STATE OF MAINE
KENNEBEC, ss

STATE BOARD OF PROPERTY TAX REVIEW
Docket No. 2006-012 & 2006-013

CITY OF BREWER)
)
v.)
)
ELLEN M. LEACH MEMORIAL)
HOME)
)

DECISION

ELLEN M. LEACH MEMORIAL)
HOME)
)
v.)
)
CITY OF BREWER)

INTRODUCTION

This matter came before the State Board of Property Tax Review (hereinafter "the Board") on appeal of both Ellen M. Leach Memorial Home on behalf of Leach Home Partners, L.P., and the City of Brewer from the decision of the local board of assessment review for the tax years April 1, 2004 and April 1, 2005 to abate property taxes for those years that were assessed on Leach Home Partners, L.P. Leach Home Partners, L.P. is the owner of a 90 unit residential congregate care housing facility that provides low-income housing and services to below median income elderly persons which is described in Map 14 Lot 31B of the City of Brewer tax maps and is the subject property of the appeal before the Board. The facility was developed under the Low-Income Housing Tax Credit (LIHTC) Program defined in Section 42 of the Internal Revenue Code of 1986. For the tax years April 1, 2004 and April 1, 2005 the assessor valued the property at $6,938,700 for both tax years. The petitioner asserts that the property, exclusive of the value of the tax credits, should be valued at $2,140,000 for both tax years.

The Board convened on May 8 and 9, October 31 and November 1, of 2007 to hear the substance of the appeal. Present on behalf of the Board were Chairperson of the

Panel Charles A. Lane, Esq., John E. Hodgkins, Mary P. Nelson, and Dorcas Zeiner. The Petitioner was represented by Edmond Bearor, Esq. The City was represented by Erik Stumpfel, Esq. After the hearing the parties submitted briefs. The Board conducted public deliberations on August 4, 2008 and granted an abatement. The Board concluded that the taxpayer had met its burden to prove the property substantially overvalued for both tax years and granted an abatement based on a fair market value as of April 1, 2004 of $4,727,212 and as of April 1, 2005 of $4,287,789.

JURISDICTION AND BURDEN OF PROOF

The Board's authority to hear and decide property tax disputes is set forth in 36 M.R.S.A. § 271. The property that is the subject matter of this appeal is non-residential property within the meaning of 36 M.R.S.A. § 843(1-A) and has an equalized valuation greater than $1,000,000. The Board, therefore, has jurisdiction to conduct a de-novo hearing without regard to any decision that may have issued from the local board of assessment review. 36 M.R.S.A. § 843 (1-A).

The assessment is presumed correct and the burden is on the Petitioner to show that the assessor's valuation is unjust, i.e., that there has been an overvaluation or the valuation is the result of discrimination, fraud, dishonesty, or is illegal. Sweet v. City of Auburn, 134 Me. 28 (1955). Here, in the matter of Leach Home Partners, L. P. the taxpayer asserts that the City has overvalued the property. It, therefore, is Leach Home Partners, LLC's burden to persuade the Board that the property is overvalued or it loses the appeal. [1]

[1] During the hearing before the State Board, counsel for Leach Home Partners stated that the taxpayer was satisfied with the decision of the local board of assessment review regarding both tax years. That decision would have become final had the City not appealed. Because the City chose to appeal the decisions of the local board to the State Board, Leach Home Partners, L.P. chose to appeal those decisions as well. In either event, the proceeding before the State Board is de-novo and the assessor's determination of value, NOT the decision of the local board of assessment review, is presumed correct. See CMP v. Town of Moscow 649 A.2d 320, 322 (Me. 1994). When only the City appeals to the State Board or, as here, when both the City and the taxpayer appeal the decision of the local board of assessment review to the State Board, the assessor is presumed correct and the taxpayer shoulders the burden to persuade the Board that the property is overvalued as originally assessed by the assessor otherwise the assessment stands.

With regard to the issue of overvaluation, the taxpayer carries its burden to prove that the subject property is substantially overvalued when it proves that the "assessed value in relation to just value is 'manifestly wrong'". Delta Chemicals, Inc. v. Town of Searsport, 438 A.2d 483, 484 (Me. 1981).[2] Impeachment of the assessor alone is not enough to prove the taxpayer's case. The taxpayer must affirmatively offer credible evidence of value against which the assessment may be compared sufficient to persuade the Board that the assessed value in relation to just value is "manifestly wrong". City of Waterville v. Waterville Homes, Inc. 655 A.2d 365 (Me. 1995). If the taxpayer meets this burden then, and only then, may the Board engage in an independent determination of value based on the entire record. Town of Southwest Harbor v. Jean Harwood, Trustee, Cranberry Point Realty Trust. 763 A.2d 115 (Me. 2000).

The Legislature has provided guidance in determining fair market value of the property for the purpose of assessment of taxes. In particular section 701-A of Title 36 entitled "Just value defined" provides in relevant part, as follows:

> In determining just value [i.e fair market value] the assessors *must consider all relevant factors*, including without limitation, the effect upon value of any enforceable restrictions which use of the land may be subjected, current use, physical depreciation, sales in the secondary market, functional obsolescence and economic obsolescence. Restrictions include but are not limited to zoning restrictions limiting use of land, subdivision restrictions and any recorded contractual provisions limiting the use of land. The just value is determined to arise from the legally permissible use or uses only...
>
> *(emphasis added)*

[2] The requirement that the property be assessed according to its just value is set forth in Article IX, Section 8 of the Maine Constitution and further defined at 36 M.R.S.A. section 701-A. Case law has long established that the just value is the equivalent of true or market value. Frank v. Assessors of Skowhegan, 39 A.2d 167, 173 (Me. 1974) and cases cited therein.

PROCEDURAL HISTORY

For each tax year the subject property was assessed at $6,938,700. The parties' have stipulated that for those tax years the applicable assessment ratio was 94% for April 1, 2004 and 92% for April 1, 2005. In applying the assessment ratio to $6,938,700, the fair market value of the property as assessed by the City was $7,381,595 as of April 1, 2004 and $7,542,065 as of April 1, 2005. These assessed values are presumed correct.

