

Patricia Larson/Rosewood Realty Trust

v.

Town of Rye

Docket Nos.: 13164-92PT and 13957-93PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1992 and 1993 assessments of \$764,950 (land \$288,000; buildings \$476,950) on a 3.9-acre lot containing the Rye Place Motor Inn, a mini mall, a two-family house, an apartment, motel office and laundry area (the Property). For the reasons stated below, the appeals for abatement 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) a February 1994 appraisal estimated the market value at \$435,000; a revision of the appraisal estimated the market value as of April 1, 1991 to be \$345,000;

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(2) the Property has had significant deferred maintenance, is adjacent to the Coakly Landfill, has underground storage tanks associated with the garage and had some water contamination that necessitated hooking to town water in 1994;

(3) the sum total of the parts of the Property exceed its value as a whole; the uses of the Property are quite varied and, thus is difficult to value the Property based on its various components;

(4) the Property would be purchased for the income it would generate from the entire Property and thus the income approach based on the net operating income is the most appropriate approach to value;

(5) the mall area has interior rental space that is not visible and accessible directly from the outside; this type of rental space is not as desirable especially when at the time superior rental space was experiencing high vacancy rates;

(6) the sales approach, based on an analysis of 12 sales, generally supports the primary income approach; and

(7) the land value alone was estimated at \$234,000 which indicates a high level of the physical and functional depreciation associated with the improvements.

The Town argued the assessments were proper because a comparison of eight properties in Rye, three of which sold, indicate the front foot land price and the physical and functional depreciations are proper and proportionate.

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Board's Rulings

All assessments must be based on and relative to market value. RSA 75:1

states:

"Except with respect to open space land appraised pursuant to RSA 79-A:5, and residences appraised pursuant to RSA 75:11, the selectmen shall appraise all taxable property at its full and true value in money as they would appraise the same in payment of a just debt due from a solvent debtor, and shall receive and consider all evidence that may be submitted to them relative to the value of the property, the value of which cannot be determined by personal examination."

"The relief to which [the taxpayer] is entitled is to have its property appraised for taxation at the same ratio to its true value as the assessed value of all other taxable estate bears to its true value Boston & Maine R.R. v. State of New Hampshire, 75 N.H. 513, 517; Rollins v. City of Dover, 93 N.H. 448, 450." Bemis v. City of Claremont, 98 N.H. 446, 452 (1954).

There are three approaches to value: 1) the cost approach; 2) the comparable sales or market approach; and 3) the income approach. Appraisal Institute, The Appraisal of Real Estate, 71 (10th edition 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 the valuation is authorized to select any one of the valuation approaches based on the evidence, Brickman v. City of Manchester, 199 N.H. 919, 920 (1979).

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Given the evidence in this appeal, we find the income approach is the most appropriate method to value the Property for the following reasons. The Property is a mix of income producing uses - rental commercial/office space, a motel and a

rental residential duplex. Due to the age and nature of the development of the improvements, the Property has significant levels of physical, functional and economic depreciation making the cost approach difficult. Further the market approach is difficult to use due to the Property's uniqueness and combination of uses.

The board finds the discounted cash flow (DCF) submitted in Mr. Stanhope's August 30, 1995 report (Taxpayer's exhibit #2) for the 1992 tax year is a reasonable method to estimate the Property's value. Further the board finds the income and expense assumptions are generally reasonable with the exception of three items.

First the board finds the real estate taxes, instead of being deducted as an operating expense, should be included with the discount rate. The approximately \$10,000 real estate tax expense contained in Mr. Stanhope's DCF was based on the appealed assessment. Since the goal of the DCF analysis is to estimate market value, the effective tax rate should be included with the discount rate.

Second the board finds the estimate for the replacement for reserves at 10% of effective gross revenue is high and should be reduced to 5%. While the board finds the Property will require significant ongoing maintenance, the DCF does in the first year contains repairs and improvements such as roof repair, motel rehabilitation, etc., that would not be required again for a ten to twenty year period.

