Frank P. Crivello/
Principal Mutual Life Insurance Co.

v.

Town of Milford

Docket Nos.: 11615-91-PT and 12895-92-PT and 13956-93-PT

DECISION

The "Taxpayers" appeal, pursuant to RSA 76:16-a, the "Town's" 1991, 1992 and 1993 assessments of $12,781,400 (land $6,146,900; buildings $6,634,500) on the Lorden Shopping Center (the Property). Mr. Frank P. Crivello owned the Property in 1991, and the Principal Mutual Life Insurance Co. owned the Property in 1992 and 1993. Principal Mutual Life filed to intervene in the 1991 appeal, and we hereby grant intervention. For the reasons stated below, the appeals for abatement are granted.

The Taxpayers have the burden of showing the assessments were disproportionately high or unlawful, resulting in the Taxpayers 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 Taxpayers carried their burden and proved disproportionality.

The Taxpayers argued the assessments were excessive because:

(1) the Property was constructed in the late 1980's;

(2) there are many vacant properties on Route 101A;

(3) the Property has experienced decreased income due to the occupancy decreasing from 80% in 1991 to 73% in 1992 (the occupancy increased to 78% in 1993);

(4) a vacant secondary building with 18,000 square feet of space has never been fitted out and has never been rented; and

(5) a September 1994 appraisal estimated the market value of the Property to be $8,500,000 as of April 1, 1991, $8,150,000 as of April 1, 1992, and $8,300,000 as of April 1, 1993.

The Town argued the assessment was proper because:

(1) the Taxpayers previously submitted an appraisal report dated April 1992 that estimated the Property's 1992 value to be $8,500,000;

(2) the market rents used by the appraiser were not consistent with the Town's rent survey or the subject's actual rents;

(3) it was not appropriate to deduct the cost of "tenant improvements" in arriving at the Property's fair market value; therefore, the fair market value of $8,870,000 is appropriate for the 1992 tax year or assessed values of $12,329,300 per year;

(4) the 1991 assessment was confirmed by time adjusting the 1992 fair market value to April 1991, which equalizes to $12,887,900; and

(5) the Taxpayers' September 1994 appraisal relied on inaccurate data and the comparable leases utilized were not comparable to the subject.

Board's Rulings

Based on the evidence, we find the correct assessments should be:

1991 - $10,540,000;

1992 - $11,328,500; and

1993 - $11,537,000.

These assessments are ordered because:

(1) the Town did not present any evidence to support the assessments;

(2) the Taxpayers' appraisal was the best evidence of value;

(3) the Town did not raise sufficient deficiencies with the Taxpayers' appraisal; and

(4) we do not accept the Town's trending analysis.

The Town did not present any evidence to support the assessments.

The Town is entitled to, in essence, a presumption that the assessments were correct because the Town has the statutory duty to assess property based on market value, pursuant to RSA 75:1, and to review assessments and the market on a yearly basis, pursuant to RSA 75:8. Thus, the board would expect municipalities to present some information to support the assessment and to demonstrate how the assessment was initially calculated.

Here, the Town did not present any evidence about its methodology or its assessments. Therefore, the board was unable to make any review of the

assessments themselves.

The burden of proof is on the Taxpayers and remains there. However, the burden of persuasion can shift, and it did here. In this appeal, as with

other appeals, the Taxpayers made their presentation first, which included the appraisal and appraiser's testimony. Clearly, this evidence was sufficient to show prima facie overassessment. Since the Taxpayer had made a sufficient showing, the burden of persuasion shifted to the Town to either support the assessments or to refute the Taxpayers' evidence. The Town did neither, and the Town's failure to refute the Taxpayers' evidence will be discussed below.

There being no evidence to support the Town's methodology and assessments, we turn to the Taxpayers' appraisal and appraiser's testimony.

The Taxpayers' appraisal was the best evidence of value.

The Taxpayers presented Steven R. Foster, MAI, who testified extensively and presented an appraisal report. The board finds his testimony and his appraisal to be the best evidence presented to the board. The appraisal was a thorough and professional job of appraising the Property for the three years under appeal. The appraiser made sufficient underlying inquiries and analysis to use in his appraisal, he generally supported his underlying assumptions and overall analysis, and he was responsive to board questions concerning the appraisal and his value opinion. We were persuaded by Mr. Foster's presentation, and thus, we have given full weight to his opinion.

As will be discussed below, the board did have some concerns and questions about parts of the appraisal, but we concluded the appraisal and Mr. Foster's value

opinion represented a professional and reliable fair market value opinion.

The Town did not raise sufficient deficiencies with the Taxpayers' appraisal.

The Town raised several concerns with the Taxpayers' appraisal, including:

1) Mr. Foster's lack of sufficient knowledge about the Town's market;

2) the thoroughness of the appraiser's job;

3) the deduction of the so-called "tenant improvements";

4) the seven dollar per-square-foot rent used on the satellite units;

and

5) the inclusion of taxes as an expense in the income analysis.

