

**Post Office Square Nominee Trust
Edward J. Casey, Trustee**

v.

Town of Newport

Docket No.: 11398-91PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1991 abated assessment of \$511,600 on a 1-acre lot containing 2 triplex and 4 duplex buildings (a total of 14 units) (the Property). For the reasons stated below, the appeal for abatement is granted.

The Taxpayer has the burden of showing the assessment was 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 carried this burden and proved disproportionality.

The Taxpayer argued the assessment was excessive because:

- (1) the Property's highest and best use was as rental, not as condominiums;
- (2) a July 23, 1992 appraisal (performed for the bank) estimated a \$190,000 value based on a highest and best use as rental property;
- (3) the Property was to be sold as condominium units in 1988 but despite marketing efforts none were sold and thus the Taxpayer decided to rent the units;

- (4) the market was in free fall;
- (5) the Town's analysis did not give enough consideration to the financially feasible component of highest and best use;
- (6) the Town's income analysis included some erroneous assumptions, including higher rents and lower vacancy rates than actual or reasonable; and
- (7) the Town erred in their comparative sales approach.

The Town argued the assessment was proper because:

- (1) it was based on market information not on the Taxpayer's financial situation;
- (2) the Property's highest and best use was for the sale of individual units not as an apartment complex;
- (3) the Town reviewed the assessment and made a substantial reduction;
- (4) the Taxpayer's appraisal was flawed, including making no adjustments for the superiority of townhouse units compared to garden-style apartments and making incorrect projections; and
- (5) the Property's units had a rock-bottom value based on time-adjusted 1989 values and based on auction sales at River Bend a property in direct competition with this Property.

The Town submitted a thorough analysis of the case.

Both parties agreed the cost approach was inapplicable.

Board's Rulings

Based on the evidence, we find the correct assessment should be \$448,000.

This assessment is ordered because:

- (1) the Property's highest and best use was an interim use as rental housing with a future use as condominiums;

(2) the Taxpayer's appraisal was not reliable; and
(3) the Town's evidence except for its highest and best conclusion warranted consideration.

Valuing this Property was not and is not an easy or a precise science. It reminds the board of the supreme court's statement that "the search for fair market value is a snipe hunt carried on at midnight on a moonless night." Fusegni v. Portsmouth Housing Authority, 114 N.H. 207, 211 (1974)(citations omitted). This is not to say the board's search for a proper value is unguided and without basis. Rather, finding value involves informed judgment and experienced opinion. See Brickman v. City of Manchester, 119 N.H. 919, 921 (1979). 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); see also Petition of Grimm, 138 N.H. 42, 53 (1993) (administrative board may use expertise and experience to evaluate evidence). We have done so here after careful consideration.

Highest and Best Use

The pivotal issue in this case is what was the Property's highest and best use. The Town argued the Property's highest and best use was as a condominium development with the owner selling the individual units over one year. The Taxpayer argued the highest and best use was as rental property.

There is no question that the board must decide the Property's highest and best use based on what the market would conclude was the highest and best use and not what this Taxpayer would conclude was the highest and best use. However, this does not mean the board may not consider and give weight to the Taxpayer's testimony concerning his conclusion of the Property's highest

and best use. In deliberating on this issue, the board reviewed Appraisal Institute, The Appraisal of Real Estate, chapter 12 (HIGHEST AND BEST USE ANALYSIS)

(1992). The criteria for highest and best use analysis are:

1) legally permissible; 2) physically possible; 3) financially feasible; and 4) maximally productive. Id. at 280-83. There is no question that the Property could have been legally and physically used as either rental or condominiums. The dispute arose concerning whether rental or condominiums were financially feasible and which one was maximally productive. While one normally thinks of highest and best use as a single use, there can be situations where a property has an interim use. This occurs where a property's highest and best use may change in the foreseeable future, and until the new highest and best use arises, the property is put to an interim highest and best use. Id. at 289. Additionally, a property may have a multiple highest and best. Id. at 293.

