

Willow Realty Trust

v.

Town of Plaistow

Docket No.: 13280-92PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1992 assessment of \$866,800 on a 2.02-acre lot with an 18,000 square foot shopping center (the Property). For the reasons stated below, the appeal for abatement is granted based on a \$660,000 assessment.

The Taxpayer has the burden of showing the assessment was disproportionately high or was unlawful, resulting in the Taxpayer paying a disproportionate share of taxes. See RSA 76:16-a; TAX 203.09(a); Appeal of City of Nashua, 138 N.H. 261, 265 (1994). To establish disproportionality, the Taxpayer must show that the Property's assessment was higher than the general level of assessment in the municipality. Id. The Taxpayer carried this burden.

The Taxpayer argued the assessment was excessive because:

- (1) an April 1, 1992 appraisal estimated the Property's value at \$485,000;
- (2) the Property is not located in the prime retail area, being on the "wrong" side of the railroad tracks that is a geographical boundary between different retail districts; and
- (3) the Taxpayer was vigorously trying to maximize the income at the Property but had a difficult time finding and keeping tenants.

The Town, recomputed the Property's value to be \$780,800 based on a discounted cash flow analysis. The Town argued the proper assessment should be \$780,000.

Board's Rulings

This appeal requires the board to address the following issues:

- 1) the Taxpayer's motion for limited hearing or clarification;
- 2) the Town's motion for clarification of the Taxpayer's status;
- 3) a decision on the merits of the appeal; and
- 4) a decision concerning the applicability of this appeal given RSA 76:17-c and the Town's subsequent settlement of a separate appeal with the subsequent property owners.

With the exception of the value issue, the three other issues are related, and the board will address them now.

The Taxpayer owned the Property during all of tax year 1992, 1993, and 1994 and a few days in 1995. The foreclosure occurred January 25, 1995, and the deed was executed on March 20, 1995. But the deed was not recorded until April 5, 1995. Under RSA 479:26 III, title of a foreclosed property does not pass until the foreclosure deed is recorded. Therefore, until the foreclosure deed

was recorded, the Taxpayer owned the Property. As such, and pursuant to RSA 76:17-c, the Taxpayer is entitled to abatements for 1992, 1993 and 1994. (The Taxpayer has not asserted any claim to the 1995 taxes, and therefore, the board will not address that issue.)

Nonetheless, the board will only make an assessment finding for the 1992 tax year, and then the Town is entitled to review the ordered abatement and adjust the ordered abatement for the subsequent years based on any good-faith changes that occurred either to the Property or to the market. See RSA 76:17-c; TAX 203.05 (g). Therefore, upon receipt of the decision the Town is entitled to review the ordered assessment, especially the board's income analysis, and make any good faith adjustments based on changes to the Property or the market that the Town deems necessary. If the Town decides such adjustments are necessary and the Taxpayer disagrees with those adjustments, the Taxpayer has the right under TAX 203.05 (j) to question the adjustments. The board would then take whatever steps are necessary to review the Town's adjustments. In this case, given the wide disparity between the Taxpayer's evidence, the Town's evidence and the board appraiser's evidence, it was clear that the market for this particular Property was in flux as of 1992. Stability may have come in 1993 or 1994, but we make no decision on that issue.

One final note concerning the subsequent-year issue. In 1994, the new owners of the Property filed an appeal and settled that appeal for a specific amount that is in variance with the board's order below. The Town is not required to carry the board's order, with good-faith adjustments, forward to 1995 because the Town reached a new agreement with the subsequent owner.

Now we turn to the issues concerning the Taxpayer's standing.

The Town has challenged the Taxpayer's standing because the Taxpayer did not directly pay any of the 1992, 1993 or 1994 taxes. Instead, those taxes were paid by the Taxpayer's mortgagee (the Bank).

The Taxpayer's initial standing to file the appeal has not been challenged. The Taxpayer, Page 4
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as record owner as of the 1992 assessment date, had standing under RSA 76:16-a. However, the Town raised an interesting question about whether such a taxpayer can lose standing when that taxpayer

ultimately never pays the taxes, i.e., the taxpayer was not actually aggrieved by the assessment. (We also note that the Bank never filed to intervene in this matter, and the foreclosure documents and release documents apparently did not include any specific mention of the pending 1992 tax appeal.)