As has been noted, Ellen M. Leach Memorial Home filed petitions on behalf of Leach Home Partners L.P. (Hereinafter the petitioner shall be referred to as Leach Home Partners, L.P.). Ellen M. Leach Memorial Home is a Maine non-profit corporation and sole shareholder of Brewer Congregate Housing Corporation, a for-profit corporation and general partner of Leach Home Partners L.P. Leach Home Partners, L.P. is comprised of Brewer Congregate Corporation, the general partner, and Key Community Development Corporation, the sole limited partner. (City Ex. #19 Organization Chart). The limited partnership owns the improvements on the property and holds a 99 year lease from the Housing Authority of the City of Brewer for the land on which the project was built by the limited partnership. (Taxpayer Ex. #5, Lease). Because the lease is long term at a rate of $1.00 per year, the property was appraised by both Mr. Plourde and Ms. Amidon as though the limited partnership holds a fee simple interest in the property. This is not an issue.

Leach Home Partners, L.P. applied to the assessor for an abatement for both years. The assessor denied abatement for both years and Leach Home Partners appealed. The local board of assessment review (LBAR) determined that the property was overvalued in 2004 and 2005, and found that fair market value for both tax years should be $4,032,000. It granted an abatement based on that value.[3] Both the taxpayer and the City appealed these decisions to the State Board as permitted by statute. 36 M.R.S.A. §843(1-A).

[3] It remains unclear whether the LBAR took into consideration the relevant assessment ratio. This is of no consequence, however, because the hearing before the State Board is de novo.

The proceeding before the State Board is *de-novo*. This means that "when [the] Board hears [an] appeal of an assessment that has already been reviewed by the local board of assessment review, [the] Board shall hold a de-novo hearing and 'determine(s) the matter in the same manner as if the appeal had been taken directly from the assessors' decision or municipal officers' decision on the abatement application to the state board'". CMP v. Town of Moscow 649 A.2d 320, 322 (Me. 1994), quoting Statement of Fact to L.D. 2364, (112th Legis. 1986) or 36 M.R.S.A. 843(1-A). Consequently, the decision of the LBAR is not relevant to the matter before the Board. The assessor's determination of value, $6,938,700 (or $7,381,595 as of April 1, 2004 and $7,542,065 as of April 1, 2005, as adjusted by the assessment ratio), and not the finding of the local board of assessment review, is presumed correct. Chase v. Town of Machiasport 721 A.2d 636 (Me. 1998). The City continues to enjoy the presumption that the assessor's determination of value is correct. In the proceedings before the Board, the taxpayer must prove the assessment manifestly wrong by not only impeaching the credibility of the assessor but also by offering credible evidence of value against which to compare the assessment in order to prove overvaluation. The taxpayer offered an appraisal prepared by Mark Plourde as evidence of value. The City offered an appraisal prepared by Patricia Amidon in support of the assessment and which challenged Mr. Plourde's conclusion of value.

THE SUBJECT PROPERTY

The subject property is a 90 unit congregate care housing facility that provides low-income housing and various services to below median-income elderly persons. The project was developed in three stages of 30 units each. The project operates under certain rent restrictions imposed by Maine State Housing Authority (MSHA) in exchange for tax credits made available to for-profit owners, such as Leach Home Partners, L.P., through the Low-Income Housing Tax Credit Program (LHITC) as set forth in Section 42 of the Internal Revenue Code of 1986.[4] MSHA is designated under 30-A M.R.S.A. § 4741 as

[4] The LHITC program was created under the Tax Reform Act of 1986. Prior to 1986, the federal government encouraged development of low-income housing through subsidy programs administered by HUD. The so-called Section 8 program paid income/rent subsidies to landlords on behalf of tenants. The

the state agency responsible for allocating credits extended to Maine by the federal government under the Low-Income Tax Credit Program.[5] Under the Program each state is provided an allotment of tax credits to allocate to qualifying projects. In Maine, the state allocates credits pursuant to a competitive process on a project by project basis.[6] Under the Program a developer agrees to restrictions imposed by MSHA on the use of the land for a period no less than 30 years which require, among other things, that the owner offer low rental rates to qualifying individuals. In exchange for restrictions imposed on the property, tax credits are made available to the developer/general partner who, in turn, assigns the credits to third parties in exchange for equitable contributions to the partnership and limited partner status. In this way the LIHTC program provides an equity/capital subsidy to the successful bidder (i.e. developer/general partner) who builds the low-income project.

The tax credits are claimed on an annual basis over a 10 year period and earned over 15 years. Over the 15 year period, if the project fails to comply with all restrictions including rent imposed by the program, then the credits may be re-captured. Typically, 2/3 of the project is funded by equity provided by the credits. Other financing, at less than market rates, may be provided to the successful bidder by MSHA, as was done here with Leach Home Partners. L.P.

The limited partner and the developer/general partner as the Limited Partnership, become the owner of the property which remains subject to the restrictions imposed by MSHA for a period no less than 30 years. As part of the competitive bid process, the developer/general partner may propose a longer period than 30 years for the rent restrictions to remain in place. Ultimately, Leach Home Partners, L.P. agreed to rent restrictions for 90 years. The tax credits are tied to the restrictions imposed on the property and are not severable from it. The tax credits that are claimed annually over a

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HUD 236 program paid mortgage interest subsidies to owners of qualifying projects or directly to their lenders. These subsidies allowed owners to charge below market rents.

[5] See, 30-A M.R.S.A. § 4741(14); and 99-345 CMR Chapter 16 "Allocation of State Ceiling for Low-Income Housing Credit". The Rules were submitted by Leach Home Partners L.P. as Taxpayer Ex. #14.

[6] The amount of tax credit available to any one state is established pursuant to a certain formula and is stated in terms of per capita.

10 year period are not dependent on the tax bracket of the developer/general partner or the limited partner.

In Woodland Kittery Limited Partnership v. Town of Kittery the Board, SBPTR Docket No. 2006-008, decision dated December 27, 2007, the Board concluded that such tax credits are a value influencing factor that must be considered when valuing a Section 42 Tax Credit Program project. In Woodland the Board determined that the tax credit benefit is inextricably intertwined with the highest and best use of the property "as a Low-Income Tax Credit residential complex" and, therefore, must be considered together with the rent restrictions in determining the fair market value of the subject property.[7] In Woodland, however, the assessor did not include the value of the credits in the assessment nor did the taxpayer offer evidence of value for the credits. As a result, even though the credibility of the assessment was placed in question, the taxpayer did not meet its burden of offering credible evidence of value and the assessment stood. Here, in the matter of Leach Home Partners, L.P., the question for the Board in light of Woodland is not whether the tax credits should be considered in determining fair market value of the property but how they should be valued. Both Leach Home Partners L.P. and also the City offered a methodology for valuing the tax credits in conjunction with their development of the income approach to value.

