

**Prolman & Stabile**

**v.**

**City of Nashua**

**Docket Nos. 4247-88, 5895-89 and 8150-90**

**DECISION**

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "City's" assessments for 1988, 89 and 90 on a commercial industrial building with approximately 76,808 square feet of net leasable office space and approximately 62,025 square feet of net leasable industrial space (the Property). The assessments were:

1988--\$4,420,500 (land \$1,025,000; building \$3,395,500);

1989--\$4,480,500 (land \$1,025,000; building \$3,455,500); and

1990--\$4,480,500 (land \$1,025,000; building \$3,455,500).

The Equalization Ratio

Before reaching the merits of the appeals, the board must address an issue raised by the City concerning the equalization ratio and its use in these appeals. For the subject years, the City's equalization ratios were: 1988--43%; 1989--43%; and 1990--47%.

In presenting the appeals, the Taxpayer relied upon the ratios and asked the board to do the same. Basically, the Taxpayer argued the assessments were disproportional by providing opinions of market value for each year and comparing those figures with the equalized values for each year. The equalized value was calculated using the assessments divided by the ratios. The Taxpayer also used two comparable assessments to support its argument of disproportionality. The Taxpayer did not produce any evidence concerning the validity of the ratios.

In its requests, the City, citing Stevens v. Lebanon, 122 N.H. 29 (1982),

asserted the ratio should not be used because the City did not stipulate to the

ratios or use the ratios in the assessment process. The City did not introduce any evidence on what it thought the correct ratios were. The City provided the board with a fair-market-value estimate, but the City did not indicate how the board was to compare this estimate with the assessments.

The board, on its own, reviewed the comparables submitted by the City, and we compared the sales with the assessments on those sales. While this provided some confirmation of the ratio for 1988, there were some assessments at great variance from the ratio.

Given this divergence--the City arguing the ratios cannot be used and the Taxpayers arguing they can--the board must first decide to what extent it will rely on the ratios. After consideration of this issue, the board has decided the ratios will be used only as a guide for comparing the market values with the assessment. Without such use the board would be unable to use the market value evidence submitted by both parties. The use of the ratios will be so limited, and consistent with Stevens, the ratios themselves do not make the Taxpayer's case.

We note that in Stevens, the ratio was a main issue since the municipality had used the ratio in converting a costs value to an assessed value, i.e., the ratio was an integral part of the assessment itself. Here, the ratio was not used in arriving at the assessment, and thus it was not an integral part of the assessment. Given the appeal now before us, we do not read Stevens as a total prohibition against the board's use of the ratio. Moreover, as required by Stevens, 122 N.H. at 33, the Taxpayer introduced other evidence of disproportionality and did not rely solely on the ratios.

The ratios will thus be used as a guide to assist in reviewing the assessment as compared to fair market value. They will also be used as an indicator of the city-wide trend of values from 1988 to 1990.

#### Introduction to Review of Assessments

The Taxpayer has the burden of showing the assessment was disproportionately high or unlawful, resulting in the Taxpayer paying a disproportionate share of taxes. See RSA 76:16-a; TAX 201.04(e); Appeal of Town of Sunapee, 126 N.H. 214, 216 (1985). We find the Taxpayer failed to carry this burden for 1988 but carried the burden for 1989 and 1990. The

parties can be

assured that the board reviewed and analyzed all of the evidence, spending a considerable amount of time doing so.

1988 Tax Year

The parties' fair-market-value estimates for 1988 were relatively close, differing by only 14%--City \$10,500,000 and Taxpayer \$9,055,000. We have concluded the Taxpayer failed to carry its burden for this year because it did not present sufficient evidence that the rents, expenses and vacancy rates used in its analysis were market. Whereas, the City presented ample evidence that its estimate of full value was based on the market. Given this evidence, the board must rule the Taxpayer failed to carry its burden.

The board reviewed the Taxpayer's equity analysis, but we disagree with the Taxpayer's conclusion that the analysis established the Property was over assessed. The equity analysis certainly raised the issue of proportionality, but it did not carry the burden and convince the board of disproportionality. Moreover, looking at the assessments on some of the City's comparables and comparing those assessments to the sales price, we find the Property's assessment was in line with other assessments. We note some of the City's comparables were not true or good comparables because they differed so much from the Property, e.g., 154 Broad St., 155 Main Dunstable Rd., and 16 Progress Ave. Those comparables were not considered in our analysis.

