

Albert Gemmiti

v.

City of Berlin

Docket No.: 13873-93PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "City's" 1993 assessment of \$204,700 (land \$12,600; buildings \$192,100) on a .09-acre lot with an office/retail building (the Property). The Taxpayer also owns, but did not appeal, two other lots in the City with a combined, \$132,800 assessment. For the reasons stated below, the appeal for abatement is granted.

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) a February, 1991 appraisal estimated the value to be \$72,500 and in July

1996 the appraiser stated the market estimate was still reliable;

(2) the cellar floods regularly due to water problems created by PSNH;

(3) comparable properties have significantly lower assessments;

(4) the board's review appraiser ("Bartlett") determined a \$111,000 value by

the income approach and \$140,100 by the modified sales approach; and

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(5) the fair market value as of April 1993 was \$75,000 to \$80,000.

The City argued the assessment was proper because:

(1) the Taxpayer's appraisal is not comparable because the sales were in 1985, 1986 and 1987;

(2) six comparables sales support a \$33.23 per square foot value;

(3) rental income data supports \$4.66 per square foot for the subject and when capitalized at 15% supports a value by the income approach of \$191,600;

(4) the City's method for valuing properties is the cost approach; the Property was depreciated by 32% based on its remaining economic life and an additional 20% for its location on Main Street and its lack of parking; and

(5) the City reviewed the sales comparison and income approaches and applied them as a check to the cost approach and found they supported the assessed value of the Property.

Board's Rulings

Response to City's Letter

This responds to the City's August 2, 1996 letter concerning the board instructing the board's review appraiser to review individual appeals and to send a copy of his report to the City and to the individual taxpayers.

The review appraiser becomes involved in an appeal when the board concludes the review appraiser can assist the board in reviewing an appealed

assessment. In these individual appeals, the board decided to employ the review appraiser to: 1) independently review the appealed assessments thereby providing the board with additional evidence on whether the assessments were correct or not; 2) address the concerns that were raised during the reassessment hearings about whether the City's assessments were correct or not and whether the City was performing an adequate review of the assessments (e.g., April 4, 1995 order at 4; September 29, 1995 order at 2; August 15, 1995 review appraiser's report at 4-6); and 3) provide a basis for resolution

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without a hearing. The board has used its review appraiser in similar situations, and thus, the City has not been treated differently than other municipalities.

"In determining matters before it, the board may institute its own investigation, or hold hearings, or take such other action as it shall deem necessary." RSA 71-B:5 I. To this end, the board's staff includes a review appraiser "who shall be competent to review the value of property for tax purposes." The individual appeals that the review inspector reviewed were filed under RSA 76:16-a, which requires the board to make "inquiry and investigation ***." The board, therefore, has the discretion, and in some cases the duty, to employ the review appraiser to review an assessment and to then file a report with the board. Appeal of Sokolow, 137 N.H. 642 (1993) (the board's denial of a tax abatement was reversed and remanded because board did not have board appraiser review assessment).

Once the review appraiser's report is completed and filed with the

board, the board is required by RSA 541-A:31 IV, VI (h) and RSA 541-A:33 VI to provide the report to the parties and to provide the parties with an opportunity to comment on the report. See also Appeal of Sokolow, 137 N.H. at 643 (court presumes that after a report is prepared the parties will have an opportunity to rebut the report). Providing the report to the parties before the hearing enables the parties to comment on the report at the hearing itself rather than leaving the record open for later comment.

The report, however, does not establish the proper assessment. It does not, as the City asserted, automatically have the board's "imprimatur." Rather, the board reviews the report and treats the report as it would other evidence, giving the report the weight it deserves. Thus, the board may accept or reject the review appraiser's recommendation. Mr. Bartlett's report (see the report's introduction) explicitly informed the parties about the extent of his investigation and analysis, and he stated the report was not conclusive but was only part of the evidence.

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Given the above discussion, the board concludes it was appropriate to seek the review appraiser's input on this case and to then provide his report to the parties before the hearing. This procedure allows the parties to use the hearing to present their original evidence and to respond to the report.

Valuation Findings

On September 16, 1996, the board viewed the Property from the exterior at the same time it viewed the other 1993 appealed properties in Berlin. The view was done without either the City or the taxpayers being present. The view enabled the board to be more familiar with the appealed properties and the various neighborhoods and value influencing factors within Berlin.

Based on the evidence, we find the proper assessment to be \$122,500. This assessment is based on a market value finding of \$125,000 and the City's 1993 equalization ratio of 98% ($\$125,000 \times .98$).

The board arrives at this decision by giving equal weight to Mr. Bartlett's income and modified market value estimates contained in his report.

The board gives little weight to either the Taxpayer's appraisal or the City's summary of value estimate.

The board gives little weight to the Taxpayer's appraisal due to the use of 1986 to 1989 sales for a 1993 tax appeal and the associated large adjustments for time. Further, the appraiser found the income approach not applicable to the Property due to the weakening economic atmosphere in the area. The board finds that both the sales and income approaches are very applicable to estimating the value of this type of property. The Property is comprised of various retail and office rental space, and there exists both property-specific and general market data from which to derive an income approach. Lastly, it is curious why the appraiser calculated a site value under the cost approach but chose not to continue with an improvement value. If the appraiser felt that the cost approach was not applicable due to the difficulty of estimating the Property's obsolescence, then why even bother to perform an estimate of the site?

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The board also gives little weight to the City's summary of value estimate contained in Municipality Exhibit B. While the City stated its sales comparables are strictly a broad-brush approach to show that other properties in northern New England have sold for a similar price per square foot, this

provides little support of the assessment without there being further analysis done as to differences and similarities between the comparables and the Property. The board also finds the City's net rent of \$4.66 per square foot for the subject Property is not reasonable given the testimony as to the actual rents, vacancies and expenses of the Property and those analyzed in Mr. Bartlett's report. The Property is located in a good downtown area of the City and one would expect to find some of the higher rents attainable in this area. The Taxpayer appears to be competently managing the Property and, thus, the Taxpayer's actual rental information and vacancy information is given considerable weight. Further, Mr. Bartlett recognized in his report that the Property was in a good location and his choice of rent from his rent analysis recognizes that fact. The City used only one comparable rental Property to arrive at its net rent of \$4.66 per square foot. The City had adjusted the comparable's net rent of \$5.08 by only approximately 8% to recognize vacancy and landlord expenses. The board finds this adjustment is adequate and not related to all other market evidence submitted.

Lastly, the board gives equal weight to both the income and market approaches in Mr. Bartlett's report because the Property has aspects that both approaches reflect to some extent. First, the Property is rental retail and office space; thus the income approach reflects the value of a properly calculated and capitalized income stream. However, as the City properly pointed out, it is likely some of the rental space would be partially owner-occupied. Consequently, the reliance solely on the income approach may not recognize the Property's full market value. It is the board's experience that owner-occupied rental property generally sells for more than property that is primarily purchased by investors for its income stream.

Refund

If the taxes have been paid, the amount paid on the value in excess of \$122,500 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 City has undergone a general reassessment, the City shall also refund any overpayment for 1994, 1995 and 1996. Until the City undergoes a general reassessment, the City shall use the ordered assessment for subsequent years with good-faith adjustments under RSA 75:8.
RSA 76:17-c I.

Rehearing

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, Chairman

Ignatius MacLellan, Esq., Member

Michele E. LeBrun, Member

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Albert Gemmiti, Taxpayer; and Chairman, Board of Assessors, City of Berlin.

Date: January 15, 1997

Valerie B. Lanigan, Clerk

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