Unlike Woodland, the subject property is a congregate care housing facility that provides services for the elderly. Leach Home Partners, L.P. receives a subsidy from Ellen M. Leach Memorial Home to make up the short-fall in operating costs and payment for debt service created by its obligation to provide services to the elderly tenants and to charge reduced rents. (Taxpayer Ex. #6 page 1 Subsidy Agreement between Ellen M. Leach Memorial Home and Leach Home Partners, L.P.). As previously noted, Ellen M. Leach Memorial Home is a non-profit corporation that is wholly owned by Brewer Congregate Housing, a for-profit corporation and general partner of Leach Home Partners L.P. (Taxpayer Ex. #19 Organizational Chart). Ellen M. Leach Memorial Home is able to

[7] In arriving at its conclusion the Board cited Glenridge Development Company v. City of Augusta 662 A.2d 928 (Me. 1995), and also UAH-Hydro Kennebec, L.P. v. Town of Winslow, 2007 ME 36, in which the Law Court cites Glenridge.

provide the subsidy by virtue of an agreement it has with the Tyrell Trust. (Taxpayer Ex. #6 page 10 Contribution Agreement between Ellen M. Leach Memorial Home and Tyrell Trust). As more fully discussed below, under the Internal Revenue Code, funding from non-profit entities such as Ellen M. Leach Memorial Home, for supportive services, over and above allowable restricted income from rents, may be offered/committed as part of the bid for credits. Furthermore, under MSHA rules and regulations (99-345 CMR Chapter 16, Rule 7(D)(2)), a maximum of 30 points may be awarded to a bidder that incorporates "[a]ny low-income benefit promised (such as supportive services) in order to secure additional consideration for selection". (Taxpayer Ex. #14). Leach Home Partners, L.P. promised funding for supportive services as part of the competitive bid process that resulted in an agreement between and among Leach Home Partners, L.P., Ellen M. Leach Memorial Home, and MSHA. (Taxpayer Ex. #11 Maine State Housing Authority Low-Income Housing Tax Credit Program, Extended Low-Income Housing Commitment Agreement). The conditions incorporated in the agreement were "given as a condition precedent to the allocation of low-income housing credits by MSHA". (Taxpayer Ex. #11, first paragraph). The question for the Board is, when determining fair market value of the property, should market rates for services provided to elderly tenants be considered, as suggested by Ms. Amidon in support of the assessment; or instead should the actual or stabilized income received by Leach Home Partners, L.P. from Ellen M. Leach Memorial Home, as provided by the Tyrell Trust be considered, as recommended by Mr. Plourde.

The Tax Credits

In support of its asserted value of $2,140,000, for both tax years, Leach Home Partners, L.P. first offered the testimony of Robert Taylor who had been involved in structuring the project for Leach Home Partners, L.P. The Board found Mr. Taylor experienced, knowledgeable and his testimony credible and helpful in describing the process and procedure employed in gaining award of the tax credits.

In particular, Mr. Taylor explained that, unlike many other Tax Credit Program projects, the Leach Home project is motivated by the charitable mission of providing affordable elderly housing with associated supportive services. In order to qualify for the tax credits, however, an applicant must be an entity that generates profit against which the credits may be claimed. Hence the creation of Brewer Congregate Housing Corporation as general partner, a wholly owned, for-profit corporation of Ellen M. Leach Memorial Home, itself a Maine non-profit corporation. Brewer Congregate Housing then joined with Key Community Development Corporation as limited partner to create Leach Home Partners, L.P., the entity which owns the property. The developer/general partner was awarded a total of $7,250,390 in tax credits as the successful bidder for the project. The credits were divided .01% to the general partner and 99.99% to Key Community Development Corporation in exchange for an infusion of equity/capital of $5,332,723 and limited partner status. (Stipulation of the Parties, page two, next to last paragraph).[8] The credits are claimed annually for 10 years from the date that they are issued. Because the project was built in three phases, the credits were issued in three phases and were claimed, commencing in 1995 through 2012, according to the schedule set forth in last page of City Ex. #10. (City Ex. #10 last page). As has been noted, if the project should fail at any time to comply with the restrictions imposed upon it by the program within the fifteen year period from the year the credits were granted, then the credits may be re-captured. Here the fifteen year period for any remaining credits ends in 2017. Mr. Taylor testified that the credits cannot be transferred separately from the real property and that they are an incident of ownership of Leach Home Partners, L.P. (SEE T.T. May 8, 2007 page 108). According to Taylor, Section 42 Tax Credit Program projects are transferable and there is a market for these types of properties, although sales are rare before the 15 year enforcement period has lapsed. (T.T. May 8, page 148).

[8] Note that the Stipulation of the parties (page two next to last paragraph) indicates that the total infusion of equity was $5,617,505 of which $5,332,725 was provided by Key Community Development Corporation. The difference between those two figures, $284,780 or approximately $300,000, represents, according to Mr. Taylor, an equity contribution funded by the Tyrell Trust through Ellen M. Leach Memorial Home to Leach Home Partners, L.P. The contribution is considered a "gift" to the project. (SEE T.T. May 8, 2007 page 101).

Taylor went on to explain that large investors, such as Key Community, are motivated to bid on tax credits awarded by MSHA under the federal program not only because of the tax credit benefit (although that is the primary motivation, because it is a dependable benefit) but also because the investor may claim depreciation against its income as an ordinary incident of ownership. This type of depreciation, however, is not the type of depreciation usually considered in valuing real property and, from his view, would not be considered in valuing the tax credits using a discounted cash flow analysis for the purpose of determining the fair market value of the real property. (T.T. May 8, 2007 pages 60 to 63, 121) Large investors are also motivated to bid on tax credits because their participation in the program benefits their institution under the Federal Community Reinvestment Act which regulates, among other things, corporate mergers. Such benefits are, from his view, a non-economic, non-quantifiable motivation factor and, therefore, should not come directly into play in applying a discounted cash flow analysis when determining the value of the credits. (T.T. May 8, 2007 pages 63 to 65 and 121).

