

Birch Pond Office Park Association
v.
City of Nashua
Docket Nos.: 4246-88 and 5894-89

New England Life Insurance Company
v.
City of Nashua
Docket No.: 8471-90

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "City's" 1988 and 1989 assessments of \$3,696,900 and 1990 assessment of \$3,689,200 on its real estate, consisting of 71,000 plus or minus square foot three-story brick office building on 5.89 acres (the Property). For the reasons stated below, the appeal for abatement is granted.

The Taxpayer has the burden of showing the assessments were disproportionately high or unlawful, resulting in the Taxpayer paying an unfair and disproportionate share of taxes. See RSA 76:16-a; Tax 201.04(e); Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985). We find the Taxpayer carried this burden and proved disproportionality. An initial issue of whether the Taxpayer timely filed its appeal with the City was resolved in favor of the Taxpayer at the hearing based on the evidence.

The Taxpayer argued the assessments were excessive because:

- (1) Taxpayer Exhibit 2 estimated market values of \$5,000,000 for 1988;
\$4,500,000 for 1989; and \$4,000,000 for 1990;
- (2) the income approach to value was the most reliable indication of value;
- (3) the Property was increasingly difficult to rent, causing rent prices to be reduced; and
- (4) the Property was taken deed-in-lieu of foreclosure by New England Life Insurance Company on May 24, 1990 for \$4,039,582.

The City argued the assessments were proper because:

- (1) their appraisal report (Town Exhibit A) indicated market values of:
\$7,500,000 for 1988; \$7,100,000 for 1989; and \$6,860,000 for 1990;
- (2) the Taxpayer failed to show that its Property was assessed at a higher percentage of market value than the percentage at which property is generally assessed in Nashua.

Board's Findings & Rulings

The board is faced with two general issues as argued by the parties:

- (I) what were the proper estimates of market value for the Property for the three years under appeal; and
- (II) what ratio(s) should be applied to the estimates of market value to arrive at the proper assessments.

(I) Estimate of Market Value

The board finds that the market and income approaches to value must be considered together to provide the most reliable indication of value in this case.

Income Approach

The differences between the parties in this approach fall in three general areas: estimated rent, vacancy rate and capitalization rate.

The Taxpayer relied on the Property's actual rental rates and vacancy rate and testified they were representative of the market. The City analyzed six rentals in Nashua for its basis of the market rent and relied upon general market data and knowledge for its estimates of vacancy.

The Taxpayer derived its overall capitalization rate from a discount rate (mortgage and equity considerations), an appreciation rate and an equalized tax rate. The City derived a direct capitalization rate from five sales by comparing their net operating incomes to the sale prices.

The board finds the general methodology utilized by the City conforms more to generally accepted appraisal norms than that used by the Taxpayer's agent, and thus the board will rely on the City's methodology in this approach. However, based on a thorough review of the evidence, the board finds different market rents, vacancy rates and capitalization rates than those used by the parties.

Market Rents

The City's rents were derived from six leases, several of which commenced in 1987 and one where the tenant was Pizza Hut. The board finds that space for a tenant such as Pizza Hut is not truly comparable to the Taxpayer and that market rents were progressively less for the three years under appeal due to the softening real estate market. The leases relied upon by the City appear in most cases to have been commenced in a better market preceding the years under appeal. Based upon the evidence and the board's experience (the agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence. See RSA 541-A:18, V(b)), the board finds market rents as follows:

1988 - \$14.50/square foot

1989 - \$14.00/square foot

1990 - \$13.50/square foot

Vacancy Rates

Again, the evidence and the board's experience conclude a progressively increasing vacancy rate for 1988-1990. The board finds reasonable estimates for vacancy rates for this Property are:

1988 - 10%

1989 - 15%

1990 - 20%

Capitalization Rate

The board finds that the preferable method (less subject to appraiser judgment) of deriving a capitalization rate is by direct capitalization from sales of similar income producing property. This is what the City did. However, the City admitted that much of their income information on the sales was received from third parties and was not verified. A direct capitalization rate will generally better reflect any "present worth of future benefits" that investors will pay for when purchasing income property. However, the direct capitalization rate should be checked against a built-up overall rate to make sure it is reasonable. The board finds the City's direct capitalization rate of 7 percent is too low, as it was based upon unverified income data and does not reasonably consider the equity, mortgage and tax commitments that have to be fulfilled by the net operating income of the Property. As to the Taxpayer's evidence, the board finds that the Taxpayer's mortgage constant of 10.55% and equity yield rate of 17% were too high, especially for 1989 and 1990 based on general market conditions for that period. Based upon the evidence and the board's experience, the board finds a reasonable capitalization rate for this Property in 1988-1990 was 9.5 percent.