1989 and 1990 Tax Years

The board has concluded adjustments must be made to the 1989 and 1990 assessments because values on commercial/industrial properties declined more rapidly than values for other types of properties, e.g., single-family homes. This conclusion is supported in five ways: 1) the board's general knowledge of real estate values throughout the state gained through both tax appeals and eminent domain cases; 2) the board taking official notice, pursuant to RSA 541-A:18 V.(a)(2), of testimony in State v. Gauthier, BTLA #91-005A, which indicated commercial/industrial property was depreciating at approximately 1% per month from late 1988 to 1990; 3) the Taxpayer's evidence concerning the decline in its rental income; 4) the City's failure to do any market study for 1989 and 1990; and 5) the dearth of commercial and industrial sales in 1989 and 1990.

Concerning numbers 1 and 2 above, arriving at a proper assessment is not a science but is a matter of informed judgment and experienced opinion. See Brickman v. City of Manchester, 119 N.H. 919, 921 (1979); see also Marshall Valuation Service, Section 1, Page 2 (March 1989). This board, as a quasi-judicial body, must weigh the evidence and apply its judgment in deciding upon a proper assessment. Paras v. City of Portsmouth, 115 N.H. 63, 68 (1975). Recently, the board has been hearing several eminent domain cases in Nashua and the surrounding communities. While the Taxpayer did not present evidence of a market decline, the board, in an attempt to make the right decision, cannot ignore all of the testimony it has recently heard concerning the decline in commercial/industrial property in these eminent domain cases. The board takes official notice of the Gauthier case and the testimony of Miriam Wiggin.

Concerning number 3 above, it is true that the Taxpayer did not show the figures used in its income approach were market figures. Nonetheless, the City, which asserted it used market figures, arrived at a 1988 value within 14% of the Taxpayer's value. This proximity of values indicated the Taxpayer's analysis warranted some consideration as evidence of the market.

While we have considered the Taxpayer's figures and analysis on some evidence, it was not considered conclusive. Additionally, there was no evidence that the Taxpayer's leases or expenses were below market. Rather, it appeared the Taxpayer was attempting to run this property as a viable business enterprise. In addition to the lack of market figures, the Taxpayer's income analysis was flawed by not clearly providing information concerning the space occupied by the Taxpayer itself and then imputing rent for that space in the analysis. This information was requested from the Taxpayer at the hearing, but what the board received was unclear and not focussed on the board's concerns. Therefore, while the Taxpayer asserts its rents went down 26% from 1988 to 1989 and 29% from 1988 to 1990, the board cannot rely completely on these income reductions to adjust the assessment.

Concerning number 4 above, the City only analyzed this property for 1988, with some reliance on 1989. It is certainly not the City's burden of proof to support the assessment. Rather, it is the Taxpayer's burden of proof to challenge the assessment. Nonetheless, given the Taxpayer's evidence and the

board's knowledge, the City certainly had to carry some burden of persuasion to show the 1989 and 1990 assessments reflected the changes in the market to this type of property.

Concerning number 5, only two sales were presented in 1989 and none for 1990. The board compared the 1988 comparables sales with the 1988 assessments and found those sales generally within an acceptable range (45%-55%) of the assessments with consideration for the equalization ratio (43%). However, the two 1989 sales prices of 9 and 22 Clinton St. when compared to their assessments indicated a variance of 84% and 85% when the 1989 ratio remained 43%. This comparison is not conclusive evidence that the values on these types of property were rapidly falling, but it certainly can be viewed as cumulative or confirming evidence of a sharp drop in values for these types of property. Furthermore, neither party reported any 1990 sales. The lack of sales is further evidence of declining values when contrasted to the number of sales when the market was rising.

The above indicates the Property's value declined from 1988 to 1989 and 1990. The question now is whether such decline resulted in a disproportionate payment of taxes. The evidence indicated and the board's knowledge supports finding that this type of property dropped faster than other types of properties and thus would warrant reducing the assessment. Meanwhile, throughout the City, the ratio indicated a stable market from 1988 (43%) to 1989 (43%) and a slight decline from 1989 (43%) to 1990 (47%). Given the lack of sales for 1989 and 1990, it is obvious the decline in the value of these types of property was not reflected in the ratio.

Given all of this, the board has concluded a total adjustment of 12% should be applied for both 1989 and 1990, resulting in assessments for 1989 and 1990 of \$3,942,840. These assessments reflect the evidence and the board's knowledge.

The board has already explained why the Taxpayer's figures were not adopted. The board has merely tried to set an assessment within the parameter of the evidence and its knowledge without exceeding the facts and evidence before it.

