

Digital Equipment Corp.

v.

Town of Hudson

Docket No.: 12995-92PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1992 assessment of \$3,681,700 on a vacant, 174-acre lot (the Property). The Taxpayer also appealed a property at 5 Wentworth assessed at \$3,736,300 but withdrew that property from appeal before the hearing. The parties agreed the 5 Wentworth property was properly assessed. For the reasons stated below, the appeal for abatement is granted but not to the full extent requested by the Taxpayer.

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) an appraisal performed by Thompson Appraisal Co. estimated the 1992 market value at \$1,210,000;

(2) because of the surplus residential, commercial and industrial land in the area, there was no immediate demand for utilization of the Property, and thus, the Property's highest and best use was to hold the Property for future development; and

(3) three separate economic units were valued based on the existing zoning districts and the value of the three parts was reduced by 10% because the three uses would require subdivision approval.

The Town argued the assessment was proper because:

(1) an appraisal performed by Glenn Walker estimated a 1992 market value of \$3,450,000;

(2) the market has been relatively stable from 1992 to 1994 (as exhibited by the Town's constant equalization ratio), and therefore, market activity after 1992 could be considered; and

(3) Digital sold 19.2 acres to Southeast Container in June 1994 for \$451,200 and subsequently listed the balance of the Property for \$4,000,000.

The board thoroughly reviewed the documents submitted by the parties.

### **BOARD'S RULINGS**

Deciding this appeal requires addressing three general issues:

1) what is the effect on the Taxpayer's burden of proof where the Town does not present any information to support the actual assessment, but rather the Town relies upon a new appraisal of the Property?;

2) what was the Property's highest and best use?; and

3) what was the Property's 1992 market value?

### **Burden of Proof Issues**

The Taxpayer has the burden of showing the assessment was disproportional. The burden, in essence, treats the municipality's assessment as presumptively correct unless otherwise shown by the taxpayer. There are several reasons why it is appropriate for the burden to be on the taxpayer. Most importantly our constitution and statutes require municipalities to assess all properties proportionally. N.H. CONST., pt. 1, art. 12th, pt. 2, art. 5th; RSA 75:1 (property to be appraised at fair market value); RSA 75:7 (assessors to certify under oath that property appraised at full fair market value); RSA 75:8 (assessors to annually review assessments to ensure proportionality). Additionally, municipalities will usually use the same methodology for assessing all properties, which should result in proportional assessments. See Bedford Development Company v. Town of Bedford, 122 N.H. 187, 189-90 (1982) (using the same methodology to assess properties in a municipality is evidence of proportionality).

In this appeal, however, the Town did not present any evidence to support the appealed assessment even though the assessment was calculated during the Town's 1991 revaluation. Rather than defending the assessment by showing how it was determined, the Town presented a new appraisal. This appraisal: 1) was performed at a different time from when other assessments were calculated; 2) used a different methodology than was used to assess other properties; and 3) was performed by a different appraiser than was used during the 1991 revaluation. These factors create the question of whether the assessment under appeal is entitled to the usual presumption of correctness.

Certainly, the Town's appraisal that was prepared specifically for the hearing is not entitled to a presumption of correctness.

In the final analysis, the board has left the burden of proof on the Taxpayer, but we have not given the assessment under appeal the weight normally given an assessment because the Town did not present any information about how that assessment was calculated. Therefore, the board can have no confidence that it was calculated in a supportable manner and that it resulted in proportional assessment.

#### **Highest and Best Use**

Under RSA 75:1, property must be assessed at "its full and true value \*\*\* [,]" which has been interpreted to mean market value. See Brock v. Farmington, 98 N.H. 275, 277 (1953). One of the first steps in estimating market value is to determine the property's highest and best use. "The highest and best use must be legally permissible, physically possible, financially feasible, and maximally productive." Appraisal Institute, The Appraisal of Real Estate 280 (10th ed. 1992). Highest and best use is also defined as "that use which will generate the highest net return to the property over a period of time." The International Association of Assessing Officers, Property Appraisal and Assessment Administration 81 (1990).

To determine the Property's highest and best use requires answering two questions:

1) how should one view the legally permissible criteria of highest and best use given the Property's 1992 zoning?; and

2) was the Property ready for immediate development under the selected highest and best use?

The board concludes the zoning change in all probability would have been granted. The board also concludes the Property's highest and best use was vacant land for future development.

The Property's existing zoning and the potential for a zoning change must be analyzed under the legally permissible criteria of highest and best use. Appraisal and assessing authorities agree -- the probability of a zoning change should be considered in determining highest and best use. "If the highest and best use of the site or property is not allowed under current zoning, but there is a reasonable probability that a change in zoning could be obtained due to shifting economic and social patterns, these conditions can be considered in determining highest and best use." The Appraisal of Real Estate, supra at 281. "If it is easy to obtain a change or variance in zoning, uses not permitted by current regulations must be considered along with the probability that the zoning will be changed." Property Appraisal and Assessment Administration, supra at 81.

