

Keller Realty Trust

v.

Town of Merrimack

Docket Nos.: 7572-89, 8156-90 and 11524-91 PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1989, 1990 and 1991 assessments of \$617,100 (land \$173,000; buildings \$444,100) on a 1.307-acre lot with a one-story office building (the Property). For the reasons stated below, the appeals for abatement are 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.

The Taxpayer argued the assessments were excessive because:

- (1) they exceeded the Taxpayer's value estimates based on its analysis and certain appraisals;
- (2) the Property does not have frontage on the D.W. Highway or public sewer;
and
- (3) values have fallen greatly from 1989 to 1991.

The Taxpayer submitted a report along with the appraisals and value opinions.

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The Town argued the assessments were proper because:

- (1) a -\$50,000 adjustment was made for the Property's lack of frontage on D.W. Highway;
- (2) the Property's value was analyzed using both the cost approach and income approach with the assessment being based on the income approach; and
- (3) the rents and expenses used in the income approach were consistent with the Property's actual rent and expenses.

Board's Rulings

Based on the evidence, we find the correct assessment should be \$493,350 (land \$173,000; building \$320,350). This assessment is ordered because we find the cost approach, as calculated by the board's inspector, to be the best evidence.

The board began its analysis by reviewing the assessment and the Town's methodology used in calculating the assessment. As explained in other Town decisions, the board was not provided with sufficient data on the rents used in calculating the model rents. Thus, the board could not determine whether the selected rent of \$13.75/square foot was appropriate for this Property. Additionally, the board questions whether adequate adjustments were made to the model rents to reflect the particular factors for individual properties.

One of the main factors that should have been considered in the income approach was location. In this appeal, the Property does not have any frontage on the D.W. Highway, having only an access easement to the highway. The Town stated an adjustment was made for this, but the board was unable to ascertain how this adjustment was arrived at and how it was used in the income

approach. The board, therefore, has serious concerns about the Town's income analysis.

The board then reviewed the Town's cost approach, but the board determined it could not rely upon it because the Town stated that once it decided to use the income approach it did not review the initial cost calculations.

The board then turned to the Taxpayer's report and the various appraisals and value estimates therein. We found deficiencies with each report, which will be itemized below.

Mitchell Report

- the appraisal was prepared for a bank
- the appraisal was as of August, 1991
- the appraisal was not time adjusted to any of the assessment dates
- the 1991 estimate would not be applicable to 1989 or 1990 given market changes
- comparable one in the market approach was a bank sale and the appraiser did not make any adjustments for this
- comparables three and four in the market approach were not in the Town, requiring major locational adjustments
- all of the comparables were adjusted for location and site so drastically as to make them not comparable -- the final site and location adjustments range from -75% to -68%
- of the 21 comparable rents used in the income approach, only seven were in the Town and there was insufficient data to determine the

comparability of the rents, especially when four out of the seven

rents in the Town were office condominiums

-there was no market data to support the expenses used

-the appraiser assumed, without substantiating, that the Property's land

value must be adjusted by -50% because the Property is not on the D.W.

Highway

-in the cost approach, the \$85,000 land value was totally insufficient

and unsupported

-the -40% depreciation factor was used without substantiation,

especially when all of the evidence indicated this building is in

good shape, including the photographs, the Town's inspection, the

Taxpayer's inspection, and the board inspector's inspection

Argosy Report

-the appraiser did not substantiate the rental figures

Cassell Report

-the 1987 appraisal was too remote in time

Taxpayer's Comparable Sales (Report pages 20-50)

-the board gave this evidence no weight because the Taxpayer did not

organize and analyze the sales. (The board does not do this work for

the Taxpayer.)

Given all of these deficiencies, the board sent its inspector out to

review the Property. He concluded the assessment should be \$493,350 (land

\$188,000; building \$305,350). (Copy of report attached without photographs.)

