



**FINAL ADMINISTRATIVE DECISION
ILLINOIS PROPERTY TAX APPEAL BOARD**

APPELLANT: Fox Pointe Apartments LP
DOCKET NO.: 09-04360.001-C-3
PARCEL NO.: 15-36-251-003

The parties of record before the Property Tax Appeal Board are Fox Pointe Apartments LP, the appellant, by attorney Robert E. Welsh of Madigan & Getzendanner, Chicago, Illinois; the Kane County Board of Review; and the City of Aurora, intervenor, by attorney Joshua S. Whitt of Whitt Law LLC, Aurora, Illinois.

Based on the facts and exhibits presented, the Property Tax Appeal Board hereby finds a reduction in the assessment of the property as established by the Kane County Board of Review is warranted. The correct assessed valuation of the property is:

LAND: \$558,843
IMPR: \$2,715,402
TOTAL: \$3,274,245

Subject only to the State multiplier as applicable.

ANALYSIS

The subject property is improved with a 248-unit low income apartment complex that was constructed in 1995. The property has a 16.08 acre site and is located in Aurora, Aurora Township, Kane County.

The appellant appeared before the Property Tax Appeal Board by counsel contending overvaluation as the basis of the appeal. Counsel presented a brief and argument in support of the contention that the assessment of the subject property was excessive. Counsel explained the subject property is commonly known as Fox Point Apartments located in Aurora. Mr. Welsh asserted the property is a 248 unit low-income apartment complex constructed in 1995 with the express purpose of operation as a Section 42 tax credit property under the Internal Revenue Code. The appellant contends that for the 2009 tax year that the Aurora Township Assessor did not assess the property in conformity with section 10-245 of the Property Tax Code. (35 ILCS 200/10-245). Counsel explained that section 10-245 of Property Tax Code provides for the method of valuation of a low-income housing project that qualifies for the low-income housing tax credit under Section 42 of the Internal Revenue Code. Mr. Welsh

asserted that section 10-245 calls for the use of the actual or probable net operating income using a vacancy rate of not more than 5% and actual expenses capitalized by a market based capitalization rate.

Counsel submitted the subject's operating statements for 2008, 2007 and 2006 as well as the subject's January 1, 2009 rent roll. According to counsel the subject's gross income was \$2,080,773, \$2,180,464 and \$2,069,803 for 2006, 2007 and 2008, respectively. The appellant submitted copies of Operating Statements for each year identified as Appellant's Exhibits C, D and E. Mr. Welsh asserted that the weighted occupancy for 2008 was 84.27%, as depicted in Exhibit F of his submission. Counsel then calculated the subject's full or stabilized potential gross income for 2008 to be \$2,456,299 by dividing the 2008 actual income by 84.27%. He then deducted 5% or \$122,815 for vacancy and collection loss to arrive at an effective gross income of \$2,333,484. He then deducted \$1,235,668 for expenses to arrive at a net operating income of \$1,097,816. A capitalization rate was then calculated using the band of investment technique. Counsel asserted that a review of market conditions as of January 1, 2009, revealed that mortgages would be in the area of 6% with a mortgage ratio of 70% over a 20 year term. He also contends a buyer would be looking for a rate of return of 10% on the investment. Counsel calculated the capitalization rate to be 9% to which he added an effective tax rate of 2.45% to arrive at a loaded capitalization rate of 11.45%. Dividing his estimate of the subject's net income by his estimated capitalization rate resulted in an estimated value of \$9,587,912. Multiplying the estimated value by the statutory level of assessment resulted in a corresponding assessment of \$3,195,651.

Mr. Welsh further noted that for the 2010 tax year the township assessor had reduced the subject's assessment to \$3,274,245, which was documented by the Appellant's Exhibit G.

Based on this argument the appellant requested the subject's assessment be reduced.

The board of review submitted its "Board of Review Notes on Appeal" wherein the subject's total assessment of \$4,022,931 was disclosed. The subject's total assessment reflects a market value of \$12,077,247 when applying the 2009 three year average median level of assessments for Kane County of 33.31% as calculated by the Illinois Department of Revenue.