Mr. Taylor offered an analysis of the value of the tax credits as a defined stream of benefits to the owner of the property, commencing on the relevant April 1st valuation date, then going forward. (T.T. May 8, 2007 page 122). Because the available credits decline over a defined period of time, he applied a discounted cash flow (DCF) method in valuing the remaining tax credits as of April 1, 2004 and April 1, 2005. According to Taylor, a typically motivated investor, such as Key Community Development Corporation, would value the credits based on a discounted cash flow analysis rather than a direct capitalization analysis. (T.T. May 8, 2007 page 144). A direct capitalization method would not be appropriate in this instance, because, when applying that analysis, it is assumed that the cash flow or stream of benefits will increase over time, and that is not what is happening here. The tax credits are a definite dollar for dollar off the investor's tax liability, regardless of its income, and must be claimed over a time certain. In determining an appropriate discount rate, Taylor considered what large investors would demand as an internal rate of return and concluded that 10% was reasonable. He used 9.75%, however, because it was closer to the capitalization rate used in Mr. Plourde's basic income approach analysis, exclusive of the value of the credits. (Taxpayer Ex. #16 page 2). In any event, had he used 10%, instead of 9.75%, the difference would be insubstantial. Using this method, Taylor concluded that the value of the tax credits as of April 1, 2004 was $2,085,100. As of April 1, 2005, he concluded that the value of the tax credits was $1,615,378. (Taxpayer Ex. #16 page 2).

The project cost $9,682,084 and was completed in 2003. Taylor explained that of that amount, $5,332,725 was paid by Key Community Development Corporation to the limited partnership and resulted in a tax credit benefit being awarded by MSHA to the partnership, as owner, in exchange for restrictions on the property. The remaining $4,349,359 was provided the partnership in part through MSHA mortgaged loans in the face amount of $4,064,579, as outlined in the parties' Stipulation. The difference between $4,349,359 and $4,064,579 (or approximately $300,000) was contributed by the Tyrell Trust through Ellen M. Leach Memorial Home to Leach Home Partners, L.P. as an equity gift to the project in order to bridge the gap in capital financing. (T.T. May 8, 2007 page 101).[9] According to Mr. Taylor, after the 15 year enforcement period has lapsed in 2017, it is likely that the partnership will want to withdraw from the property because the tax credits will have run out by that time. In 2017, the "sponsor'" of the project, Ellen M. Leach Memorial Home, the non-profit corporation, may acquire the project for the debt plus a dollar. (T.T. May 8, 2007 page 116 and City Ex. #17 Partnership Agreement Section 8.6) At that point, it is likely that Ellen M. Leach Memorial Home will apply for a charitable exemption from payment of property taxes. (T.T. May 8, 2007 page 61).

Mr. Taylor went on to explain that MSHA is able to offer a combination of non-reduced rate and reduced rate loans for these projects because the return on non-reduced rate loans is used as collateral when issuing bonds which, among other things, raise money which is used to support the reduced rate loans. Here MSHA financed $3,529,570 dollars in non-reduced mortgages over 30 years, and $535,000 in zero rate mortgages to

[9] This particular project was structured as revenue neutral based on its charitable mission. According to Mr. Taylor and also Mr. Plourde, it was structured to produce enough income to cover operational costs and debt service. It was anticipated that "profit" would be minimal, if any. Thus, Key Community Development Corporation is involved in the project primarily for the tax credit benefit.

be paid in two installments in 2027 and 2033, well after the 15 year period and probable turnover of the property to Ellen M. Leach Memorial Home. (SEE Stipulation of facts). At that point, as previously noted, it is likely that Ellen M. Leach Memorial Home will apply for a charitable exemption from property taxation and be free to re-negotiate the financing arrangement with MSHA, if deemed practical.

Income subsidy

The financial structure of the project, as bid to MSHA, was based on the fact that a subsidy would be available. (T.T. May 8, page 56). Indeed, Key Community Corporation contributed capital in the amount of $5, 332,725 and became a limited partner in Leach Home Partners, L.P. "in contemplation of the fact that the subsidy would be there". (T.T. of Taylor, May 8, 2007 page 55). As more fully discussed below, under Section 42(g)(2) of the Code, nonprofit entities may provide funding for the project. Although the application (bid) to MSHA was never made part of the record, it appears, based on Robert Taylor's testimony, Section 42(g)(2) of the Internal Revenue Code, the Rules and Regulations of the Maine State Housing Authority, 99-345 CMR Chapter 16, Rule 7(D)(2)[10], and other documents submitted as evidence and discussed below, that provision of the subsidy was an important part of the project, and a positive factor in awarding the credits to Leach Home Partners, L.P. in what has been described as a highly competitive process.[11] Though the obligation of the subsidy provider, as reflected in the various documents, is to fund operational cash shortfalls and payment for debt service of the project which are a direct result of the restricted rents, the annual subsidy payment appears generally equivalent to the cost of "services" provided to tenants. (T.T. May 8, 2007 page 56 and October 31, 2007 pages 17 to 18).

Under Section 42(g)(2) of the Internal Revenue Code, entitled "rent restrictions", qualifying projects bidding for credits may, in addition to restricted rents, promise to provide supportive services, so long as those services are paid for by the government or

[10] See Taxpayer Ex. #14.

[11] In general, there are 10 to 15 projects competing for the credits and only 4 or 5 are awarded credits. (T.T. May 8, 2007. page 53).

by nonprofit entities, such as Ellen M. Leach Memorial Home. Under Section 42(g)(2), restricted rents do not include "any fee for supportive service which is paid to the owner of the unit [i.e. Leach Home Partners, L.P.] by any government program of assistance or by an organization described in section 501(c)3) [26 USCS § 501(c)(3)] and exempt from tax under section 501(a)[26 USCS § 501(a)] if such program provides assistance for rent (i.e. funding for cash losses of the project) and the amount of assistance provided for rent is not separable from the amount of assistance provided for supportive services ..." Supportive services are defined in the Code as meaning "any service provided under a planned program of services designed to enable residents of residential rental property to remain independent and avoid placement in a hospital, nursing home, or intermediate care facility for the mentally or physically handicapped". Thus, funding for cash losses inclusive of supportive services by non-profit entities, such as Ellen M. Leach Memorial Home, over and above allowable restricted income on rents may be offered/committed as part of the bid for credits under the Program. Indeed, under 99-345 CMR Chapter 16, Rule 7(D)(2), a maximum of 30 points may be awarded to a bidder that incorporates "[a]ny low-income benefit promises (i.e. supportive services) in order to get additional consideration for selection". (Taxpayer Ex. #14). This was done here.

