Paul E. Messier, Jr.

v.

City of Concord

Docket No.: 12138-91PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1991 assessment of $488,600 (land $269,700; buildings $218,900) on a multi-unit, woodframe commercial/retail building on a 40,500 square-foot lot (the Property). For the reasons stated below, the appeal for abatement is granted to the City's recommended assessment of $442,800.

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).

The Taxpayer argued the assessment was excessive because:

(1) the site contains 40,050 square feet of land with 200 feet of frontage on Loudon Road and 166.25 feet of frontage on Branch Turnpike;

(2) the frontage on Branch Turnpike suffers incurable functional obsolescence due to the 50 foot frontage setback requirement;

(3) the improvement is in good condition with the exception of some

foundation movement (cost to cure $30,000) and a deteriorated heating system (cost to cure $27,000);

(4) a February 1992 bankruptcy appraisal placed most weight on the income approach to value and estimated the fair market value to be $170,000; and

(5) the fair market value as of April 1991 is $170,000.

The Town argued the assessment was proper because:

(1) the Property was purchased for $580,000 in April 1989, two bays were converted into a laundromat and an attached 10' X 56' building was added at an estimated cost of $100,000 (which included personal property);

(2) the Taxpayer stated in response to interrogatories that the new heating system for 4 rental bays cost $18,846 ($27,000 with air-conditioning upgrade);

(3) the foundation wall has a bow in it which was considered to be a structural defect with no detrimental effect on cash flow; however, an adjustment was made for this defect in the cost approach to value;

(4) in arriving at a value by the income approach, an economic rent based on a modified gross was used because rentals generated were in excess of the rental market;

(5) land sales support a site value of $179,400;

(6) the Taxpayer's land sale at 219 Loudon Road did not consider the evidence of its subdivision and resale; and

(7) based on the appraisal report submitted, the fair market value of the Property as of April 1, 1991 was $410,000.

Board's Rulings

There are three approaches to value: 1) the cost approach; 2) the comparable-sales approach; and 3) the income approach. Appraisal Institute,

The Appraisal of Real Estate at 71 (10th Ed. 1991); International Association of Assessing Officials, Property Assessment Valuation at 38 (1977).

While there are three approaches to value, not all three approaches are of equal import in every situation. The Appraisal of Real Estate at 72; Property Assessment Valuation at 38. In New Hampshire, the supreme court has recognized that no single method is controlling in all cases, Demoulas v. Town of Salem, 116 N.H. 775, 780 (1976), and the tribunal that is reviewing valuation is authorized to select any one of the valuation approaches based on the evidence. Brickman v. City of Manchester, 119 N.H. 919, 920 (1979). Given the evidence in this appeal, we find the income approach and the cost approach are the most appropriate approaches to value because:

1) the Property is an income-producing property that "is typically purchased as an investment, and from an investor's point of view, earning power is the critical element affecting property value." The Appraisal of Real Estate at 409.

2) the Property was fully leased for the 24 month period prior to the date of assessment, April 1, 1991.

3) the cost approach is applicable given the Property's age (1982) and because there were sufficient sales of vacant land to compare to the subject.

Based on the evidence presented, the board finds the proper assessment to be $442,800. The board finds the City's appraisal and estimate of just compensation of $410,000 to be the best evidence of value as of April 1, 1991 for the following reasons:

City's Income Approach to Value

1) The income and expense analysis determined a value based on a

modified gross economic rent as of April 1, 1991 because the rentals generated were in excess of market rent.

2) The Property suffered no rental loss through vacancies for the 24 months preceding April 1, 1991 and the City used a 10% estimate of market vacancy and credit loss. Although vacancy in the year 1992 was higher than market for that year, over the four to five year period analyzed, vacancy was under 10%.

3) The owner installed new heating units in May 1992. The City amortized this capital improvement over an estimated 15 year life and deducted from the income stream before capitalization.

4) The City's estimates of management (4%), insurance (2%), maintenance (7%), utilities (7%), reserves for replacement (2%) were found to be appropriate deductions from the effective gross income for the subject Property.

5) Based on the economic data presented, the board finds the City's capitalization rate of 10.7% and tax factor of 1.81% to be appropriate for an indicated value by the income approach of $404,000.