In 1992, the Property included land in three zones -- 87 acres in the industrial zone, 84 acres in the residential zone and 3.22 acres in the business zone. The Town argued a prospective purchaser would have concluded there was a high probability the Property's zoning, especially the land zoned residential, could have been changed. The Town based its position on the zoning board of adjustment's record of granting variances and on the Town's master plan that stated the Property's residentially zoned land should be anticipated to be rezoned to a more intense use.

There was ample evidence for any prospective purchaser to conclude that in all probability the Property would be rezoned, by amending the zoning ordinance, to allow a more intense use.

The board was unsure how to treat the issue of whether the Town's zoning board of adjustment (ZBA) would have granted a variance to change the use of the residential land. The Property would not have legally qualified for a variance because the owner could not have shown that the denial would have resulted in unnecessary hardship. See Rowe v. Town of North Hampton, 131 N.H. 424, 427 (1989). The Town's history of granting use variances does not mean the Town had acted legally in each case. Moreover, an interested party could have challenged the legality of a variance for the Property. Valuing a property right gained by an illegal granting of a variance, despite the municipality having a track record of such grantings, is a troubling concept to the board. All highest and best use analyses begin with the basic assumption that the use is a legal use. It is a question whether such a use acquired through a variance improperly granted can form the basis for a legal highest and best use analysis. However, the board does not need to resolve this issue in this case because its determination of highest and best use does not hinge on a finding of the Town having a lenient policy of granting variances. Rather, the board's highest and best use determination, as stated earlier, is based on the reasonable probability that a zoning change could have been obtained for more intensive development of the Property.

The other aspect of highest and best use is whether the Property would be immediately developed or whether the Property would be held for future

development. The board concludes the Property would be purchased for future development with that development being consistent with the future market demand. There was no evidence of an immediate demand for large lots with a single use, and there was no showing of an immediate demand for smaller industrial lots. Specifically, the Sagamore Industrial property, an abutting property, had vacancies in 1992, indicating the lack of demand for smaller industrial sites. Based on the above, the board concludes the Property's highest and best use would be for future development as general business, industrial or commercial property or a mixed use of the three.

### Value

In determining a property's value, the board reviews the value information and detailed analysis that is presented. But the board also employs its own judgment in weighing the final value estimate presented by each side, i.e., is the final estimate itself reasonable? Arriving at a proper valuation is not a science but is a matter of 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 valuation. 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); RSA 541-A:18 V(b) (agency may rely on its experience and specialized knowledge).

Based on our review and our judgment, the board concludes the Property was certainly worth more than the Taxpayer's \$1,210,000 figure. This is a

large parcel in a good location with excellent potential for development. The soils survey indicated the Property has good soil for development. Additionally, the Property's photographs show the Property is well suited for

development either as one large site or as several smaller parcels with mixed use. Finally, this is one of the larger remaining tracts of this quality in this area of southern New Hampshire.

In addition to our nonacceptance of the Taxpayer's final estimate, the board also disagrees with the Taxpayer's appraiser's highest and best use conclusion. The appraiser concluded the Property had to be valued as presently zoned. Taxpayer's exhibit 3 at 4, at 58-60. This conclusion formed the foundation of the entire appraisal, and as stated above, the board disagrees with this highest and best use conclusion.

Turning to the Town's appraisal, the board expresses its disappointment with the appraiser's "lifting" of information directly from the Taxpayer's appraisal. Appraisers must independently collect and recite the underpinnings of the appraisal. This was not done in this case. Furthermore, the appraiser had only been hired one month before the hearing. Nonetheless, the Town's appraiser supplied better sales information, which the board relies upon in this decision. The board did not, however, agree with the appraiser's highest and best use because he assumed the Property would be immediately developed. Because the sales used by the Town's appraiser were generally sales that were for immediate development, the board has taken the Town's appraisal and adjusted it by 25%. This reduction accounts for the anticipated holding period of the Property that a prospective purchase would have expected upon purchasing the Property in 1992. This 25% adjustment is an estimate

Page 9  
Digital Equipment Corp. v. Town of Hudson  
Docket No.: 12995-92PT

based on the board's judgment, and the assumption of a 3 to 5-year holding period with minimal or no appreciation during that time period. The following calculation summarizes the market value and assessment determination: Town's market value estimate  $\$3,450,000 \times .75 = \$2,587,500 \times 1.18$  (Town's 1992 equalization ratio) =

\$3,053,250.

If the taxes have been paid, the amount paid on the value in excess of \$3,053,250 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, unless the Town has undergone a general reassessment, 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. For subsequent tax years, the Town should note the board's decision here includes the assumption that the zoning was going to change.