The Town raised a legitimate question, but the board has ultimately decided the Taxpayer has standing because even though the Taxpayer did not directly pay the taxes, the Bank added the taxes it paid on the Taxpayer's behalf to the Taxpayer's outstanding mortgage balance. To satisfy this mortgage balance, the Bank foreclosed on the Property, selling it for \$490,000. The Bank also required the Taxpayer to pay an additional \$250,000 for which the Bank executed the release. Thus, while the Taxpayer did not make direct payment of the taxes to the Town, the Taxpayer surrendered both the Property and the cash contribution to the Bank based on the mortgage's total outstanding balance that included principal, interest, costs and taxes. Therefore, the board finds the Taxpayer still has standing.

Finding the Taxpayer has standing, however, may not fully resolve the issue for the Town about to whom the abatement check should be issued. The Taxpayer asserted it was entitled to the abatement checks. We assume one of the reasons for this position is that the Bank released the Taxpayer from any further liability, and this release was obtained without the Bank receiving an assignment of the Taxpayer's appeal rights. On the other hand, the Town supplied the board with a letter from the Bank's attorney, and that attorney asserted that the Bank was entitled to the check. The attorney, however, also pointed out that the Town should probably make payment to the Taxpayer, and then the Bank would pursue a separate action against the Taxpayer.

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The board's powers are entirely statutory. Appeal of Gillin, 132 N.H. 311, 313 (1989). The dispute between the Taxpayer and the mortgagee is, in essence, a contract dispute over which the board has no jurisdiction. Therefore, the board concludes the Town should either make the payment directly to the Taxpayer or if it has concerns about such action, the Town may interplead the money to the superior court, naming both the Taxpayer and the Bank. The Taxpayer and the Bank could then argue the case

before the court.

Turning finally to the valuation issue, the board finds the proper assessment to be \$660,000.

The board spent considerable time reviewing the file, viewing the property, and obtaining a report from the board's review appraiser. Even after this work, the board struggled with finding the appropriate value for the Property. The Taxpayer's appraiser was a credible witness who presented a supportable value opinion. Thus, the Taxpayer carried its initial burden. The board concluded, however, the Taxpayer's proffered \$485,000 figure was incorrect because:

- 1) the appraiser used 16,250 square feet rather than the actual 18,000 square feet;
- 2) the appraiser's vacancy and expense rates appeared excessive; and
- 3) the 1994 \$490,000 sales price was almost identical to the appraiser's \$485,000 value estimate (Foreclosed properties do not generally produce market value prices.).

Despite these deficiencies, the Taxpayer did present a value argument concerning the Property's value, including:

- 1) the Taxpayer was very motivated to rent the units to avoid the foreclosure and personal liability;
- 2) the Property had a difficult time attracting and keeping good tenants;
- 3) the quality of tenant that would rent at the space was a low-quality tenant;

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- 4) the Property is located literally on the other side of the tracks from the more desirable retail area; and

- 5) the Property is a very basic, low-cost, strip mall.

After receiving the Taxpayer's evidence, the board was convinced that the Property was not worth the \$866,800 assessment. The board then reviewed the Town's submission. The Town's expert certainly attempted to be reasonable in his assumptions, but the board decided not to rely on the discounted cash

flow, in this specific case, because of the many uncertainties surrounding the Property. For example, the Property was in a distressed status, but that distress was not just related to renovations needed at the property, but rather was based on the Property's low-cost physical attributes and less-than desirable location. Thus, the board was not convinced that a prospective purchaser would do any more than projecting the current year's and maybe the next year's rent under the new ownership. On the following page is the board's attempt to look at the different possibilities of using an income approach to value this Property. Excluding the Taxpayer's proffered income approach, and modifying the Town's approach to a direct capitalization approach, demonstrates an income valuation for the Property between \$536,400 and \$714,000.

