

Joseph S. Pappalardo

v.

Town of Plaistow

Docket Nos.: 9263-90 and 11534-91PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1990 and 1991 assessments of:

\$6,135,200 (land \$1,693,400; buildings \$4,441,800) on Lot 1, a 9.20-acre lot with a shopping center, gas booth, camera booth, and pumphouse located at 4 Plaistow Road;

\$384,550 (land \$363,450; buildings \$21,100) on Lot 2, a .93-acre lot with a retail convenience store located at 8 Plaistow Road;

\$76,750 on Lot 4, a vacant, .78-acre lot located at 4 Wentworth Road;

\$94,000 on Lot 5, a vacant, .78-acre lot located at 6 Wentworth Road;
and

\$151,200 (land \$88,800; buildings \$62,400) on Lot 6, a .78-acre lot with a single-family house located at 8 Wentworth Road (the Properties).

In 1991, the Taxpayer also owned, but did not appeal, three condominiums with a combined \$459,500 assessment. The parties agreed the nonappealed properties were equitably assessed. For the reasons stated below, the appeals for abatements on all of the Properties except the main shopping center property are denied, and the appeal is granted on the main shopping center.

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 203.09(a); Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985). We find the Taxpayer failed to carry this burden, with the exception of the main shopping center Property.

The Taxpayer argued the assessments were excessive because:

- (1) the shopping center consists of approximately 117,000 square feet located in Massachusetts and New Hampshire;
- (2) the New Hampshire part of the center depends on the Massachusetts part in 3 main areas: (a) zoning requirements for parking; (b) snow area;
- (c) Massachusetts connection for municipal water and sewer;
- (3) Ames Department Store, the anchor tenant, went out of business in 1990 and many other stores suffered as a result and the overall income of the shopping center suffered as a result;
- (4) the owner was unsuccessful in leasing the Ames space to another store for over 2 years and operated a flea market out of that space; and
- (5) based on an income approach to value, the fair market value of the New Hampshire portion of the shopping center as of April 1, 1990 was \$3.3 million and somewhat less in 1991. (The Taxpayer submitted an April 1990 appraisal and a report to support its position.)

The Town argued the assessments were proper because:

- (1) the assessment was arrived at based on Marshall and Swift (1986) and front foot values were based on sales which occurred between 1985 and early 1987;
- (2) assessments of comparable strip malls supported the land and buildings were proportionately assessed; and
- (3) the Town also drew the board's attention to a September 1990 \$5.1 million appraisal on the Massachusetts and New Hampshire properties, and the Town argued the Taxpayer's \$3.3 million figure was inconsistent with the \$5.1 million

appraisal.

Board's Rulings

Based on the evidence, we find the Taxpayer showed the main shopping center, 4 Plaistow Road, (the Center) was overassessed, but the Taxpayer failed to show overassessment on any of the other Properties. The assessment on 4 Plaistow shall be reduced to \$5,143,815 (land \$1,693,400, buildings \$3,450,415). The building's assessment was calculated using the Town's replacement cost for the main building less 15% for physical depreciation and less 15% for functional depreciation (\$3,433,540). The assessments on the other buildings and improvements was then added (\$16,875).

The Taxpayer's appeal was primarily based on the \$3.3 million appraisal. The board, however, concludes that appraisal could not be relied upon as evidence of the Properties' fair market value for the following reasons.

First, the Taxpayer did not show that the rents being received from the stores were market rents. The appraisal was based upon the income approach, but that income approach was based on the shopping center's actual rents. The appraiser stated the rents were market rents, but he failed to support this assertion with any type of rental study. Additionally, he did not introduce evidence concerning the leases at the shopping center. For instance, he did not show when the leases were executed. This lack of information was fatal to the Taxpayer's appeal because the board is required to review market data, and the information supplied by the appraiser was not market data. See, e.g., Coliseum Vickerry Realty Co. Trust v. City of Nashua, 126 N.H. 368,369-70 (1985). In essence, the appraisal was a leased-fee appraisal rather than a fair-market value appraisal. Given the age of this shopping center and the apparent long-term leases in place, the board cannot accept the unsupported assertion that the actual rents were market rents. As cumulative support of this conclusion, the board notes that after Ames vacated, the rental