Utilizing the City's estimate of net leasable area and estimate of

expenses of 35 percent of effective gross income (these figures are also supported generally by the Taxpayer's evidence), the board rules the three years' market values, as estimated by the income approach, are as follows:

1988

Net Leasable Area 59,942
Market Rent \$14.50
Potential Gross Income \$869,159

Vacancy (-10%) (\$86,916)

Effective Gross Income \$782,243

Expenses (-35%) (\$273,785)

Net Operating Income \$508,458

Capitalization Rate divided by .095

Indicated Value \$5,352,179

(\$5,352,000 rounded)

1989

Net Leasable Area 59,942
Market Rent \$14.00
Potential Gross Income \$839,188

Vacancy (-15%) (\$125,878)

Effective Gross Income \$713,310

Expenses (-35%) (\$249,658)

Net Operating Income \$463,652

Capitalization Rate divided by .095

Indicated Value \$4,880,547

(\$4,880,500 rounded)

1990

Net Leasable Area 59,942
Market Rent \$13.50
Potential Gross Income \$809,217

Vacancy (-20%) (\$161,843)

Effective Gross Income\$647,374

Expenses (-35%)(\$226,581)

Net Operating Income\$420,793

Capitalization Ratedivided by .095

Indicated Value\$4,429,400

(\$4,429,500 rounded)

Direct Sales Approach

The Taxpayer cited several sales in late 1990 and 1991 that indicated values in the range of \$50.00 to \$85.00 per square foot of leasable area. The board places little weight on these sales as they involved foreclosed property or deeds in lieu of mortgage.

The City analyzed five sales that occurred in 1986 through March of 1989 which indicated a range of approximately \$92 to \$113 per square foot of leasable area. The median of these sales was \$99.30/square foot and the mean \$100.93. The board finds the median square foot price of \$99.30 multiplied by the Taxpayer's leasable square footage of 59,942 results in an indicated value of \$5,952,240.

This market indication of value has more weight for the 1988 tax year and less weight for 1989 and 1990 as most of the sales occurred or were initiated in 1988 or earlier.

Correlation

Both approaches to value include subjective opinions; thus the board's judgment is used to correlate the several indications of value.

"Given all the imponderables in the valuation process, '(j)udgment is the touchstone.'" Public Service Company v. Town of Ashland, 117 N.H. 635, 639 (1977).

The board rules that market values of the Property for the three years

are:

1988 - \$5,500,000

1989 - \$5,000,000

1990 - \$4,500,000

(II) Proper Ratio(s)

The second issue is what is the proper ratio or indication of the general level of assessment within the City, which then can be applied to a finding of current market value to produce a proportionate assessment.

In this case the Taxpayer's agent relied upon the Department of Revenue Administration's (DRA) equalized ratios of 43 percent (1988), 43 percent (1989) and 47 percent (1990) to equalize his estimates of market value.

The City argued the Taxpayer failed in its burden of proof on this issue because:

(1) the City did not stipulate to the validity of the DRA ratio nor did it use the ratio in assessing the Taxpayer;

(2) the Taxpayer did not submit any statistical evidence supporting DRA's ratio nor did the Taxpayer submit its own proportionality study; and

(3) the DRA ratio is not statistically valid as it is based upon an unrepresentative sample with regard to property classes within the City.

Discussion

The basis for taxation is given the legislature in N.H. Constitution pt I, art. 12 and pt II, art. 5 (each member of the community is bound to contribute his reasonable and proportionate share toward the protection of the community). The legislature in RSA 75:1 states that property shall be appraised at its market value and in RSA 75:8 directs the assessors to annually examine and reappraise property that has changed in value. However, the statutes do not specifically address the proportionality issue especially

if the assessments are at a level other than full market value. The Courts in a long series of cases have addressed this proportionality issue.