The board disagrees with the Town's position on items one and two above. To the contrary, the board found Mr. Foster did a thorough review and analysis of the local market. Moreover, if the Town's assessor thought Mr. Foster had failed to properly reflect the local market, the Town's assessor should have presented sufficient evidence to the board to support the assessment or to show what other numbers were more appropriate. The assessor did not do this. Based on the quality of Mr. Foster's direct evidence, we will not accept the assessor's empty assertion that Mr. Foster failed to do an adequate job based on adequate knowledge.

Concerning the deduction for so called "tenant improvements," the board disagrees with the Town. Mr. Foster used an income model that attributed rent to

the vacant and unfinished space. It was proper for Mr. Foster to make a deduction for capital costs that would be required to actually produce the

rental income. There were several ways Mr. Foster could have handled the unfinished space, and the Town did not present sufficient argument or information that Mr. Foster's handling of this issue was incorrect.

Concerning the lower square-foot rent ($7.00) for the satellite units, the board agrees that Mr. Foster's selection of this rent raised some questions given the Property's rent-up history during the years appealed, which indicated a $9.86 per-square-foot rent in the Property itself. Additionally, the Town raised a valid question about the comparability of some of the Taxpayers' rental comparables, which did not have anchor stores. However, the Town's proffered rent survey was not admitted because the Town did not exchange the survey with the Taxpayers before the hearing as required by TAX 201.33 and TAX 201.35. Additionally, the Town's rent survey was for 1993 only. Finally, Mr. Foster did perform a market study of rents.

Most importantly, the board is viewing Mr. Foster's value opinion as a whole, and we note that Mr. Foster, while he may have used a lower square-foot rent, used a vacancy rate that was significantly lower than the actual vacancy as demonstrated by the evidence and that was lower than the board's opinion of a proper vacancy rate. The phase two building, which included approximately 15% of the total rentable area, remained unfinished and vacant during the three appeal years. The evidence indicated the vacancy problem would continue to occur because there

were units available in the main shopping center. Mr. Foster only used a 15% vacancy on the satellite units, which equated to an approximate 6% overall vacancy rate (satellite units represented 40% of the Page 7

rentable space; 15% x .4 = 6%). It is true that the board could have adopted a higher square-foot rent, but we would have then used a higher overall vacancy rate to reflect the board's opinion as demonstrated by the evidence.

Concerning the inclusion of taxes as expenses, the board agrees that for tax abatement purposes taxes are normally not included as an expense but are more properly included in the capitalization rate. As should be read as the major theme, the board has looked at Mr. Foster's report in toto, which included an income and market approach. We find no reason to adjust the report because of the expensed taxes. We also note that in his direct capitalization approach, Mr. Foster only expensed taxes attributable to the unleased space, and those taxes were not a significant number given the overall numbers involved. Moreover, the Town did not present a calculation of how not expensing the taxes would have changed the final value conclusions.

Town's Trending Analysis

The Town also asked the board to use the Taxpayers' 1992 value opinion as calculated in the original appraisal that was sent to the Town and to trend that value based on changes in the equalization ratio. We reject this approach.

Mr. Foster had appraised the Property in 1992, and that appraisal had been earlier supplied to the Town. The appraisal presented at the hearing did change in some minor ways from the earlier appraisal, but given the numbers involved, those

changes were not significant enough to draw into question the new appraisal. Specifically, Mr. Foster testified that he completed a new

appraisal for the hearing that included value opinions not just for 1992 but for 1991, 1992 and 1993, and he testified that during this process he determined he should make certain adjustments to his 1992 appraisal. The board found Mr. Foster's testimony to be generally very consistent with the earlier appraisal, which gave additional support to Mr. Foster's credibility.

Finally, the board thinks the Town's trending methodology is flawed, and the board's inspector's analysis, which was admitted, properly explained how to use the equalization ratio for trending, when and if that is appropriate.

Conclusions and Refund

Based on all of the evidence and as explained above, the board concludes the Taxpayers carried their burden. The major theme of our decision is that Mr. Foster's value opinion was thorough and professional, and the board chose to rely on his value conclusion without making individual or specific adjustments to it. We also find the Town failed to carry its burden of persuasion once the Taxpayers had made a showing of overassessment.

If the taxes have been paid, the amounts paid on the value in excess of $10,540,000 for 1991; $11,328,500 for 1992; and $11,537,000 for 1993 shall be refunded with interest at six percent per annum from dates paid to refund date. RSA 76:17-a. 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 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 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

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Ignatius MacLellan, Esq., Member

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Michele E. LeBrun, Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Robert E. Brooks, Esq., Counsel for Frank P. Crivello and the Principal Mutual Life Insurance Co., Taxpayers; and the Chairman, Selectmen of Milford.

Dated: 10/21/94

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Valerie B. Lanigan, Clerk