income on the Ames unit actually increased due to rent received from a flea market. One would think that a long-term tenant such as Ames would produce more income than a flea market if the Ames lease had been at market rent. Finally, in his December 20, 1993 letter with the appraisal, the appraiser states: "In our opinion, market value [of] this property, in leased fee title, as of April 1, 1990 was 3.3 million dollars ***." (Emphasis added.) This sentence is consistent with the board's conclusion that the appraisal was not a market-value appraisal but rather was a leased-fee appraisal.

Second, there were major discrepancies in the adjustments applied to the \$3.3 million appraisal and the \$5.1 million dollar appraisal, including the following:

a) Income approach

	<u>\$5.1m</u>	<u>\$3.3m</u>
Vacancy	10%	non-collected money represents vacancy
Equity Yield	16%	14%
Loan to Value Ratio	70%	75%
Interest	12% plus 1 point	10% plus 1 point
Cap. Rate	12.58%	11%

b) Sales comparison approach - comparable sale of shopping plaza "heavily relied upon".

	<u>\$5.1m</u>	<u>\$3.3m</u>
Time Adjustment	15%	33%
Age & Condition	-0-	15%
Set up/Design	15%	15%
Comp. Value per sq. ft.	\$53.14	\$35.60

c) Cost approach

	<u>\$5.1m</u>	<u>\$3.3m</u>
Cost manual utilized	1990 Marshall & Swift	1993 Mears Sq. Ft. Cost Manual
As of:	9/90	4/90
Effective age	15	16
Total depreciation	25%	63%

Given the different purposes of the appraisals -- one apparently for a refinancing (the \$5.1 million appraisal) and one for tax abatement (the \$3.3 million appraisal), we are unable to place any credibility on the appraisal or the appraiser's testimony.

Additionally, based on his testimony, we find the \$3.3 million appraisal was based on hindsight gained from the actual changes in the market as compared to a fair estimate of the Properties' value as of the valuation date. Appraising property requires making assumptions about what the market thought the property was worth on the date of the appraisal. Using the hindsight approach does not, in this case, reflect the market perception in 1990.

Third, the \$3.1 million appraisal only valued the New Hampshire Property and ignored any value the Massachusetts property might add to the New Hampshire Property. As discussed above, the Massachusetts and the New Hampshire properties are interdependent. We note that in his December 20, 1993 letter in the appraisal, the appraiser states: "We stress that the market value of the subject property in its entirety is not necessarily reflective of the sum of the Massachusetts portion and the New Hampshire portion viewed independently for tax assessment[.]"

Having failed to consider the interdependence and contributory value of the Massachusetts portion to the New Hampshire portion, the appraisal cannot be accepted.

The board reduces the Center's assessment because we conclude the 15% physical depreciation that the Town used in the original assessment was insufficient. The main reason for this conclusion is that given the shopping center's age and condition, there should have been some adjustment made for the loss of rentability to large tenants that want space that is consistent with their new stores. For example, the Taxpayer's appraiser testified that larger tenants such as Shaw's Supermarket want space that is built for their specific needs, and these potential tenants are not willing to attempt to retrofit space that will not meet their specific and detailed criteria. This testimony was supported by what actually happened to the Center. The Taxpayer was unable to find another large anchor tenant, and the Taxpayer concluded the most economical use of the Center required renovations to reconfigure the Ames space. Thus, the board applied a 15% functional depreciation to the Center.

The Taxpayer did not introduce any other evidence to show that any of the other Properties warranted a reduction.