More specifically, Leach Home Partners, L.P. promised funding for supportive services as part of the competitive bid process that resulted in an agreement between and among Leach Home Partners L.P., the Ellen M. Leach Memorial Home, the Housing Authority of the City of Brewer, and MSHA. (Taxpayer Ex. #1, Maine State Housing Authority Low-Income Housing Tax Credit Program, Extended Low-Income Housing Commitment Agreement). The conditions contained in the Agreement were "given as a condition precedent to the allocation of low-income housing credits by MSHA". (SEE first paragraph). In Section 5(H) of the Agreement, the owner, Leach Home Partners, L.P., is obligated to provide "[f]or a period of ninety (90) years... the following services to the residents of the Project: resident services coordination, at least one meal per day for seven days per week, housekeeping, transportation, health maintenance services, and coordination of home health services". Section 2 of the Agreement provides that the covenants contained therein run with the land. Thus, the obligation to provide these services, at a cost beyond income received from restricted rents, was made part of the project, and that obligation runs with the land. The Agreement permits Leach Home Partners, L.P. to sell the project subject to restricted rents and provision of supportive services. These provisions are consistent with Robert Taylor's testimony that Section 42 projects are transferable, although sales are rare before the 15 year enforcement period has lapsed. The Agreement is also consistent with Taylor's testimony that the tax credits cannot be transferred separately from the property.

In order to fulfill its obligation to provide supportive services under the Agreement, Leach Home Partners, L.P. entered into a "subsidy agreement" with Ellen M. Leach Memorial Home, (Taxpayer Ex. #6 Subsidy Agreement). As a non-profit entity, Ellen M. Leach Memorial Home (hereinafter EML), is permitted under Section 42(g)(2)(B) of the Internal Revenue Code to provide funds to Leach Home Partners L.P. beyond income received from restricted rents. The Subsidy Agreement requires EML to provide a "subsidy" for a period of 15 years, or the life of the Federal Tax Program, to help defray the costs associated with the Project (i.e. operational cash losses including costs for supportive services and payment of debt service) and to allow the Partnership to make the low-income units available to Eligible Tenants". To fund its obligation to provide a "subsidy" to the Partnership, EML entered into a Contribution Agreement with Trustees of the Mable W. Tyrell Trust wherein the Trust agrees to provide funds to EML in order for EML to fulfill its obligation under the Subsidy Agreement with Leach Home Partners, L.P. (Taxpayer Ex. #6 last two pages Contribution Agreement). Finally, the Limited Partnership Agreement, (Taxpayer Ex. #17 page 36), provides that "[n]neither the Subsidy Agreement, nor the Contribution Agreement may be amended in any manner without the prior written consent of the Limited Partner". Having paid $5,332,725 in equity for the project, in exchange for limited partner ownership of the property and the right to claim the tax credits associated with the property, Key Community Development Corporation clearly has an interest in making sure that the subsidy agreements remain viable so that the project is not placed in jeopardy and the credits forfeited as reflected in the Limited Partnership Agreement.

The Plourde appraisal

In support of its asserted value of $2,140,000 for both tax years, Leach Home Partners submitted an appraisal report and testimony of Mr. Mark Plourde, a certified Maine appraiser. Mr. Plourde concluded that the highest and best use of the property is its current use as a 90 unit Section 42 Low-Income Housing Tax Credit Program congregate care facility for the elderly.[12] He testified regarding the three approaches to value and the methodology that he employed to determine fair market value of the property. In considering all three approaches to value and consistent with his determination of highest and best use, Plourde factored into his analysis the rent restrictions imposed on the property, the owner's obligation to provide supportive services and the subsidy provided the owner by EML for operational cash losses and payment of debt service. Although he provided a separate analysis of the value of the tax credits, he did not include a value of the tax credits in his appraisal report.

In arriving at his conclusion of value for the tax year April 1, 2004, Plourde found no comparable sales of properties with similar use, occupancy, and income restrictions with which to analyze the subject, and so he did not apply that approach. With regard to the cost approach, he determined that application of that approach resulted in a similar value as that resulting from the income approach, after applying economic obsolescence, having taken into consideration the restrictions on rent. Ultimately, Plourde relied on the income approach, and concluded a value of $2,140,000 for the property as of April 1, 2004. In arriving at that value, Plourde considered the restrictions on rent and a "stabilized" income based on the contribution of the subsidy. He testified that there had been no substantial change in factors considered in developing value as of April 1, 2004 compared to April 1, 2005; and, therefore, he would not expect the value of the property to change substantially had he formally prepared an appraisal for April 1, 2005. In addition to his appraisal report, Mr. Plourde offered Taxpayer Ex. #20 wherein, among

[12] See Taxpayer Ex. #22 "Plourde appraisal" pages 64 and 65 discussion regarding highest and best use and most "feasible use" criteria as 90 unit care facility developed under LIHTC Program.

other things, he developed a value of the remaining tax credits for both tax years using a DCF analysis similar to Taylor's, and various discount rates, including 9.75%.

In particular, with regard to the income approach, Plourde considered the maximum level rent that could be charged under the Program rather than actual rents which were lower than the permitted maximum. (T.T. May 9, 2007 Page 21). This does not appear unreasonable. Secondly, Plourde considered the owner's obligation to provide services as a condition of issuance of the tax credits by MSHA and the subsidy in developing value of the property. From his view, had he valued the property without considering the subsidy, he would not have found value to the property consistent with its highest and best use as encumbered under the LIHTC Program. He then "stabilized" the income from the subsidy at $506,553, which is essentially equivalent to his stabilized cost of services of $510,000 (T.T. May 9, 2007 page 27 and Plourde appraisal at page 78 and 88). As more fully discussed below, the Board concludes that stabilizing the income from the subsidy is an appropriate consideration in determining value under the income approach as opposed to consideration of market rate for services.

