

Fairview Realty Associates

v.

City of Nashua

Docket Nos.: 7274-89 and 8456-90

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "City's" 1989 and 1990 assessments of:

Map & Lot #LandBuildingTotal Assessment

0102Q - 00011Q\$420,000\$3,359,500\$3,779,500

at 22 Hunt Street/78 Lake Street consisting of Courville at Nashua nursing home and Aynsley Place an elderly assisted living residence (the Property). For the reasons stated below, the appeal for abatement is denied.

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 failed to carry this burden.

The Taxpayer argued the assessments were excessive because:

(1) the highest and best use of the Property is as a licensed convalescent (nursing) home and an elderly residential care facility, not as an apartment complex; and

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(2) an "appraisal report" (Exhibit TP-1) submitted by the Taxpayer's consultant, Robert Banks of Property Tax Relief (Consultant), estimated the market value by the income and cost approaches at \$4,062,000 and \$4,300,000 respectively.

The City argued the assessments were proper because:

- (1) a site plan showed the square footage of the convalescent home was 46,660 not 41,778 as testified to by the Consultant;
- (2) the City could not adequately examine the Taxpayer's income and expense figures because the Taxpayer was reluctant to have that information be part of the public record;
- (3) Courville at Nashua receives reimbursements from Medicaid; thus the risk is lower than for Aynsley Place and the capitalization rate should also be lower;
- (4) the Consultant did not supply any evidence of market rents or vacancies;
- (5) the City questioned several of the Consultant's expense items used in the income approach to value;
- (6) the Consultant did not discover and analyze any of the numerous land sales that existed in the area; and
- (7) the Consultant did not submit any evidence of the general level of assessment within the City for the two years under appeal except for relying on the Department of Revenue Administration's equalization ratio.

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Board's Rulings

The board of tax and land appeals (board) finds this case particularly disheartening as: 1) it was initiated by the Consultant without adequate review of the market to determine if an appeal was warranted, 2) it was maintained without a serious attempt to resolve it with the City, and 3) it was argued before the board without a competent analysis of the facts.

Availability of Information

The Consultant, as agent to the Taxpayer, was unwilling to release the income and expense information to the City to enable the assessors to use the information to assist them in the determination of whether the abatement request was valid. While there is no statutory requirement for this information to be provided the City, the burden to prove the assessment is disproportional lies with the Taxpayer. Without this information, which would have assisted the assessors in performing their responsibility under RSA 75:1 ("{assessors} shall *** receive and consider all evidence that may be submitted to them, relative to the value of property, the value of which cannot be determined by personal examination."), the assessors were proper in not abating the assessment due to the lack of "good cause shown" (RSA 76:16).

Bias

The board asked the consultant how he was being paid for the services to the Taxpayer. The consultant objected to the board's question, but the board

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overruled the objection. The consultant testified he had a contingency-fee arrangement with the Taxpayer whereby the consultant would earn 50 percent of any abated taxes. At the hearing, the board explained the basis for overruling the consultant's objection, but the board thought it would be appropriate to include those reasons in this decision.

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The board overruled the objection because the consultant's fee arrangement is relevant to the consultant's testimony concerning value. The inquiry was made to determine whether the consultant had any bias. "The term 'bias' denotes a variety of mental attitudes that may cause a witness to give false or misleading testimony. In general, it signifies a witness's interest in the outcome of the case. *** The (questioner) can expose any potential bias by showing the (witness) has a (financial) interest in the outcome ***."

Lilly, Introduction to the Law of Evidence dated 297 (1978). Under the New Hampshire Rules of Evidence, witnesses may be impeached for bias. See New Hampshire Rules of Evidence Rules 104(e), 401, 404, 607, 608, 611(b).

Allowing inquiry into a witness's potential bias has also been recognized in case law. e.g., Cheshire Toyota/Volvo, Inc. v. O'Sullivan, 129 NH 698, 701 (1987) (" the proper way to expose a witness's bias is through rigorous cross-examination."); Bedford School District v. Caron Construction Co., Inc., 116 NH 800, 805 (1976) (a witness may be questioned concerning any financial gain they may receive from their testimony to indicate bias). Clearly, given the above, witnesses that express opinions concerning value may be examined to determine if they have any financial interest in the outcome of the appeal. Therefore, the board's overrule of the objection was appropriate.

The consultant also argued he should not be required to disclose his fee arrangement because attorneys are not required to do so. There is a

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difference between an attorney and a property-tax consultant. An attorney is an advocate for his client's position, but the attorney offers no evidence or valuation opinion. On the other hand, property-tax consultants are both

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advocates and witnesses. Thus, to the extent the consultant offers evidence, he/she is subject to questions concerning bias.

The board finds the Consultant's manner of payment in conjunction with the pattern of unsubstantiated and conflicting information contained in his report raises the concern of bias or, in the very least, a lack of credibility.

Consultant's "Appraisal Report"

The Consultant's "appraisal report" lacked credibility because of unsubstantiated and conflicting information and inconsistent methodology, examples of which are:

1) the Consultant's uncertainty as to who his contact person was with the Taxpayer;

2) discrepancies observed in the cost approach such as the size of Courville at Nashua building, the land value arrived at without the use of comparable sales, the cost to build Aynsley Place in 1988 (\$2,600,000) versus the Consultant's replacement cost (\$1,577,487) and the presumption of superadequacy without obtaining any evidence of market rates as difficult as that may be to obtain; and

3) discrepancies observed in the income approach such as unsubstantiated rent for Courville at Nashua, the 1989 taxable income for Courville at Nashua as indicated by the NH Business Profits tax significantly

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exceeding the Consultant's estimate of the Property's net operating income and
no substantiation of the market room rates and vacancy rates.

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The board is uncertain whether the Consultant's manner of payment biased his determination of value or simply whether the Consultant performed an inadequate "appraisal report". Therefore, we find the Taxpayer failed to prove the Property's assessments were disproportional.

The board is authorized to award costs as in the superior court. RSA 71-B:9; TAX 201.05(c). Costs are awarded where an appeal was frivolously filed or maintained. We find the Taxpayer's appeal was frivolously filed and maintained by the Consultant. As the board has discussed earlier in this decision, the Consultant did not initially determine whether the request for abatement was of merit, did not adequately attempt resolution with the City and on appeal performed an inept presentation. The board cannot afford the luxury of clogging its docket arteries with unsubstantiated appeals such as this. Therefore, pursuant to RSA 71-B:9, the Consultant is ordered to pay the City \$133.62 for costs incurred in prosecuting this frivolously maintained appeal. These costs cover expenses and witness fees for the hearing day. The Consultant shall pay the City this \$133.62 within 10 days of the clerk's date below, sending a copy of the payment letter to the board. If the Consultant fails to so comply, the City may file an enforcement motion with the board, and then the board may file an enforcement action in the Merrimack County Superior Court.

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Member

Michele E. LeBrun, Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Robert Banks, Agent for the Taxpayer; and Chairman, Board of Assessors of Nashua.

Dated: November 9, 1992

Valerie B. Lanigan, Clerk

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