If the taxes have been paid, the amount paid on the value in excess of \$6,157,531 plus assessments on nonappealed properties shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Pursuant to RSA 76:16-a (Supp. 1991), RSA 76:17-c II, and board rule TAX 203.05, the Town shall also refund any overpayment for 1991, 1992 and 1993. Until the Town undergoes a general reassessment, the Town shall use the ordered assessment for subsequent years with good-faith adjustments under RSA 75:8. RSA 76:17-c I.

A motion for rehearing, reconsideration or clarification (collectively "rehearing motion") of this decision must be filed within twenty (20) days of the clerk's date

below, not the date this decision is received. RSA 541:3; TAX 201.37. The rehearing motion must state with specificity all of the reasons supporting the request. RSA 541:4; TAX 201.37(b). A rehearing motion is granted only if the moving party establishes: 1) the decision needs clarification; or 2) based on the evidence and arguments submitted to the board, the board's decision was erroneous in fact or law. Thus, new evidence and new arguments are only allowed in very limited circumstances as stated in board rule TAX 201.37(e). Filing a rehearing motion is a prerequisite for appealing to the supreme court, and the grounds on appeal are limited to those stated in the rehearing motion. RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Ignatius MacLellan, Esq., Member

Michele E. LeBrun, Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Fred Sewall of Marvin F. Poer & Co., Agent for Joseph S. Pappalardo, Taxpayer; and Chairman, Selectmen of Plaistow.

Dated: February 22, 1994

0008

Valerie B. Lanigan, Clerk

Joseph S. Pappalardo

v.

Town of Plaistow

Docket Nos. 9263-90 and 11534-91PT

ORDER

This order relates to the "Taxpayer's" TAX 203.05(j) motion, asserting the "Town" has not complied with the board's order concerning abatements for subsequent years. See RSA 76:17-c; TAX 203.05. Specifically, the Taxpayer asserted the Town has not made abatements for tax years 1991, 1992 or 1993.

The board held a telephone conference call with the parties. Based on the file and the conference call, the board orders the following.

- 1) The Town shall refund taxes for 1991 based on the \$5,143,815 assessment for 4 Plaistow Road.
- 2) The board will hold a hearing on the enforcement motion for tax years 1992 and 1993.
- 3) The board will schedule the Taxpayer's 1993 appeal on the same date as the enforcement hearing. After deciding the enforcement motion, the board will, if necessary, hear the 1993 appeal.

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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 John M. O'Connor of Marvin F. Poer & Co., Agent for Joseph S. Pappalardo, Taxpayer; and the Chairman, Selectmen of Plaistow.

Valerie B. Lanigan, Clerk

Dated:

0005

Joseph S. Pappalardo

v.

Town of Plaistow

Docket Nos. 9263-90, 11534-91PT

ORDER

This order relates to the "Taxpayer's" motion to enforce the board's ordered assessment. The Taxpayer requested that the board order the Town to use the ordered assessment for tax years 1992 and 1993. The board held a hearing on October 4, 1994 pursuant to Tax 203.05(k) and issues the following order. The board concludes, the Town shall use the ordered assessment of \$5,143,815 on 4 Plaistow Road for 1992, and the board denies the Taxpayer's request for 1993.

The Town argued good faith adjustments were made for the 1992 and 1993 tax years because:

(1) in 1992, a general reassessment was made in Town, resulting in 90% of the land values in Town being adjusted;

(2) although the land value in the area of the subject did not change, the functional obsolescence adjustment to the building was removed because physical changes were being made to the building and occupancy permits had been issued;

and

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(3) as of April 1, 1993, the Taxpayer had demolished a substantial portion of the building, added land and made substantial changes to the Property.

The Taxpayer agreed that the Property was expanded at a cost of one million dollars and excess parcels were consolidated as of April 1, 1993, and a separate hearing should be held. The Taxpayer argued that as of April 1, 1992, none of the activities were in place (i.e. work permits, occupancy permits, etc.), therefore the board's ordered assessment for tax years 1990 and 1991 was proper for 1992.