Finally, with regard to the income approach, Mr. Plourde considered real estate taxes as a line item expense rather than loading the tax rate into the capitalization rate. (Plourde appraisal, page 88). This is questionable, however, because the Board has consistently taken the position that, when the value of the subject property is being appraised for property tax purposes, the applicable tax rate should be loaded in the capitalization rate. Distortion of the ultimate determination of value is thereby avoided, becasue it is assumed that all properties within a municipality are assessed at a uniform percentage of value. (SEE, Northeast Empire Limited Partnership #2 v. Town of Ashland, SBPTR Docket No. 99-015 and 99-027 May 30, 2001; and Maine Public Service Company v. City of Caribou, SBPTR Docket No. 97-108, June 3, 1999).

The Amidon appraisal

In arriving at the assessed value for both tax years, the assessor applied the cost approach, and no other approach in valuing the subject property. In defense of the assessment the City offered both testimony and also the appraisal report of Ms. Patricia Amidon. Unlike Mr. Plourde, Ms. Amidon concluded that the highest and best use of the property is a "90 unit elderly housing facility", without taking into consideration the current use of the property as restricted under the Section 42 LIHTC Program. (Amidon appraisal page 22 to 23). Consequently, in considering all three approaches to value, she did not factor into her analysis the rent restrictions imposed on the property, the owner's obligation to provide supportive services, nor the associated subsidy provided the owner by EML for operational cash losses and payment of debt service. Although she provided various analyses of the tax credits, she did not include a value of the tax credits in her initial appraisal report.

With regard to the cost approach, Ms. Amidon arrived at a value similar to that arrived at by the assessor. She reported that she did not rely heavily on this approach in determining value of the subject property. With regard to the market approach, Ms. Amidon compared eight sales of multi-family units to the subject property. One of the eight sales was a foreclosure sale, and only one of the eight sales was a congregate care facility. None of the sales involved Section 42 LIHTC Program properties. Ms. Amidon adjusted the sales only for time, and used her market approach analysis solely to determine the range of the market for such properties. She did not rely heavily on this approach in determining value of the subject property.

In developing her ultimate conclusion of value, Amidon relied primarily on the income approach and concluded a value of $5,260,000 for the property as of April 1, 2004 and $5,445,000 as of April 1, 2005. Unlike Mr. Plourde, she did not consider rent restrictions imposed on the property by the Section 42 Low-Income Tax Credit Program nor did she consider the owner's obligation to provide services as a condition of issuance of the tax credits by MSHA and the subsidy. As more fully discussed below, the Board finds this questionable.

Ms. Amidon revised her income approach for both tax years three times as shown on City Ex. #14B, #14C, and #16. In her first revision covering both tax years, as shown in City Ex. #14B, Ms. Amidon considered restricted rents, did not include the owner's obligation to provide services for tenants and the subsidy, averaged the remaining face value of the tax credits available to the owner as of the relevant tax year, and added this averaged figure as a line item in the pro forma income schedule she established for each tax year. (SEE City Ex. #14B, page 4 and page 6). She then applied a direct capitalization rate to the net operating income, as shown on the pro forma income schedule for each tax year. The capitalization rate applied to net income for each tax year included (loaded) the tax rate for that year. Having applied this analysis, she arrived at a value of $5,200,000 as of April 1, 2004 and $5,175,000 as of April 1, 2005. In City Ex. #14C Ms. Amidon revised her loaded cap rate, at the assessor's request, and re-calculated her conclusion of value for both tax years. That re-calculation resulted in a value of $5,470,000 as of April 1, 2004 and $5,200,000 as of April 1, 2005. As more fully discussed below, the Board finds questionable Ms. Amidon's failure to consider the owner's obligation to provide services as well as the associated income from the subsidy as part of the project. The Board also finds questionable the fact that she averaged the face value of the remaining tax credits and used a direct capitalization rate for this defined benefit rather than a discount rate.

In response to Mr. Plourde's criticism of averaging the face value of the tax credit benefit and use of a direct capitalization rate rather than a discount rate when determining the value of the tax credits, Ms. Amidon offered City Ex. #16. In Ex. #16 she considered rent restrictions, but did not consider the owner's obligation to provide services for tenants nor the associated income from the subsidy. She excluded consideration of the tax credits as a line item on the pro forma income schedule for each tax year. She then applied a loaded capitalization rate to the net operating income, exclusive of the tax credits, for each tax year, and arrived at a value of $2,250,000 as of April 1, 2004 and

$2,250,000 as of April 1, 2005. (SEE City Ex. #16 pages 3 and 5). With regard to the tax credits, Ms. Amidon considered the average face value of the remaining credits for each tax year and added to that average an annual amount for depreciation. She then applied a discount rate of 10% to arrive at a present worth of the tax credits of $2,763,692 as of April 1, 2004 and $2,211,842 as of April 1, 2005 (City Ex. #16 page 1); and then added these values to her conclusion of value, using the income approach to arrive at an overall value of the subject property of $5,013,692 as of April 1, 2004 and $4, 461,846 as of April 1, 2005. (City Ex. #16 pages 3 and 5). Her analysis appears questionable primarily because consideration of depreciation in this context is not directly related to the value of the real estate. Rather, it is directly related to the income level of the individual taxpayer against which depreciation is actually deducted. Any depreciation in this context is an accounting function conditioned upon the particular income level of the owner of the property, and is not related to the value of the property itself. For these reasons, and as more fully discussed below, the Board finds that Ms. Amidon's analysis of value is flawed.