Bemis & C Bag Co. v. Claremont, 98 N.H. 446 (1954);

Berthiaume v. City of Nashua, 118 N.H. 646 (1978);

Milford Props., Inc. v. Town of Milford, 119 N.H. 165 (1979);

Stevens v. City of Lebanon, 122 N.H. 29 (1982);

Public Service Co. of N.H. v. Town of Seabrook, 133 N.H. 365 (1990);

Appeal of Andrews, ___ N.H. ___ (July 30, 1992).

In short, these cases state:

- (1) there should be only one general level of assessment per town, i.e., two or more ratios or levels of assessment by classes of property is impermissible;
- (2) trial courts must consider DRA's equalization ratio in the issue of disproportionality, but by itself is not sufficient to carry the taxpayer's burden of proof; and
- (3) if the municipality has neither stipulated to the ratio nor used it in arriving at the assessment, then the taxpayer must submit statistical evidence in support of the DRA's ratio or separate proportionality study.

The board understands and agrees with the court's interpretation of the Constitution and Statutes. As a quasi-judicial, administrative body, the board must also be concerned with the practical and equitable application of the law. The board finds the City's attempt in this case is to stonewall the board's ability to grant an abatement in the face of strong evidence of overassessment¹ solely because the Taxpayer did not submit any further

¹ The 1988 and 1989 assessed value when equalized by the City's ratio of 43 percent for those two years indicates a market value of \$8,597,442 (\$3,696,900 divided by .43) and \$7,849,362 (\$3,689,200 divided by .47) in 1990, both clearly in excess of even the City's most optimistic opinions of value.

evidence of the proportional level of assessment other than DRA's studies.

This is improper for two reasons:

(1) To allow the City's spin of this legal thread to tie the board's hands would be counter to the board's broad statutory authority under RSA ch. 71-B (see also Appeal of Wood Flour, Inc., 121 N.H. 991, 994 (1981) (board has broad authority to remedy tax inequities) and the authority, pursuant to RSA 541-A:18, V(b), of the board to utilize its experience and specialized knowledge in the evaluation of the evidence before it. The absurd extension of the City's argument would be for all municipalities to routinely not concur with DRA's ratio and force all taxpayers to provide an expensive duplicative proportionality study or automatically not prevail in their appeal. The board has started to hear this argument more often, and it is time to end the stonewalling practice. Therefore, the board must weigh all the evidence before it and arrive at an assessment that is proportional within the spirit of the law.

(2) The City argued DRA's ratios were invalid for several reasons:

(a) the samples used were unrepresentative of the general property mix in the City (some residential classes of property are overstated);

(b) the sample time period of six months before and after April 1 was too restrictive to allow for a truly representative sample of sales for all types of property;

(c) no time adjustment of sales was employed by DRA;

(d) some properties transferred with improvements done after April 1 that were not on the assessments; and

(e) some of the sales used were unverified.

While some of these arguments could have some potential merit, the City did not even indicate how the DRA ratio should be different. They only

concluded "(w)ithout further evidence of the general level of assessment, the Board of Assessors should not employ the State's ratio in the appeals process."² (Town Exhibit A)

The City, in fulfilling its responsibilities to equitably assess property under RSA 75, must be aware of and consider, while not necessarily use, the general level of assessment within the City. The general level of assessment is just as important an element for determining an equitable assessment as is the proper physical description of a property and relevant market data. In fact, equitable assessing can be viewed as a three legged stool, the three legs being: accurate physical description of the property, relevant market data and the general level of assessment. If any one leg is lacking, equitable assessment has not been achieved by the City. The City cannot annually review and correct assessments without a general knowledge of the length of the proportionality leg to that stool. "Once a town has generally assessed real estate taxes at a specific percentage of fair market value,...and property values then fluctuate, without a change in the overall assessment, the town must use some method to equalize tax assessments to insure proportionality." Appeal of Andrews, ___ N.H. ___, slip op. at 2.