INCOME APPROACH COMPARISON

TAXPAYER	MODIFIED TAXPAYER (USING 18,000/SF)	MODIFIED TAXPAYER (USING 18,000/SF, VACANCY 20%, EXPENSE 25%)	TOWN¹	BOARD'S REVIEW APPRAISER	
POTENTIAL GROSS INCOME	16,250 sf x <u>\$6.91/sf</u> \$112,356 (APPROX.)	18,000 sf x <u>\$6.91/sf</u> \$124,380	18,000 sf x <u>\$6.91/sf</u> \$124,380	18,000 sf x <u>\$6.25/sf</u> \$112,500	18,000 sf x <u>\$7.00/sf</u> \$126,000
VACANCY & COLLECTION LOSS	-\$28,089 (25% of \$112,356)	-\$31,095 (25% of \$124,380)	-\$24,876 (20% of \$124,382)	-\$16,875 (15% of \$112,500)	-\$18,900 (15% of \$126,000)
EFFECTIVE GROSS INCOME	\$84,267	\$93,285	\$99,504	\$95,625	\$107,100
EXPENSES	-\$26,244 (APPROX. 31% OF \$84,267)	-\$28,920 (APPROX. 31% OF \$93,285)	-\$24,876 (25% OF \$99,504)	\$25,200 ² (APPROX. 26% OF \$95,625)	-\$21,420 (20% OF \$107,100)
NET OPERATING INCOME	\$58,023	\$64,365	\$74,628	\$70,425	\$85,680
CAPITALIZATION RATE	12%	12%	12%	11%	12%
VALUE	\$485,000 (ROUNDED)	\$536,400	\$621,900	\$640,000 ((\$586,900 using 12% cap rate)	\$714,000

¹ Town performed a discounted cash flow calculation. Board has taken this approach and converted it to direct capitalization calculation.

² Calculation does not include capital improvements shown on Town's grid, page 8.

Ultimately, the board concluded to use the following income analysis.

BOARD'S INCOME ANALYSIS

POTENTIAL GROSS INCOME	18,000 sf x 6.90/sf \$124,200
VACANCY & COLLECTION LOSS	-\$18,630 (15% of \$124,200)
EFFECTIVE GROSS INCOME	\$105,570
EXPENSES	-\$26,390 (25% of \$105,570)
NET OPERATING INCOME	\$79,180
CAPITALIZATION RATE	12%
VALUE	\$660,000

Based on the above the board orders an assessment of \$660,000 with this assessment being applied to the subsequent years consistent with the discussion above. Therefore, if taxes had been paid, the amount paid based on an assessment in excess of \$660,000 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 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.

One final note, TAX 203.03 (d) requires that parties state in their appeal document filed with this board the specific reasons for the appeal. TAX 203.03 (g) then limits the parties to the grounds stated in the appeal document. The board has decided to generally not bring up the specificity issue unless raised by the parties. In this appeal, the Taxpayer's appeal document estimated a market value of \$335,376. This was based on a rough income analysis. At the hearing, the Taxpayer proffered a new appraisal that was prepared for the hearing, and that appraisal estimated a \$485,000. This discrepancy disturbs the board, but consistent with the board's policy, the board did not raise the issue. The board, however, would have responded to a Town objection to the appraisal, and the board would have ruled on that objection. Furthermore, the board is still having discussions about whether it should, on its own, raise the specificity issue. Therefore, the Taxpayer's agent should be warned that either the Town or the board has the authority to challenge any change in arguments from the appeal document to the hearing evidence. This board is supposed to be an appellate board. Taxpayers should have their arguments and their valuation estimate ready when the appeal is filed. The board understands that parties perform more detailed analysis for hearings. Thus, the board would probably allow in an appraisal not presented or discussed in an appeal document, provided the appeal document and appraisal are consistent. This is not what happened here. In this case, there was no relation between the appeal document calculation and the hearing appraisal. In this case, the board would have considered the Town's motion to exclude the hearing appraisal.

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

Ignatius MacLellan, Esq., Member

Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Mark Lutter, Agent for Willow Realty Trust, Taxpayer; and Chairman, Selectmen of Plaistow.

Date: March 31, 1997

Valerie B. Lanigan, Clerk

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