DISCUSSION

The Assessment

In addressing whether the taxpayer has met its burden to prove the assessments manifestly wrong, the Board first focuses on whether the taxpayer has impeached the credibility of the assessor. The Board concludes that the assessment for both tax years is subject to challenge for the following reasons. First, Mr. Plourde, whom the Board finds credible, concluded that the highest and best use of the property is as a "low income elderly congregate care" facility developed under the Low Income Housing Tax Credit Program. As previously noted, the Board in Woodland and Kittery Limited Partnership v. Town of Kittery concluded that, in addition to the restrictions on rent, tax credits must be considered when valuing a Low Income Housing Tax Credit Program project, because the tax credits are a value influencing factor, inextricably intertwined with the highest and best use of the property as a low-income residential complex developed under the federal program and under 36 M.R.S.A. § 701-A, and is relevant in determining fair market value. The assessor for the City of Brewer considered neither when he applied the cost approach in arriving at the assessed value. The cost approach fails to capture the influence on value of both the rent restrictions and also the tax credits, let alone the subsidy for operational cash losses and payment for debt service. Furthermore, in defense of the assessed value, Ms. Amidon applied all three approaches to value but relied primarily on the income approach which resulted in a conclusion of value substantially less than the assessment for both tax years. Although the Board finds the methodology employed by Ms. Amidon in applying the income approach questionable because she failed to consider either rent restrictions or tax credits consistent with the Board's reasoning in Woodland, the fact that her conclusion of value was approximately 2 million dollars less than the assessed value for both tax years is further evidence that the assessment for those years was flawed.

Credible evidence of value

The Board next considers whether Leach Home Partners L.P. has offered credible evidence of value against which to compare the assessments to determine whether the property has been overvalued. In evaluating the weight of the evidence produced by the taxpayer, the Board finds Mr. Plourde's conclusion of highest and best use credible and his appraisal report, based on that use, which necessarily takes into consideration the restrictions on rent and income subsidy reliable. The Board also finds credible his valuation of the tax credits.

The Board concludes, as did Mr. Plourde, that the income approach is best able to capture market evidence of the fair value of the subject property. The income approach is particularly relevant given the highest and best use of the property as a low-income congregate care facility which requires that the owner restrict rental income as a condition of participation in the program and distribution of the credits. In this regard, consideration of the value of the credits, in addition to consideration of the restriction on rental income through application of the income approach, is consistent with the decision in Woodland and the provisions of section 701-A of Title 36.

First, with regard to valuation of the tax credits, the Board concludes that application of the discounted cash flow method of valuation reasonable and appropriate when determining the value of the credits, because what is being valued is a definite benefit over a time certain. The present value of the definite benefit over a time certain is best measured by application of a discount factor, as was done by both Mr. Taylor and also Mr. Plourde. Secondly, the Board finds Mr. Taylor's testimony that the depreciation benefit to Key Community Bank associated with the tax credits is not the type of depreciation associated with valuation of real property credible. Unlike the credits which are a dollar for dollar deduction off the tax liability of the owner of the property regardless of the owner's income level, the deprecation associated with the credits is related to the particular income level of the taxpayer against which depreciation is actually deducted. Consequently, this type of depreciation is not directly related to the real property, is more in the nature of an accounting function based on the individual owner's income and should not be considered a value influencing factor to the real property. Consistent with Mr. Taylor's reasoning, which the Board finds persuasive, Mr. Plourde did not consider depreciation a factor when applying the discounted cash flow method of valuation to the credits. Furthermore, the Board finds persuasive Mr. Taylor's testimony that any benefit to Key Community Development Corporation under the Federal Community Reinvestment Act, gained as a consequence of being awarded the credits, is a non-economic, non-quantifiable motivation factor, not directly related to the value of the real property. Indeed, neither Mr. Plourde nor Ms. Amidon considered this benefit in their analysis when valuing the credits. In Ex. #20 page 2 and 3 Mr. Plourde posed several conclusions of value of the remaining tax credits as of April 1, 2004 and April 1, 2005, respectively, based on different discount rates. The Board finds that application of the 9.75% discount rate reasonable and consistent with the capitalization rate Mr. Plourde employed in his income approach to his pro forma stabilized net income, exclusive of the tax credit benefit. Based on the foregoing, the Board concludes that $2, 065,934 and $1,601,125 for the tax years April 1, 2004 and April 1, 2005, respectively, is credible evidence of fair market value of the remaining tax credits.

On the other hand, the Board notes that Ms. Amidon posed several inconsistent valuation methods for the credits, none of which utilized the discounted cash flow analysis, exclusive of depreciation, as did Mr. Plourde. For these reasons Ms. Amidon's determination of value of the tax credits is unpersuasive.

Secondly, with regard to the income subsidy, the Board finds that the obligation to fund operational losses inclusive of supportive services and payment of debt service, was made a condition to the award of the project and is entwined with the subject property through various agreements, as explained by Mr. Taylor and as noted by Mr. Plourde. In arriving at this conclusion, the Board gives weight to Section 5(H) of Extended Low Income Housing Commitment Agreement by and among Leach Home Partners, L.P., the Housing Authority of the City of Brewer, and Maine State Housing Authority, (See Taxpayer Ex. #11), which requires that Leach Home Partners, L.P. provide the described services for a period of 90 years and that that obligation runs with the land. To fulfill this obligation, Leach Home Partners, L.P. entered into a subsidy agreement with the non-profit Ellen M. Leach Memorial Home, as permitted by Sec. 42(2)(g) of the Code, to defray operational costs associated with the project which necessarily includes supportive services. (SEE Taxpayer Ex. #6). According to the Leach Home Partners Limited Partnership Agreement, Key Community Development Corporation's decision to become a limited partner was contingent upon EML entering into a subsidy agreement as was done here. (Taxpayer Ex. #17 page 36). The Ellen M. Leach Memorial Home, in turn, entered into a Contribution Agreement with the Mabel W. Tyrell Trust to ensure a source of funds that would enable it to meet its obligations under the subsidy agreement with Leach Home Partners, L.P. Indeed, neither the Subsidy Agreement nor the Contribution Agreement "may be amended in any manner without the prior written consent of the Limited Partner [Key Community Development Corporation]". (Taxpayer Ex. #17 page 36). Because the subsidy was made a condition of the award of credits, runs with the land and continues as a requirement of the project, as demonstrated by the three aforementioned agreements, the Board finds that the income subsidy is entwined with the property, influences its value and, therefore, is an appropriate factor to consider when determining market value, as recognized by Mr.

Plourde in his application of the income approach. This finding is consistent with the Board's conclusion in Woodland, regarding consideration of the tax credits when determining the fair value of the Section 42 project, and the Law Court's decision in UAH-Hydro Kennebec L.P. v. Town of Winslow 2007 ME 36, regarding consideration of a long term purchase power agreement as a value influencing factor when determining the fair value of the subject hydro-electric power plant.[13] But for the income subsidy, the subject property would not exist as it did on April 1 of 2004 and April 1, 2005.