The board finds that the DRA's samples, while perhaps not identically

² While the board is aware that the City might have argued that DRA's ratio is a derivative of the equalized valuation process of DRA's responsibility under RSA 21-J:3 xIII and 21-J:9(F) and could be proper for that process and not for indicating the general level of assessment in the city, the two concepts are interrelated. (See Public Service Co. of N.H. v. Town of Seabrook, 133 N.H. 365 (1990); Appeal of Andrews, ___ N.H. ___ (No. 91-073, July 30, 1992). The City's reticent acceptance of the equalized values for RSA 21-J purposes was some evidence that the City felt the ratios properly boosted the total assessed valuations from the existing general level of assessment to 100 percent, or full market value. It would be inconsistent for the City to accept the ratio on one hand and challenge it on the other. One cannot have their cake and eat it too. "Once (a) town decided to use the median ratio as the basis of its equalization process, it should...(grant) all abatements to that median ratio." Appeal of Andrews, ___ N.H. ___, slip op. at 3.

representative of the property mix within Nashua, are reasonably representative and thus indicate the general level of assessment within the City. In fact, upon questioning, the City's assessor testified that the DRA ratios may not have been far off from the results of a statistically valid study. Therefore, the board concludes that the best evidence before it as to the general level of assessment in the City are the DRA ratios:

1988 - 43%; 1989 - 43%; and 1990 - 47%.

Underlying the above analysis is the conclusion that to deny this appeal would require the board to ignore its statutory duty to grant relief to taxpayers who prove disproportionality. RSA 76:16-a authorizes and requires the board to "make such orders [on tax appeals] as justice requires ***." The phrase "as justice requires," also found in RSA 76:17, mandates that the board to act equitably in ruling on tax appeals. See Ansara v. City of Nashua, 118 N.H. 879, 880 (1978). In making equitable decisions, the board must be mindful of equitable principles and the interplay between those principles and the law. Therefore, the board has considered the parties' various burdens (of proof and persuasion) and duties and the statutory limits that exist on the board's authority. See Appeal of Gillin, 132 N.H. 311 (1989); see also Pomeroy, Equity Jurisprudence Section XI (equity follows the law).

One equitable principle states, "Equity will suffer no wrong without a remedy." Equity Jurisprudence Section X. This principle can operate concurrently with legal remedies and is applied when the legal remedy is incomplete or inadequate. Id. sec. 424, at 702-03. Such is the case here. Both the Taxpayer and the City estimated the Property's market value, and both values when compared to the assessments and the equalized assessments established overassessment. Thus, the only issue was how to convert the board's finding of fair market value to an assessment. For the board to

ignore the clear evidence of overassessment, confirmed by the board's knowledge of fluctuating values between property classes, would result in a wrong--over assessment--without a remedy.

The board is acutely aware that it must only invoke equitable principles in those limited situations where the statutes and caselaw have not provided a remedy where a remedy should exist. The board's decision is not a rejection of the burden-of-proof standard enunciated by the supreme court. See e.g., Appeal of Town of Sunapee, 126 N.H. at 217-18. Rather, we conclude the facts presented in this appeal--clear evidence that equalized assessment exceeded fair market value--have not yet been presented to the court. The board has concluded that if the court were presented with these facts, the court would add to the burden-of-proof standard consistent with the standard applied here.

For the court to do otherwise would, in effect, allow disproportionality to exist despite clear evidence of disproportionality.

A holding contrary to the board's decision would have two detrimental effects. First, it would encourage more municipalities to rely on the burden-of-proof issue rather than focusing on the proportionality issue, which we have ruled is part of their initial assessing responsibility. The board has been working hard on its own and with the legislature to ensure proper local review and, when appropriate, adjustments of assessments. See Appeal of Andrews, ___ N.H. at ___, slip op. at 2 ([Towns] "must use some method to equalize assessments to ensure proportionality.>"). To allow a municipality to avoid this duty because of an incomplete burden-of-proof standard would be contrary to the board's efforts and unfair to taxpayers. The second effect would be related to the first. If the board's standard is overturned many taxpayers would not be able to carry their burden because of the expense required to conduct an assessment-to-sales, ratio study. This would result in

over assessed taxpayers being without an affordable, practical and thus adequate remedy.

The board's findings of market value in the first section should therefore be equalized by the DRA ratios to arrive at the proper assessments of:

1988 \$5,500,000 x .43 = \$2,365,000

1989 \$5,000,000 x .43 = \$2,150,000

1990 \$4,500,000 x .47 = \$2,115,000

If the taxes have been paid, the amount paid on the value in excess of the above stated assessments shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

The board rules on the City's Request for Findings of Fact and Rulings as follows:

1. Denied
2. Granted
3. Granted
4. Granted
5. Granted
6. Granted
7. Granted
8. Granted
9. Granted
10. Granted
11. Granted
12. Neither Granted nor Denied
13. Granted
14. Neither Granted nor Denied

156. Neither Granted nor Denied
17. Neither Granted nor Denied
18. Denied
19. Denied
20. Denied
21. Neither Granted nor Denied
22. Neither Granted nor Denied
23. Neither Granted nor Denied
24. Denied
25. Denied
26. Denied

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Paul B. Franklin, Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Gary M. Stern, Property Tax Consultants, Representative for the Taxpayer; and Chairman, Board of Assessors of Nashua.