If taxes have been paid, the amount paid on the value in excess of \$3,942,840 for both 1989 and 1990 shall be refunded to the Taxpayer with

interest at six percent per annum from the date paid to the date refunded.

FINDINGS & RULINGS

City's

1. Neither Granted nor Denied
  - a. Neither Granted nor Denied
  - b. Neither Granted nor Denied
  - c. Neither Granted nor Denied
2. Granted
3. Granted
  - a. Neither Granted nor Denied
  - b. Neither Granted nor Denied
  - c. Granted
  - d. Granted
  - d. Neither Granted nor Denied
5. Neither Granted nor Denied
  - a. Neither Granted nor Denied
  - b. Neither Granted nor Denied
6. Neither Granted nor Denied

Addendum

Before leaving this appeal, the board is compelled to mention a few things to the parties. These matters are mentioned because the board must insist on certain basics if the board is to perform its job efficiently. Both parties should always ask themselves: 'how can I best organize and present material so I make my point in a direct and easily understandable way?'

To the City: 1) When notifying taxpayers of your comparables, you should limit the comparables to a reasonable number. Otherwise, the board and the taxpayer end up doing more work than really needed. 2) Each request for findings

and rulings should be a succinct statement, requesting a finding on only one fact or one statement of law. The requests here were generally verbose, and often contained multiple requests in each single request, requiring the board to neither grant nor deny several requests. Moreover, in multiple years for appeals, the tax years should be referenced in the request. Finally, requests can be submitted by leave of the board after the hearing. Submitting the requests after the hearing would avoid guessing what the evidence will be.

To the Taxpayer's representative: 1) Whenever a report is submitted to the board, it should be bound not just clamped together, and the original plus 2 copies must be submitted. The report should include the representative's

qualifications. The reports should continue to include a table of contents and numbered pages. 2) At the hearing, the board asked the Taxpayer to submit some

information to assist the board. Unfortunately, the Taxpayer submitted documents not requested, which the board did not use in making this decision. Moreover, what was submitted failed to assist the board and was nonresponsive to the board's request.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III Chairman

Ignatius MacLellan, Esq., Member

Michele E. LeBrun, Member

Date: October 18, 1991

I certify that copies of the within Decision have been mailed this date, postage prepaid, to Gary M. Stern, representative for Prolman & Stabile, taxpayer; and the Chairman, Board of Assessors of Nashua.

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Brenda Tibbetts, Clerk

Date: October 18, 1991

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**Prolman and Stabile**  
**v.**  
**City of Nashua**  
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**ORDER**

This order relates to the "City's" two post-decision motions: 1) late filing motion ; and 2) rehearing motion under RSA 541:3. For the reasons stated below, the late filing motion is denied, and thus, the rehearing motion is denied as untimely.

The decision was sent to the parties on October 18, 1991, resulting in a November 7, 1991 deadline for filing the rehearing motion. See RSA 541:3; see also Appellate Advocacy Handbook 111 (1990) ("The motion for rehearing must be filed within 20 days after any order or decision of the agency."). The rehearing motion was not filed until November 8, 1991, and thus was untimely. The City's late filing motion argues its failure can be excused by the board because of accident, mistake or misfortune.

Nothing in RSA 541:3 or case law supports the City's position that the board can excuse a late filing. RSA 541:3 states the twenty-day deadline and makes no provision for an extension. Compare RSA 74:8 (discretion to grant extension authorized for late inventory filing).

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Recent cases establish the board cannot extend statutory deadlines without specific statutory authorization. Appeal of Gillin, 132 N.H. 311, 313 (1989) (the board's powers are entirely statutory and all board action must be consistent with statutes); Arlington American Sample Book Company v. Board of Taxation, 116 N.H. 575, 576 (1976) (board must follow statutory deadlines and cannot extend them even if deadline missed due to accident, mistake and misfortune); see also Daniel v. B & J Realty, N.H. \_\_\_\_, slip op. at 2-3 (April 26, 1991) (statutorily based deadlines cannot be extended).

Even if the board had the authority to extend the filing deadline, the facts here do not warrant a finding of accident mistake or misfortune.

Late filing motion--DENIED.

Rehearing motion--DENIED

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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George Twigg, III, Chairman

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Paul B. Franklin, Member

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Ignatius MacLellan, Esq., Member

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Michele E. LeBrun, Member

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I certify that copies of the within Decision have this date been mailed, postage prepaid, to Property Tax Consultants, representative for Prolman and Stabile; Taxpayers; and Mark J. Bennett, Esq., representative for the City of Nashua.

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Brenda L. Tibbetts, Clerk

Date: December 5, 1991

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