Indiana Board of Tax Review

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Commissioner,  
Indiana Board of Tax Review

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Commissioner,  
Indiana Board of Tax Review

## 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>.**