City's Cost Approach to Value

1) The City utilized three comparable sales, which sold between July 1990 and July 1992, to estimate the value of the site as if vacant. The board finds the sales were adequately adjusted for differences in time, location, size, and frontage. The board also finds the 10% adjustment made to the comparables for the subject's inferior lot (frontage on Loudon Road and Branch Turnpike - frontage setbacks must be used in determining build-out or

expansion of existing building under the zoning regulations) was appropriate. The City's estimated site value was $179,400.

2) The City determined a replacement cost new of the building using Marshall Valuation Service. The building was adjusted for physical depreciation (15%), physical curable depreciation/heating system upgrade (7%), and functional obsolescence/structural deficit (5%). A contributory value of the site improvements (paving, etc.) of $30,000 was added for a total replacement cost new less depreciation of the building of $242,400.

3) The City's estimate of value by the cost approach was $420,000 as of April 1, 1991.

The board did not find the Taxpayer's appraisal convincing for the following reasons:

Taxpayer's Income Approach to Value

1) The appraisal was prepared for a bankruptcy hearing as of February, 1992 and the income and expense figures used were 1992 figures, not 1991 (the date of assessment). The appraiser stated his opinion of value as of April 1, 1991 was the same as of the date of his appraisal; however, this opinion was not supported by the evidence.

2) No market adjustments were made to the appraisal to determine a value as of April 1, 1991; the appraiser deducted the actual vacancy of 22.6% (as of February 1992) from the potential gross income to arrive at an effective gross income and made no adjustments for the fact that for two years prior to April 1991 the Property was fully occupied.

3) The appraiser deducted real estate taxes as a fixed expense. Property taxes are sometimes considered proper expenses for the income

approach. To avoid circularity, however, property taxes are accounted for in valuations for assessment purposes by adjusting the capitalization rate. Otherwise, the amount of tax affects the estimate of value used to calculate the tax. The International Association of Assessing Officers, Property Appraisal and Assessment Administration at 258 (1990).

Taxpayer's Cost Approach to Value

1) The appraiser employed the use of two properties to purport that land values declined 60-65% since the market peak in 1988 -- the 1988 sale of a property on 219 Loudon Road which was foreclosed on by the bank and resold for $500,000 in 1991 and a land option for 10 acres of land at $250,000 an acre in 1989 which fell through and a subsequent option on the same property in 1992 at $150,000 an acre. The appraiser then used three land sales which occurred between April 1988 to September 1988 and depreciated these sales by 65% due to the determined decline in the market. The board does not agree with the appraiser's analysis. The sales made by an owner to satisfy delinquent loans are not "arm's length" due to the pressure of the owner to sell; consequently, while these accelerated sales will affect the market value of those who choose not to sell, they alone do not define the market. Further, an option to purchase is a contract conveying a right to buy or sell at a specified price during a stipulated period. Options are not enforced for any number of reasons. To determine a time adjustment based upon a later option is not market evidence.

2) The appraiser failed to submit a detailed explanation of how the values were determined in his estimated value of the building by the cost approach. The appraiser stated he used Marshall & Swift Cost Manual but the

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report did not include a calculator cost form. He did not indicate the size of the building (he stated in testimony that he used 6,480 square feet). Site improvements were added in to the value of the building without explanation. A cost of $26,569 for the heating system was depreciated and a cost of $20,000 to repair the foundation wall was also depreciated. Capital improvements are long-lasting additions to the property that usually increase income, total value, or economic life. They should not be considered operating expenses.

The International Association of Assessing Officers, Property Appraisal and Assessment Administration at 259 (1990).

3) The appraiser did not include a value for the utility building, canopy/porches or basement and the board was unable to determine how the total value was arrived at and exactly what was included in that value.

Based on the foregoing, the board finds the City's revised assessment of $442,800 to be proper. The estimate of value determined by the income approach and the valuation of the site through the use of comparable sales in conjunction with the cost approach to valuing the improvements supports the estimate of value of $410,000 (for an assessment of $442,800 -- $410,000 x 108% equalization ratio) determined by the City.

If the taxes have been paid, the amount paid on the value in excess of $442,800 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 City shall also refund any overpayment for 1992, 1993 and 1994. Until the City undergoes a general reassessment, the City 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 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

Michele E. LeBrun, Member

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to James T. Minichiello, representative for the Taxpayers; and Chairman, Board of Assessors of Concord.

Dated: May 31, 1995

Valerie B. Lanigan, Clerk

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