Appearing on behalf of the board of review was board member Timothy Sullivan. Mr. Sullivan testified the board of review essentially accepted the numbers set forth by Mr. Welsh. He noted that the income figure used was grossed up and considerably higher than the three prior years. He also asserted that if you have a higher occupancy typically you have a higher expense ratio which he contends was reflective in the figure of \$1,235,668 used by Mr. Welsh. With respect to the capitalization rate Sullivan testified that the six percent figure for the mortgage rate

seemed appropriate for the lien date of January 1, 2009 but the 20-year term may be towards the low end of the amortization period. He also thought the 10% equity dividend rate was fine for a simple band of investment technique. Sullivan thought if an amortization period of 25 or 30 years was used with a five, seven or ten year call, the mortgage constant might be lower resulting in a slightly higher value. Based on this record the board of review proposed the subject's assessment be reduced to \$3,274,245.

The intervening taxing district appeared by counsel who submitted a brief and requested an increase in the assessment of the subject property to \$4,526,485, which reflects a market value of \$13,580,812. Counsel initially noted in the brief that the subject property is to be assessed in accordance with Section 10-245 of the Property Tax Code (35 ILCS 200/10-245). He further asserted that Section 10-245 provides that in assessing a low-income housing project, "local assessment officers must consider the actual or probable net operating income attributable to the property, using a vacancy rate of not more than 5%, capitalized at normal market rates." Counsel also noted that section 10-245 provides in part that "[t]he interest rate to be used in developing the normal market value capitalization rate shall be one that reflects the prevailing cost of cash for other types of commercial real estate in the geographic market in which the low-income housing project is located."

Mr. Whitt asserted that the appellant's income approach advocated by Mr. Welsh: (1) underestimates the subject property's actual potential gross income; (2) greatly over estimates the subject property's annual operating expense; and (3) erroneously overstates the capitalization rate and tax load.

Using the same operating statements as submitted by the appellant but marked as Intervenor's Exhibit #1, counsel asserted the property's potential gross income was \$2,557,485 for 2008, \$2,529,765 for 2007 and \$2,508,252 for 2006 for an average of \$2,531,834. Counsel contends that there was no support for the appellant's counsel's use of a potential gross income of \$2,456,299. Mr. Whitt asserted that the actual potential gross income for the subject is represented by \$2,530,000.

Mr. Whitt further indicated that the subject property had actual expenses of \$1,096,064 for 2008, \$937,759 for 2007 and \$1,003,768 for 2006 as reflected in Intervenor's Exhibit #1.¹ Mr. Whitt contends there was no explanation why Mr. Welsh used an annual operating cost of \$1,235,668, a 22% increase over the average of the three preceding years. Mr. Whitt asserted an operating cost rate is more appropriately estimated at no more than \$1,100,000.

With respect to the capitalization rate Mr. Whitt asserted the appellant failed to explain why a mortgage rate of 8.59717% was

¹ The Intervenor's counsel had the expenses for years 2006 and 2008 reversed in his brief.

used and not the 6% interest rate. He contends a capitalization rate of 7.2% is appropriately calculated. He also asserted the appellant applied a tax rate of 7.3507%, which had no support. He cited the historic property tax rates, referenced in Intervenor's Exhibit 2, of 7.1951% for 2008, 6.8818% for 2007 and 7.0025% for 2006 for a three year average of 7.0265%. Mr. Whitt asserted that using a correct capitalization rate of 7.2% and the highest historic tax rate of 7.1951%, a loaded capitalization rate of 9.5981% is more appropriate.

Using the estimates as outlined, Mr. Whitt calculated the subject had an indicated market value of \$13,580,812 and an assessment of \$4,526,485 when applying the statutory level of assessments.

After hearing the testimony and considering the evidence, the Property Tax Appeal Board finds that it has jurisdiction over the parties and the subject matter of the appeal.

The appellant argued the market value of the subject property was not accurately reflected in the subject's assessed valuation. When market value is the basis of the appeal the value of the property must be proved by a preponderance of the evidence. National City Bank of Michigan/Illinois v. Illinois Property Tax Appeal Board, 331 Ill.App.3d 1038 (3rd Dist. 2002). Proof of market value may consist of an appraisal of the subject property, a recent sale, comparable sales or construction costs. (86 Ill.Admin.Code §1910.65(c)).