(Note: the inspector added the paving to the land assessment, but the board,

for consistency sake, included the paving in the building costs.) The board

reviewed the inspector's report and compared it with the Taxpayer's cost calculation. Since the other evidence was so questionable, the board has adopted the inspector's report as the best evidence before the board. The board will admit, however, its reluctance to use the Town's land value without independent verification -- something that the Taxpayer did not do. Normally, we expect experts who rely upon the cost approach to perform their own land valuation. It is not sound practice to simply adopt the Town's land assessment without verification. However, lacking any other evidence and lacking the resources for performing a land valuation, the board has accepted the Town's land assessment as the best evidence available.

The above assessment shall apply for all three years under appeal. The Taxpayer failed to submit sufficient evidence that the Property's value declined more rapidly than values generally in the Town. (As pointed out above, the 1991 appraisal was so flawed that we could not rely upon it.) The Town's equalization ratio shows the general decline from 100% in 1989 to 105% in 1990 and 124% in 1991, indicating a rapidly decreasing market.

If the taxes have been paid, the amount paid on the value in excess of \$493,350 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Ignatius MacLellan, Esq., Member

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CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Property Tax Consultants, Representative for the Taxpayer; Office of the Assessor or Merrimack; and Jay L. Hodes, Esq., Representative for the Town.

Dated: March 23, 1993

Valerie B. Lanigan, Clerk

0005

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ORDER

This order responds to the "Taxpayer's" request that the board order the "Town" to abate the 1992 property taxes based on the board's decisions in the 1989, 1990 and 1991 tax appeals. The Taxpayer made this request based on RSA 76:16-a (supp. 1991) and RSA 76:17-c (supp. 1992). Even though the board disagrees with the Town's decision to not abide by the board's prior decisions, the Taxpayer's request is denied.

The Taxpayer's request is denied because there was no statute governing subsequent tax years when the board issued the March 23, 1993 decision. Below is a chronology of the applicable RSA's.

RSA 76:16-a (supp. 1991)	effective July 2, 1991 to March 31 1992
RSA 76:17-c (supp. 1992)	effective April 1, 1992; applicable to appeals based on tax bills mailed after April 1, 1992
RSA 76:17-c (as amended by based	effective May 16, 1993; applicable to appeals HB 645 effective on tax bills mailed after April 1, 1991 May 16, 1993)

None of these statutes provide the relief requested by the Taxpayer. RSA

76:16-a (supp. 1991) does not provide any relief because the Taxpayer's 1991 appeal was filed on June 12, 1992, which was after the effective dates of RSA 76:16-a (supp. 1991). RSA 76:17-c (supp. 1992) does not apply because it only applies to appeals based on tax bills mailed after April 1, 1992, and the Taxpayer has not appealed for the 1992 tax year. RSA 76:17-c (as amended by HB 645 effective May 16, 1993) does not apply because the board had issued the decision before the effective date of the amendment.

While the legislature clearly intended HB 645 to have retrospective effect, it is unconstitutional for that retrospective effect to apply to appeals that have gone past the procedural step covered by the statute. See Norton v. Patten, 125 N.H. 413, 417 (1984); Gelinas v. MacKey, 123 N.H. 690, 694-95 (1983). Simply put, HB 645's amendment to RSA 76:17-c can only apply to appeals based on 1991 tax bills for which a decision is made after May 16, 1993.

Based on the above analysis, and while RSA 76:17-c as amended by HB 645 applies retrospectively, the amended RSA 76:17-c cannot apply to these appeals because the appeals had passed the procedural step governed by RSA 76:17-c, namely a decision had been issued and an appeal was no longer pending.

Keller Realty Trust/George F. Keller, Trustee

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Paul B. Franklin, Member

Ignatius MacLellan, Esq., Member

Michele E. LeBrun, Member

CERTIFICATION

I hereby certify a copy of the foregoing order has been mailed this date, postage prepaid, to Gary M. Stern, representative for the Taxpayer; and Chairman, Selectmen of Merrimack.

Dated:

0008

Valerie B. Lanigan, Clerk