

Victor and Kathe Hofmann

v.

Town of Bethlehem

Docket No.: 12479-91PT

DECISION

The "Taxpayers" appeal, pursuant to RSA 76:16-a, the "Town's" 1991 adjusted assessment of \$574,000 (land \$84,700; buildings \$489,300) on a 3.59-acre lot with a motel and restaurant known as the Wayside Inn (the Property). For the reasons stated below, the appeal for abatement is granted.

The Taxpayers have the burden of showing the assessment was 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 this burden and proved disproportionality.

The Taxpayers argued the assessment was excessive because:

- (1) the Town assessed the building using replacement cost which does not reflect market value for motels;
- (2) the motel's occupancy rate is approximately 38% which excludes the 3 months per year the motel is closed;
- (3) no economic obsolescence factor has been applied for the lack of business or availability to purchase other motels at 50-60% of replacement cost;

- (4) the most reliable indicator of value is the direct capitalization method with income and expenses as backup information;
- (5) the estimated market value as of April 1, 1991 is \$300,000; and
- (6) the Town's comparable sales all included business value and furniture, fixture and income (FF&E), sale #1 includes a 7-8 room detached house, sales #2 & 3 are in North Conway, a superior location, with 50% occupancy, and the cap rates are not accurate.

Further, the Taxpayer requested costs covering the return of the filing fee and mileage for the Taxpayer and Agent for the following reasons: (1) the Town's refusal to refund interest penalties on previously abated taxes, and (2) the Town's agent did not come to the hearing with the authority to settle the case.

The Town argued the assessment was proper because:

- (1) the Taxpayers comparables do not have similar locations, are not comparable in terms of room count and many are foreclosure sales;
- (2) the Taxpayers' cap rate is too high as indicated by the market sales, and the Transactions publication and Rushmore analysis referred to by the Taxpayers deals with metropolitan areas and monitors investor rates of return rather than owner-occupied properties;
- (3) furniture, fixtures and equipment is not valued as highly in smaller owner-occupied income producing properties;
- (4) three comparable sales located in Littleton and North Conway, all owner-occupied, support the assessment; and
- (5) the comparable sales analysis supports a \$19,000 per room value or a market value of \$589,000.

Board's Rulings

Based on the evidence, we find the correct assessment should be \$500,600 (land \$84,700; buildings \$415,900). This assessment is ordered because:

1) the Town did not consider any economic depreciation in their cost approach;

2) the board finds that the location and seasonality of the lodging and restaurant operations of the Property are factors that would affect its market value and should be recognized (Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1975) (all factors affecting market value should be considered by the municipality in arriving at a proper assessment));

3) A 15% economic depreciation on the improvements should be applied to recognize the location and seasonality of the Property;

4) in a general fashion, the sales and income that have been submitted by the parties support a finding of economic depreciation;

5) the resulting assessment provides a market value estimate of \$407,000 - a value more consistent with the market evidence submitted.

The board placed no weight on the Taxpayers' 1993 appraisal submitted at the request of the board subsequent to the hearing because it was done two years subsequent to the tax year and was based on an assumption of significant improvements and additions to the Property. While it would be possible to derive certain components of the three approaches to value from the appraisal, the board finds the later date of the appraisal and the basic assumption made by the appraiser would make such extractions speculative.

The board finds the Taxpayers' request for an abatement based on a finding of a \$300,000 market value is not warranted because:

1) the Taxpayers' representative submitted conflicting income and expense information in his income approaches contained in Taxpayers' exhibits #1 and #2 (for example in Taxpayers' #2, Mr. Lutter submitted a gross income estimate of \$213,119 derived on page 2 from his gross restaurant income and room income; however on page 3 of exhibit #1, he submitted gross income estimates of \$232,366 and \$240,965; similarly the Property's expenses in the two Taxpayers' exhibits do not coincide; further the board attempted to calculate a gross operating income for the rooms by utilizing the per-room rent as testified to by the Taxpayers multiplied by the number of rooms and adjusted by the seasonal occupancy rate; this number exceeded both of the Taxpayers' other two estimates of income for the motel);

2) while Mr. Lutter assumed 33 rooms could be rented (so as to include a value for the owners' apartment), his two income approaches did not indicate that any income was attributable to these rooms nor, in the alternative, was an estimated value for the owners' apartment added to the calculation of value by the income approach;

3) the three most comparable sales relied upon by Mr. Lutter in his sales approach are not very similar or reliable indicators of value; sale #1, while in the general region as the Property, was a bank sale and, therefore, does not meet the requirements of a true market value sale; the two other sales relied upon were in Keene, New Hampshire and Lowell, Massachusetts neither of which are similar properties or in a similar market; and

4) Mr. Lutter's calculation of 33 rooms in his sales approach rather than 31 to account for the owners' apartment only ends up contributing \$20,000 (two units x \$10,000 for their apartment area); the board finds the market would value the residential use of the Property by the owners significantly higher than \$20,000.

Costs

Mr. Lutter requested the board order a refund of filing fee and hearing costs be assessed against the Town because the Town had not refunded an earlier 1991 abatement with the proper interest and because the Town's representative did not come to the hearing with the authority to settle the case as required by the board's rules. The board denies the Taxpayers' request for the following reasons.

The board's authority to assess costs is contained in two statutes:

(1) RSA 76:17-b, which states, "(w)henever, after taxes have been paid, the board of tax and land appeals grants an abatement of taxes because of an incorrect tax assessment due to a clerical error, or a plain and clear error of fact, and not of interpretation, as determined by the board of tax and land appeals, the person receiving the abatement shall be reimbursed by the city or town treasurer for the filing fee paid under RSA 76:16-a, I."; and

(2) RSA 71-B:9, in part, which states, "(c)osts may be taxed as in the superior court."

Generally, the courts and this board do not have the authority to award costs against a municipality in a tax abatement case unless there is a specific statute authorizing such an assessment of costs. See Tau Chapter of Alpha XI

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76:17-b does give the board specific authority to have the filing fee reimbursed by the Town if the tax assessment was due to a "clerical error or a plain and clear error of fact and not of interpretation as determined by the board of tax and land appeals ***."

However, in this case the board denies the reimbursement of the filing fee because the basis of the abatement is not due to clerical error or a clear error of fact.

Under the board's RSA 71-B:9 authority to assess costs, the court has allowed the assessment of attorney's fees against the state or one of its political subdivisions only where there has been a finding of bad faith. See Harkeem v. Adams et al, 117 N.H. 67 (1977). In Harkeem, the court stated that, "where an individual is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention, an award of counsel fees on the basis of bad faith is appropriate." The court further states that bad faith is shown where the party in question has acted vexatiously, wantonly, obdurately or obstinately. The board finds the Town's actions in this case did not warrant bad faith. Following the Taxpayer's request for abatement, the Town reviewed the Property and granted an abatement from \$682,050 to \$574,000. While the Town apparently failed to properly reimburse the interest associated with the abatement, its assessor stated at the hearing the Town was in the process of calculating and reimbursing the interest.

Lastly, while the boards rules instruct the parties to come to the

hearing with the authority to settle or to be able to immediately obtain it

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(Tax 201.07), the Town's assessor's lack of authority does not constitute bad faith.

If the taxes have been paid, the amount paid on the value in excess of \$500,600 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.

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.

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Member

Michele E. LeBrun, Member

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Mark Lutter of Northeast Property Tax Consultants, Agent for Victor and Kathe Hofmann, Taxpayers; and Chairman, Selectmen of Bethlehem.

Dated: June 20, 1995

Valerie B. Lanigan, Clerk

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