The parties agreed the subject property was a low income housing complex that qualified for low-income housing tax credits under Section 42 of the Internal Revenue Code. The parties also agreed the subject property should be valued using the procedure contained in Section 10-245 of the Property Tax Code (35 ILCS 200/10-245). Section 10-245 of the Property Tax Code provides:

Notwithstanding Section 1-55 and except in counties with a population of more than 200,000 that classify property for the purposes of taxation, to determine 33 and one-third percent of the fair cash value of any low-income housing project developed under the Section 515 program or that qualifies for the low-income housing tax credit under Section 42 of the Internal Revenue Code, in assessing the project, local assessment officers must consider the actual or probable net operating income attributable to the property, using a vacancy rate of not more than 5%, capitalized at normal market rates. The interest rate to be used in developing the normal market value capitalization rate shall be one that reflects the prevailing cost of cash for other types of commercial real estate in the geographic market in which the low-income housing project is located.

Although both the appellant and the intereving taxing district made reference to the subject's operating statements for 2006

through 2008, neither called any witnesses who were experts in the field of real estate appraisal to estimate a value for the subject property using the procedures contained in section 10-245 of the Property Tax Code and the data from the operating statements. Instead, the respective attorneys each developed estimates of value purportedly following the dictates of Section 10-245 of the Property Tax Code. The Board finds problematic the fact that appellant's counsel and the intervenor's counsel developed an "income approach" to value rather than an expert in the field of real estate valuation. The Board finds that an attorney cannot act as both an advocate for a client and also provide unbiased, objective opinion testimony of value for that client. Furthermore, Section 1910.70(f) of the rules of the Property Tax Appeal Board states:

An attorney shall avoid appearing before the Board on behalf of his or her client in the capacity of both an advocate and a witness. When an attorney is a witness for the client, except as to merely formal matters, the attorney should leave the hearing of the appeal to other counsel. Except when essential to the ends of justice, an attorney shall avoid testifying before the Board on behalf of a client. (86 Ill.Admin.Code 1910.70(f)).

The Board finds both Mr. Welsh and Mr. Whitt appeared to be developing opinions of value for their respective clients while at the same time acting as advocates in violation of Section 1910.70(f) of the Property Tax Appeal Board's rules. The Board gives little weight to the conclusions of value and the assessment requests presented by Mr. Welsh and Mr. Whitt.

The Board finds the record disclosed the assessment of the subject property was reduced by the Aurora Township Assessor for the 2010 tax year to \$3,274,245. During the course of the hearing Mr. Sullivan, member of the Kane County Board of Review, testified to the merits of Mr. Welsh's analysis and further indicated the mortgage constant used in the analysis might be lower resulting in a slightly higher value. Based on this record the board of review proposed the subject's assessment be reduced to \$3,274,245. In light of the fact that the 2010 assessment of the subject property was reduced to \$3,274,245 and the board of review requested the subject's 2009 assessment of the subject be reduced to \$3,274,245 the Board finds a reduction in the assessment is appropriate.

This is a final administrative decision of the Property Tax Appeal Board which is subject to review in the Circuit Court or Appellate Court under the provisions of the Administrative Review Law (735 ILCS 5/3-101 et seq.) and section 16-195 of the Property Tax Code.

Donald R. Cuit

Chairman

K. L. Fern

Member

Frank A. Huff

Member

Mario Morris

Member

J. R.

Member

DISSENTING: _____

C E R T I F I C A T I O N

As Clerk of the Illinois Property Tax Appeal Board and the keeper of the Records thereof, I do hereby certify that the foregoing is a true, full and complete Final Administrative Decision of the Illinois Property Tax Appeal Board issued this date in the above entitled appeal, now of record in this said office.

Date: September 20, 2013

Allen Castrovillari

Clerk of the Property Tax Appeal Board

IMPORTANT NOTICE

Section 16-185 of the Property Tax Code provides in part:

"If the Property Tax Appeal Board renders a decision lowering the assessment of a particular parcel after the deadline for filing

complaints with the Board of Review or after adjournment of the session of the Board of Review at which assessments for the subsequent year are being considered, the taxpayer may, within 30 days after the date of written notice of the Property Tax Appeal Board's decision, appeal the assessment for the subsequent year directly to the Property Tax Appeal Board."

In order to comply with the above provision, YOU MUST FILE A PETITION AND EVIDENCE WITH THE PROPERTY TAX APPEAL BOARD WITHIN 30 DAYS OF THE DATE OF THE ENCLOSED DECISION IN ORDER TO APPEAL THE ASSESSMENT OF THE PROPERTY FOR THE SUBSEQUENT YEAR.

Based upon the issuance of a lowered assessment by the Property Tax Appeal Board, the refund of paid property taxes is the responsibility of your County Treasurer. Please contact that office with any questions you may have regarding the refund of paid property taxes.