Based on the above and the long history of these appeals, the board concludes the Town did not show a good-faith reason to not use the board's previously ordered assessment for 1992 but did show such reason for 1993. The key factor was that as of April 1, 1992, the Taxpayer had not corrected the very problem that was the basis for the board's 1990 and 1991 decision.

If the taxes have been paid, the amount paid on the value in excess of \$5,143,815 for 1992 plus the assessments on the Taxpayer's other properties shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

The board notes that the Taxpayer filed a 1992 appeal with the board, docket number 13293-92PT. Quite frankly, the board does not see why the Taxpayer would wish to pursue this appeal. The Taxpayer should let the board know whether he intends to continue this appeal or file a withdrawal. The basis for the appeal would be the board's ordered assessment of \$5,143,815.

A motion for rehearing, reconsideration or clarification (collectively "rehearing motion") of this decision must be filed within thirty (30) days of Page 3 Pappalardo v. Town of Plaistow
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the clerk's date below, not the date this decision is received. RSA 541:3; TAX

201.37. The rehearing motion must state with specificity all of the reasons supporting the request. RSA 541:4; TAX 201.37(b). A rehearing motion is granted only if the moving party establishes: 1) the decision needs clarification; or 2) based on the evidence and arguments submitted to the board, the board's decision was erroneous in fact or in law. Thus, new evidence and new arguments are only allowed in very limited circumstances as stated in board rule TAX 201.37(e). Filing a rehearing motion is a prerequisite for appealing to the supreme court, and the grounds on appeal are limited to those stated in the rehearing motion. RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Ignatius MacLellan, Esq., Member

Michele E. LeBrun, Member

Certification

I hereby certify that a copy of the foregoing order was mailed this date, postage prepaid, to John M. O'Connor, taxpayer representative; and Chairman, Selectmen of Plaistow.

Dated: January 27, 1995

Valerie B. Lanigan, Clerk

Joseph S. Pappalardo

v.

Town of Plaistow

Docket Nos.: 9263-90 and 11534-91PT

ORDER

This order responds to the "Town's" rehearing motion. See RSA 541:3; TAX 201.37. The Town's request for clarification is granted.

Total Assessments

The board corrects page 6, paragraph 4, by changing "\$6,157,531 plus assessments on nonappealed properties ****" to "\$6,309,815," which figure was calculated as follows.

4 Plaistow Road	\$5,143,815	
8 Plaistow Road	\$ 384,550	
4 Wentworth Road	\$ 76,750	
6 Wentworth Road	\$ 94,000	
8 Wentworth Road	<u>\$ 151,200</u>	
	\$5,850,315	Total Appealed Properties
	<u>\$ 459,500</u>	Total Nonappealed Properties
	\$6,309,815	Total All Assessments

Note: The assessment stated on page 3, paragraph 2 (\$5,143,815) was the correct figure for 4 Plaistow Road. The board, however, erred in adding the other assessments that were not changed by the order.

Subsequent Tax Years

Under RSA 76:17-c and TAX 203.05, the Town is required to use the 1990 ordered assessment unless: 1) the Town in good faith and pursuant to RSA 75:8 adjusts the ordered assessment; or 2) the Town undergoes a general revaluation. If either scenario exists here, the Town may adjust the ordered assessment. If the Taxpayer disagrees with the Town's adjustments, the Taxpayer can then file a motion pursuant to TAX 203.05 to contest the Town's adjustments. The Taxpayer should note the limited scope of any hearing on the assessment for subsequent years. See TAX 203.05(k). Copy of TAX 203.05 attached.

Further Rehearing Motion

Because this order corrects an error in the original decision, either party may file an RSA 541:3 rehearing motion within 20 days of this order. Again, filing such a motion is a prerequisite to appealing to the supreme court. See RSA 541:6. Note: The rehearing motion is strictly limited to the 1990 assessment. Issues concerning the subsequent years are governed by TAX 203.05.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Ignatius MacLellan, Esq., Member

Michele E. LeBrun, Member

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Dated:

Valerie B. Lanigan, Clerk

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