Dated: August 13, 1992

Valerie B. Lanigan, Clerk

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Order Re: Motion for Rehearing and Reconsideration

On September 2, 1992, the board of tax and land appeals (board) received a motion for rehearing in the above captioned cases from the City of Nashua (City). An objection to the motion was received from the Taxpayers on September 8, 1992.

The board denies the motion for rehearing as all the issues raised by the City were testified to by the parties at the hearing on June 24, 1992, and were ruled upon by the board in its decision of August 13, 1992 (Decision).

For the purpose of clarification, the board responds further to the issues raised by the City.

The City's arguments for a rehearing in its grandiloquent motion can be summarized into two general issues:

- 1) the board relied upon extraneous evidence and its own knowledge and experience to improperly arrive at its decision; and
- 2) the board improperly shifted the burden of establishing the general

level of assessment from the Taxpayers to the City.

1) Extraneous evidence

The board's reference to RSA 541-A:18 V (a) in the Decision should not infer the board relied on extraneous evidence. The board did not. The board

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referenced this statute as an indication that its experience was used in weighing the evidence submitted by both parties and in arriving at findings of fact that, while may not exactly correspond to either parties' evidence, are within the parameters of the conflicting evidence as submitted. Because the board is comprised of members "who (are) learned and experienced in questions of taxation or of real estate valuation and appraisal..." (RSA 71-B:1), it must have the latitude to arrive at decisions that are based on the board's analysis of the evidence submitted.

2) Shift of Burden in Determining the Level of Assessment

The board's decision does not run counter to the New Hampshire Supreme Court's (Court) opinions on this issue. Rather, as we stated in the Decision, we do not think the Court has yet been presented with this issue of whose burden it is to determine the level of assessment when there is clear evidence that the equalized assessment exceeds market value, and where the municipality has failed to first fulfill its RSA 75:1, 8 duties. We ruled this appeal is different than earlier cases in four ways:

A) The City did not fulfill its original burden of annually reviewing and

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determining proper the proper assessment pursuant to RSA 75:1 and 75:8. As we stated, one leg of the three legged stool of assessing (physical description of the property, relevant market data and the general level of assessment) had not been determined by the City. The board in its Decision is not shifting the burden of determining the level of assessment from the Taxpayer to the City because the burden had never been placed upon the Taxpayer due to the lack of the City complying with its statutory requirements.

B) The board, having been the appealed tribunal in Appeal of Andrews, N.H. ____ (No. 91-073, July 30, 1992), is aware in that case the town did not use the equalization ratio in determining the assessments. Yet, the Court stated in

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part, "[o]nce [a] town decided to use the median ratio as the basis of its equalization process, it should... [grant] all abatements to that median ratio." Id.

C) Further, regardless of whether it was the City Assessor or counsel who stated the Department of Revenue Administration's (DRA) ratio may not have been far off from the results of a statistically valid study, the board properly concluded from all the evidence that DRA's ratio reasonably represented the general level of assessment.

D) The board's responsibility to "make such orders as justice requires ***." (RSA 76:16-a) engages the principles of equity. In this case, where there was clear evidence that the equalized assessment exceeded fair market value, equity requires a remedy.

3) Findings & Rulings

Lastly, the City asserted the board erred and misnumbered its responses to the City's requests for findings of fact and rulings of law. Not so. The board's rulings on the requests are numbered to correspond to City's misnumbering (please review Exhibit TN-B, City's Requests for Findings of Fact

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and Rulings of Law -- 12, 13, 14 156 (sic), 17, etc.). Therefore, the board's answers correspond properly to the requests as submitted and to the text of the Decision.

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Paul B. Franklin, Member

CERTIFICATION

I certify that copies of the within Order have this date been mailed, postage prepaid, to Gary M. Stern, Property Tax Consultants, Representative for the Taxpayer; and the Chairman, Board of Assessors of Nashua.

Date: September 16, 1992

Melanie J. Ekstrom, Deputy Clerk

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