

**Estate of John Zyla**

**v.**

**Town of Merrimack**

**Docket Nos.: 13109-92PT, 14380-93PT and 15375-94PT**

**DECISION**

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1992 assessment of \$2,892,300 and 1993 and 1994 assessments of \$2,039,000 on Map 5D-2, an 8.53-acre lot with a warehouse/retail building (the Property). The Taxpayer also owns, but did not appeal, two other parcels in the Town: Map 6D-1 Lot 001 assessed at \$986,500 in 1992 and \$690,000 in 1993 and 1994; and Map 6D-1 Lot 002 assessed at \$233,800 in 1992 and \$163,700 in 1993 and 1994. For the reasons stated below, the appeal for abatements is granted.

The Taxpayer has the burden of showing the assessments were 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 assessments were excessive because:  
(1) the Property was worth \$1,390,400 (1992 and 1993) and \$1,395,464 (1994) based on the income approach;

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(2) there was an error in the assessment because the so-called "excess land," which was assessed at \$200,000, cannot be separately subdivided because it lacks frontage;

(3) the Town's 1993 30% reduction to all assessments in the Town did not correct the disproportionality but rather continued it; and

(4) the Property's 1995 assessment was \$1,269,200.

The Taxpayer argued the cost approach was not applicable because the building was built in stages, and given this and the building's age, it would be difficult to accurately estimate depreciation. The Taxpayer additionally argued the market approach was not applicable because of the lack of qualified comparable sales.

The Taxpayer testified the nonappealed properties and their assessments were reviewed. The Taxpayer asserted those assessments were considered appropriate, and those properties certainly were not underassessed.

The Town admitted the Property may have been overassessed based on adjusting the Taxpayer's 1992 income analysis.

The Town argued the assessments, with the adjustments, were proper because:

(1) two other retail spaces were leased for \$8.25/sf in comparable properties, which the Town adjusted to \$5.75/sf for the Property's retail space;

(2) the Property has a well-known location, which increases the Property's value;

(3) the D.W. Highway has a daily 26,338-vehicle traffic count;

(4) adjusting the Taxpayer's income analysis resulted in \$1,867,250 (using a 12% capitalization rate) but changes to the capitalization rate would change the value estimate; and

(5) the Taxpayer's comparables had inferior locations.

Under board questioning, the Town admitted it had not reviewed the market and had not revised the assessments, except for an acreage correction and the 1993 across-the-board reduction. Additionally, the 1993 reduction was based on the revenue department's ratio; it was not based on an independent stratified market study. The Town testified the 1995 complete revaluation was based generally on sales for the 18-month period before April 1, 1995. The Town, however, asserted it was premature to rely on the 1995 assessments, noting two post-revaluation commercial sales' prices were substantially higher than the assessments.

The Town agreed the cost approach and the market approach were not reliable because of problems with availability and reliability of the data.

**Board's Rulings**

Based on the evidence, the board finds the proper assessments to be as follows:

<u>Year</u>	<u>Market</u>		<u>Ratio</u>		<u>Ordered Assessment</u>
1992	\$ 1,750,000	x	1.34	=	\$ 2,345,000
1993	\$ 1,750,000	x	.94	=	\$ 1,645,000
1994	\$ 1,750,000	x	.95	=	\$ 1,662,500

Given the evidence, the board finds the income approach to be the best approach to use in valuing this Property. Both parties agreed the cost approach and the market approach were not applicable due to questions about the availability and analysis of comparables.

Valuing the Property, especially given the evidence, was not and is not an easy or 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 a proper 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 when 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, and the board's market value conclusion of \$1,750,000 is based on: a) the evidence; b) the board's review and analysis of the evidence; and c) the board's judgment concerning this Property's value. The board reviewed the parties' valuation evidence, but we could not conclude which analysis best represented the Property's value, especially when the parties presented a broad range on certain factors. For example, the board agreed with the Town that the value attributable to the retail space should have been higher than the \$3.50/sf used by the Taxpayer. However, whether that figure should have been \$5.75/sf is still a question given the evidence. The same can be said for the vacancy rates -- 4% (Town) and 10% (Taxpayer). If one adopted the Taxpayer's vacancy rate, but otherwise used the Town's income approach, a value of \$1,753,040 would result. One could

also adjust the Taxpayer's analysis by including a rent for the mezzanine level and adding additional value for the excess land, which would result in a value of \$1,621,375. The board presents these as examples about how changing a few factors can have a dramatic effect on the value conclusion.

In this case, given the lack of conclusive evidence from either side, the board has exercised its judgment based on a qualitative analysis of the evidence, arriving at a value of \$1,750,000. Our analysis included consideration of the following factors.

1) The Property's frontage on D.W. Highway and visibility from the F.E. Everett Turnpike.

2) The value of the excess land and its highest and best use given the Taxpayer's ownership of the contiguous land that could provide additional acreage and could provide frontage on Williams Street.

3) The board has concerns about whether each party had adequately analyzed the Property's value given the quality and condition of the building, which the board thought was fair or less. The board also has questions about whether the comparables had the same inferior site improvements and inferior curb appeal.

4) The Town certainly did not show how its assessing practices complied with RSA 75:1 and 75:8. The Town did, to its credit, review this Property for purposes of this appeal, but the Town is obligated to annually review the market and assessments in the Town and to make adjustments based on market

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changes. As stated at the hearing, the board had serious questions about whether the Town's across-the-board 30% reduction in 1993 did anything to address disproportionality that may have occurred between 1989 and 1993.

5) The \$1,269,200 1995 assessment figure provided some credibility to the Taxpayer's argument of overassessment. The 1995 assessment was based on sales that occurred in the 18-month period before April 1, 1995. This period would have included sales in 1993 and 1994. The appealed assessments were established in tax year 1989, which was clearly during a boom market. The 1995 assessment was based on sales and market information that would have reflected the market changes since 1989. Therefore, for purposes of sanity check, the 1995 assessment helped support the board's conclusion of overassessment. We agree with the Town, however, that it is probably premature to completely rely on the 1995 assessment.

6) The Taxpayer's expert, despite the issues raised on cross-examination and despite our nonacceptance of his final value, presented a credible opinion of overassessment.

If the taxes have been paid, the amount paid on the value in excess of \$3,565,600 (\$2,345,000 + \$233,800 + \$986,800) for tax year 1992 and \$2,516,800 (\$1,662,500 + \$163,700 + \$690,600) for tax years 1993 and 1994 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Because the Town underwent a complete revaluation in 1995, this decision only applies to the years under appeal. See RSA 76:17-c.

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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

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George Twigg, III, Chairman

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Ignatius MacLellan, Esq., Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Joseph M. Kerrigan, Esq., Counsel for the Estate of John Zyla, Taxpayer; Jay L. Hodes, Esq., Counsel for the Town of Merrimack; and Chairman, Board of Assessors, Town of Merrimack.

Dated: December 19, 1995

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Valerie B. Lanigan, Clerk

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