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Third the board finds it is more reasonable that the capitalization rate in the eleventh year on which to determine the Property resale value should at least be no more than the 11% discount rate. Mr. Stanhope had apparently used a 12% rate; the board finds an 11% rate is more appropriate.

These three changes in the DCF produces an indicated market value of approximately \$480,000. While it is difficult to make direct comparison between the Property and the sales submitted by both sides, the market value estimate of \$480,000 appears reasonable relative to the sales. Therefore based on the income approach the board finds the proper assessment equalized by the Town's 1992 equalization ratio is \$422,400 ($\$480,000 \times .88$.)

The board placed little weight on the Town's cost (buildings)/market (land) approach that generated the assessment because the building depreciations did not adequately relate to the improvements' income producing capability and the land assessment was based on six-year-old values established during the 1986 revaluation.

If the taxes have been paid, the amount paid on the value in excess of \$422,400 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 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; Page 6
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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

Paul B. Franklin, Member

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Brian R. Barrington, Esq., Counsel for Patricia Larson/Rosewood Realty Trust, Taxpayer; and Chairman, Selectmen of Rye.

Dated: September 25, 1995

Valerie B. Lanigan, Clerk

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ORDER

On October 25, 1995, the "Town" filed a motion for rehearing, reconsideration and clarification (Motion). The "Taxpayer" filed an objection to the Motion on November 1, 1995.

The Motion raised several issues: 1) the Stanhope retrospective valuation study (Taxpayer Exhibit #2) violated TAX 201.35 because it had not been exchanged with the Town at least 14 days prior to the hearing; 2) the Town's welfare assistance payments made pursuant to RSA 165:4-a were improperly excluded as evidence; 3) the board improperly gave weight to the proximity of the Coakley Landfill; and 4) the board's reliance on the Taxpayer's discounted cash flow analysis (DCF) was improper because it included large capital costs in the first year, did not include the welfare payment as income, and did not account for the "Property" being held in receivership by a court-appointed trustee. Further, the Motion requested clarification as to the allocation of value between land and buildings.

The board denies the Motion and addresses the issues raised as follows.

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1) The Taxpayer's objection stated the parties had agreed to waive the 14-day exchange rule on both their submittals. Further, even if there had not been that agreement, the record does not indicate any objection was raised by the Town that

needed to be ruled on by the board relative to Taxpayer's Exhibit 2.

2) The Town never represented to the board that any documents they wished to submit included welfare assistance payments credited to the tax arrearage pursuant to RSA 165:4-1. During the exchange of exhibits, Mr. Cutting presented a sealed envelope that he wished to have marked as an exhibit. The board inquired as to the contents of the envelope. Mr. Cutting responded it was documents from the selectmen relative to the partial payment of the Taxpayer's taxes. The board ruled that the extent of the payment of taxes was immaterial as to the determination of proportional assessment and, thus, the sealed envelope was not marked as an exhibit. Mr. Cutting never mentioned that the documents included welfare tax credits, nor did he explain the import of the documents relative to the determination of market value. Thus, the exclusion of the documents was proper based on the Town's inaccurate and incomplete representation.

Moreover, the board finds its determination of market value would not have been affected by the inclusion of those documents as an exhibit because: 1) Mr. Stanhope's appraisal contained a market analysis of comparable rents and vacancies and concluded the subject income was within 5% of the general market analysis; and 2) the Taxpayer states in its objection to the Motion that the welfare payments were included in the income summaries provided to Mr. Stanhope.

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3) The Taxpayer is incorrect in their assertion that the board gave weight to the Property's proximity to the Coakley Landfill in arriving at its conclusion of value. The only mention of the Coakley Landfill in the board's September 25, 1995 decision (Decision) was contained in the summary of the Taxpayer's arguments (#2, Page 2).