Based on the evidence and the board's experience, we conclude this Property had an interim highest and best use as a rental property with a future highest and best use as a condominium development. Thus, in some ways the Property had two highest and best uses -- the present interim use as rental and the future use for sales of individual condominiums units. We make this conclusion based on the specific facts in this case and based on the numerous cases the board has heard concerning rental and condominium properties. In this case, we give credibility to the Taxpayer's testimony concerning the lack of a market for individual condominium units. The board concludes that any prudent owner or purchaser of the Property would not have

chosen a liquidation of the Property and would have instead turned the Property into

rentals until the market improved for condominium sales.

Having concluded the Property has an interim highest and best use as rental with a future highest and best use as condominium sales, the board could not accept the Taxpayer's \$190,000 appraisal or the Town's \$511,600 assessment.

Valuation Evidence

The Taxpayer's \$190,000 appraisal is easily discarded. First, the appraiser did not testify, and thus the board was unable to delve into the validity of the appraiser's assumptions and conclusions. Second, the \$190,000 value conclusion seemed low given the resulting \$13,570 per-unit value. Clearly, based on the Town's evidence, these units could have been liquidated for more than \$13,570. Furthermore, the Town presented sufficient questions about the appraisal, including the appraiser's use of garden-style units as comparables and using the wrong square footage in the cost approach.

Concerning the Town's methodology, the board had trouble accepting the Town time adjusting 1989 sales when the market had changed so dramatically between 1989 and 1991. Additionally, the Town used a time-adjustment factor based on sales in Concord, Gilford and Sunapee, and the board is unsure whether those markets are similar to the Town's market. The board also had concerns about the Town's use of the bank sales from Riverbend, especially when the bank was offering to finance the purchases (a factor that may not have been present if the Taxpayer here chose to liquidate). Additionally, given the size of the Town, the board wonders whether the Property's 14 units could have achieved the same per-

unit value that were achieved when six
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properties were sold at Riverbend, three of which were purchased by the same individual.

Based on the evidence, the board finds an appropriate 1991 rent to be \$500 per month with a 20% vacancy. Based on the information presented, the parties agreed that using these rental and vacancy figures would result in a \$340,000 income value. The board then decided that some additional value was required to reflect the future value as individual condominium units. We must remember that the Property was approved by the attorney general's office for condominiums in February 1991, and the cost to finalize the condominium process was estimated to be only \$10,000. Any prudent purchaser or owner of this Property would have seriously considered taking steps to ensure that the condominium approval was final and irrevocable to ensure a future return on the investment. Deciding about what value to attribute to the future use was not done scientifically, but the board concluded that overall value of the Property was approximately \$400,000, which when multiplied by 1.12 results in a \$448,000 assessment for 1991.

If the taxes have been paid, the amount paid on the value in excess of \$448,000 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Pursuant to RSA 76:17-c II, and board rule TAX 203.05, the Town shall also refund any overpayment for 1992, 1993 and 1994. 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. The board's decision focused on the 1991 tax year. The Town, may adjust the ordered assessment based on changes in the Property's market value from 1991 through 1994 consistent with decision. Such

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adjustments might include changes to the income analysis that more accurately reflect the decreasing vacancy rate and the increasing rents. As stated above the Town is authorized to make any good faith adjustment that are consistent with this

decision and the Town's review of the market information and this Property.

A motion for rehearing, reconsideration or clarification (collectively "rehearing motion") of this decision must be filed within thirty (30) 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 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. Generally, if the board denies the rehearing motion, an appeal to the supreme court must be filed within thirty (30) days of the date on the board's denial.

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 Edward J. Casey, Trustee of Post Office Square Nominee Trust, Taxpayer; and Chairman, Selectmen of Newport.

Dated: May 5, 1995

Valerie B. Lanigan, Clerk

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