Specifically, Plourde, on page 78 of his report, stabilizes the income from the subsidy for the purpose of incorporating that income as a line item on his "stabilized pro forma statement" of income and expenses set forth on page 88. He testified that he was guided by the terms of the Subsidy Agreement (Taxpayer Ex. #11 page 1) in developing the methodology he applied on page 78 of his report. (See T.T. Nov. 1, 2007 page 53). The Subsidy Agreement provides funding for operational losses including replacement reserves and also interest on indebtedness, i.e. payment for debt service. (Taxpayer Ex. #11 page 1 Subsidy Agreement at part 1(a) "Eligible costs"). On page 78 of his report, Mr. Plourde calculated the operating cost deficiency of the project exclusive of the subsidy. He then added interest on indebtedness and cost of replacement reserves to the operating cost deficiency. Replacement reserves had previously been incorporated as a line item expense on page 88 and, therefore, had to be added back into the equation on page 78 to solve the problem of operational losses covered by the subsidy, inclusive of replacement reserves. The Board finds this methodology reasonable and consistent with the Subsidy Agreement. Mr. Plourde concluded that the stabilized subsidy is $506,553 and included this figure as a line item on his "stabilized pro forma statement" of income and expenses on page 88 of his report.[14] He applied a 9.75% cap rate (similar to Ms. Amidon's 9.36%) to the stabilized net operating income and arrived at a value indication of $2,140,000 which the Board finds credible.

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[13] See also Epping Senior Housing L.P. v. Town of Epping, Decision of the New Hampshire Board of Tax and Land Appeals, Docket Nos.: 19135-01PT/19855-02PT/20263-03PT, dated March 18, 2005, as cited in the City's post hearing brief to the Board.

[14] Moreover, The Board notes that Mr. Taylor testified that "the anticipated subsidy amount is in the order of five or $600,000 per year for the life of the project. And that was a part of the initial underwriting of the financial structure, the fact this subsidy would be available". (T.T. May 8, 2007, page 56).

On the other hand, Ms.Amidon considered market rate rents and market rate cost for supportive services which, for the reasons set forth previously, is inconsistent with the highest and best use of the property as a low-income elderly congregate care facility developed under the LITC Program and conditioned upon restricted rents and the availability of a particular subsidy for operational losses and payment for debt service. For this reason, the Board finds that Ms. Amidon's conclusion of value is flawed.

Given the foregoing and considering Mr. Plourde's conclusion of value of $2,140,000 as of April 1, 2004 and adding to that value the value of the tax credits for that same year in the amount of $2,065, 934, for a total value of $4,205,934, the Board finds that, when compared with the assessed value as of April 1, 2004 of $7,381,595, that the property is substantially overvalued. With regard to April 1, 2005, the Board notes that, although Mr. Plourde did not offer a formal opinion of value for that year, he testified that he had heard nothing throughout his presence during the hearing, including Ms. Amidon's testimony, that would lead him to expect that the value of the property as of April 1, 2005 would be substantially different than the value as of April 1, 2004. Indeed, the Board notes that the difference between Ms. Amidon's values for the two years is not substantial. For these reasons, the Board concludes that it is reasonable to consider Mr. Plourde's determination of value of $2,140,000 as of April 1, 2004 also applicable for April 1, 2005. The Board adds to that value the value of the tax credits for that same year in the amount of $1,601,125, for a total of $3,741,125; and finds that, when compared with the assessed value as of April 1, 2005 of $7,542,065, that the property is substantially overvalued.

<u>Fair market value based on the entire record</u>

Having determined that the Leach Home Partners, L.P has met its burden to prove that the property is substantially overvalued by impeaching the credibility of the assessments and offering credible evidence of value against which to compare the assessments, the Board now turns to consider the fair market value of the property based on the entire record. In so doing the Board finds problematic Plourde's approach to consideration of the property tax as a line item expense of $107,225 on his "stabilized pro forma statement" of income and expenses on page 88 of his appraisal report. As has been noted, the Board has consistently taken the position that, when the value of the subject property is being appraised for property tax purposes, the applicable tax rate should be loaded in the capitalization rate. Distortion of the ultimate determination of value is thereby avoided, becasue it is assumed that all properties within the municipality are assessed at a uniform percentage of value. Northeast Empire Limited Partnership #2 v. Town of Ashland, SBPTR Docket No. 99-015 and 99-027 May 30, 2001; and Maine Public Service Company v. City of Caribou, SBPTR Docket No. 97-108, June 3, 1999. The parties have stipulated that the tax rate for April 1, 2004 and April 1, 2005 was .0211783 and .0200569, respectively. (SEE Joint Ex. # A). The Board deems it appropriate to load those rates onto Mr. Plourde's capitalization rate of .0975 for each tax year which results in loaded rates for April 1, 2004 and April 1, 2005, respectively, of .1186783 and .1175569. The Board then deletes the expense line item of $107,225 on page 88 of Mr. Plourde's appraisal report, so that the stabilized net operating income becomes $315,836, as opposed to $208,611, for both tax years. The Board then applies the relevant loaded capitalization rates to the net stabilized net operating income for each year to arrive at a value of $2,661,278 for April 1, 2004 and $2,686,664 for April 1, 2005. To these values the Board adds the value of the tax credits of $2,065,934 for April 1, 2004 and $1,601,125 for April 1, 2005 for a fair market value of $4,727,212 as of April 1, 2004, and $4,287,789 as of April 1, 2005.

CONCLUSION

Based on the foregoing and by unanimous vote, the Board finds that the taxpayer has met its burden to prove the assessment for both years manifestly wrong and that the fair market value of the property for the tax year April 1, 2004 is $4,727,212 and for the tax year April 1, 2005 is $4,287,789. The parties have stipulated as to the certified ratio applicable to these values as 94% and 92%, respectively.

Any party wishing to appeal this Decision must file a Petition for Review in the Superior Court within 30 days of receipt of Order ,pursuant to 5 M.R.S.A. §§ 11001-11008. If the decision is not appealed, it will become binding on the parties at the end of the thirty day period.

Dated: 12/03/08

Charles A. Lane, Esq.
Chairman Panel C
SBPTR