The board did not include the Coakley Landfill issue in their findings because it determined there was inadequate evidence submitted to show that the Coakley Landfill had a direct and measurable impact on the Property's value. The board always views its findings in decisions as akin to reading a road map. It will not describe all the roads not taken, only those that are.

4) The board relied upon the 1991 DCF analysis performed by Stanhope with several revisions because it found it reflected how a prudent and reasonable investor would view the Property. The board found the Property had been reasonably managed, despite it being in receivership during the appeal period. Testimony given by Ms. Larson indicated she had been in full management control during that time period (within certain fiscal constraints) and had managed the Property in a reasonable and prudent manner.

The board finds Mr. Stanhope's assumption of significant capital investment in the Property in the first year is also what a reasonable and prudent investor would expect. The Property suffered from acute deferred maintenance and needed renovations and repairs to be able to maintain its current level of income. The fact that the water line was not in place and the roof repairs did not occur until 1994 does not necessarily mean that a prudent investor with adequate financing wouldn't have done the work earlier. Further, the board finds there were a number of reasons for the Property to be connected to a public water

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supply earlier. There had been some oil contamination previously identified on the Property and, while in 1991 a report indicated the water was no longer contaminated, there had still been a recommendation not to drink the water.

Further, there was testimony that a filtration system was necessary to make the on-site water suitable for bathing and showering. Even without the oil contamination issue, the existence of seven to nine septic systems on the Property would be enough incentive for a reasonable and prudent investor to connect to a public water supply.

The Decision did reduce the replacement for reserve expense from 10% to 5%. This was done to recognize the fact that the initial year capital investment in the DCF no longer necessitated as high a replacement for reserve in the upcoming years. This reduction of 5% equates to approximately \$10,000 for each of the years during the holding period. The board determined in an alternative analysis that this was a reasonable reduction by estimating the interest cost of a \$95,000 loan an investor might incur to pay for these capital improvements in addition to the initial purchase price. The annual interest expenses on such a loan is approximately equivalent to the board's reduction of the replacement for reserve expenses.

CLARIFICATION

In making a decision on value, the board looks at the Property's value as a whole (i.e., as land and buildings together) because this is how the market views value. Moreover, the supreme court has held the board must consider a taxpayer's entire estate to determine if an abatement is warranted. See Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985).

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In this case, it is difficult, with any certainty, to allocate the value between land and buildings because the board found that the income approach was the most applicable in determining market value. The income approach by its very nature and

definition does not involve an analysis of the separate land and building components.

However, to assist the Town, the board would suggest that because the income approach embodies all the physical, functional and economic problems the board found with the Property, many of those factors affect the land as well as the buildings. This is primarily due to the fact that the Property is being valued as improved, versus as if vacant. Therefore, the nature of the improvements have a negative affect on the land value. The board would suggest that perhaps a reasonable methodology would be to reduce the land and building values proportional to the original assessment to arrive at the ordered assessment of \$422,400.

COSTS

The Taxpayer's objection to the Motion contained a request for attorney's fees and costs relative to responding to the Motion. The board denies the request because it does not find bad faith on the part of the Town necessary to grant the request.

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

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receiving the abatement shall be reimbursed by the city or the 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 Delta Fraternity v. Town of Durham, 112 N.H. 233, 235 (1978). RSA 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, the costs sought in this case are not addressed in RSA 76:17-b. 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 bad faith is found in the process of securing "a clearly defined and established right." Harkeem v. Adams et al, 117 N.H. 687, 691 (1977). 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 do not warrant bad faith. The issues raised by the Town in its Motion, while not accepted by the board as a basis for rehearing, were not so unreasonable to justify the assessment of costs.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Paul B. Franklin, Member

CERTIFICATION

I hereby certify that copies of the foregoing order have this date been mailed, postage prepaid, to Brian R. Barrington, Esq., Counsel for Rosewood Realty Trust, Taxpayer; Michael L. Donovan, Esq., Counsel for the Town of Rye; and Chairman, Selectmen of Rye.

Dated: November 15, 1995

Valerie B. Lanigan, Clerk

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