**Requests for Findings and Rulings**

In these responses, "neither granted nor denied" generally means one of the following:

- a. the request contained multiple requests for which a consistent response could not be given;
- b. the request contained words, especially adjectives or adverbs, that made the request so broad or specific that the request could not be granted or denied;
- c. the request contained matters not in evidence or not sufficiently supported to grant or deny; or
- d. the request was irrelevant.

**Town Request for Findings of Fact and Rulings of Law**

- 1. Granted.
- 2. Granted.

3. Granted.
4. Granted.
5. Granted.
6. Granted.
7. Granted.
8. Neither granted nor denied.
9. Neither granted nor denied.
10. Neither granted nor denied.
11. Neither granted nor denied.
12. Neither granted nor denied.
13. Neither granted nor denied.
14. Granted.
15. Neither granted nor denied.
16. Granted.
17. Granted.
18. Granted.
19. Denied.
20. Granted.
21. Denied.

**Taxpayer's Request for Findings of Fact**

1. Granted.

2. Granted.
3. Granted.
4. Granted.
5. Granted.
6. Granted.
7. Granted.
8. Neither granted nor denied.
9. Neither granted nor denied.
10. Neither granted nor denied.
11. Granted.
12. Denied.
13. Denied.

**Taxpayer's Request for Rulings of Law**

1. Granted.
2. Granted.
3. Denied.
4. Denied.
5. Denied.

**Rehearing and Appeal**

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 Page 12 Digital Equipment Corp. v. Town of Hudson Docket No.: 12995-92PT

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

\_\_\_\_\_  
Paul B. Franklin, Member

\_\_\_\_\_  
Ignatius MacLellan, Esq., Member

**Certification**

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Steven L. Winer, Esq., Counsel for Digital Equipment Corp., Taxpayer; John J. Ratigan, Esq., Counsel for the Town of Hudson; and Chairman, Selectmen of Hudson.

Dated: January 3, 1996

\_\_\_\_\_  
Valerie B. Lanigan, Clerk

Digital Equipment Corp.

v.

Town of Hudson

Docket No.: 12995-92PT

**ORDER**

This order responds to the Taxpayer's February 2, 1996 motion to reconsider (Motion). The board denies the Motion for the following reasons.

The Motion stated three general reasons for reconsideration:

- 1) the board's decision contained internal inconsistencies and was contrary to the evidence;
- 2) the Town's new appraisal presented an opinion of value artificially higher than the assessed value; and
- 3) the board concluded a more intensive use than was legally permissible according to the zoning.

**#1 and #2**

In this appeal the board was faced with no evidence of the assessment's basis and a separate appraisal submitted by both parties. Consequently, as stated in the decision (pg. 4), the assessment was given little weight due to the lack of documentation. While the burden of proof remained with the Taxpayer, the board's analysis of both appraisals began essentially on a level playing field.

In the process of weighing conflicting opinions of value, the board reviews the many facets of an appraisal, - the reasonableness of the highest and best use assumption, the comparability and adjustments of the market data, the thoroughness and documentation of the analysis, the credibility of the appraiser, etc. In this case, while the board expressed reservation about the Town's appraiser's ethics, the sales and, to some extent, the highest and best use assumption in the Town's appraisal were more appropriate than the Taxpayer's appraiser's. While this may at first appear contradictory, it is simply the weighing of the different aspects of the appraisals.

The board does not believe allowing the Town to present a "newly minted" appraisal of higher value inherently leads to the board adopting a higher assessment finding. If the board had found the Taxpayer's appraisal had had the more appropriate assumptions, then the assessment would have been closer to that opinion of value. In short, the appraisals stand on their own and are judged on their individual merits as opposed to any position relative to the assessment.

The important issue here is that the board gave no beginning deference to either appraisal. Rather, it relied on its experience and knowledge in weighing and analyzing the evidence that was submitted to arrive at its conclusion. (The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence. See RSA 541-A:18, V(b); Appeal of Nashua, 138 N.H. 261, 264-265 (1994); see also Petition of Grimm, 138 N.H. 42, 53 (1993) (administrative board may use expertise and experience to evaluate evidence).)

detailed in the decision. In short, a highest and best use assumption can be based on a use not permissible under the actual zoning so long as there is a reasonable probability that the zoning change could occur and the use is not highly speculative or remote. Here we found a zoning change was probable and the resulting uses feasible in the short-term future.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

\_\_\_\_\_  
Paul B. Franklin, Member

\_\_\_\_\_  
Ignatius MacLellan, Esq., Member

**Certification**

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Steven L. Winer, Esq., Counsel for Digital Equipment Corp., Taxpayer; John J. Ratigan, Esq., Counsel for the Town of Hudson; and Chairman, Selectmen of Hudson.

Date: February 13, 1996

\_\_\_\_\_  
Valerie B. Lanigan, Clerk