Parker and Jennie Allen, Docket No.: 13990-93PT
Mustafa Kaya, Docket No.: 13991-93PT
Global Investment Trust, Docket No.: 13992-93PT
Charles Oliver, Docket No.: 13993-93PT
Stephen and Eileen Banester, Docket No.: 13994-93PT
Dennis and Cheryl Hayward, Docket No.: 14049-93PT

v.

Town of Greenland

DECISION

The "Taxpayers" appeal, pursuant to RSA 76:16-a, the "Town's" 1993 assessments on the following "Properties."

TAXPAYER	LOT NO(S).	ASSESSMENT
Allen	25 26 27	$ 65,300 $ 63,500 $ 82,900
Kaya	56 57	$ 71,000 $ 71,000
Global Investment Trust	42 43	$ 86,100 $ 71,000
Oliver	40	$ 71,600
Banester	30 31	$ 63,500 $ 90,200
Hayward	36 37	$ 70,700 $ 78,000

The Properties consist of industrial condominium units on leased land. For

the reasons stated below, the appeals for abatement are granted.

The Taxpayers have the burden of showing the assessments were disproportionately high or unlawful, resulting in the Taxpayers 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 Taxpayers carried this burden and proved disproportionality.

The Taxpayers argued the assessments were excessive because:

(1) the Properties are on leased land;

(2) the amount of finished office area varies from unit to unit;

(3) sales of units from 1992 to 1994 indicate approximately $24 to $28 per square foot while the Properties are assessed at approximately $47 to $64 per square foot;

(4) while most of the sales were by the bank after foreclosing on the developer, under the principle of substitution, the bank sales affect the value of non-bank-owned units;

(5) a paired sales analysis of bank owned versus non-bank-owned units indicates the bank sales are being discounted by approximately 15%;

(6) the asking prices of units at Autumn Park are less than the equalized values;

(7) the sales of comparable units at Barker Square in Somersworth indicated values of approximately $25 per square foot;

(8) an estimate of value by the income approach is $33,000 per unit;

(9) the sales and rental data do not clearly show additional value for the units with higher office finish; and

(10) the units should be valued at $28 and $32 per square foot for unfinished and finished units respectively.

The Town argued the assessments were proper because:

(1) the sale of units 32 & 33 in July 1991 for $143,000, which was after the foreclosure, support the equalized value of these units;

(2) the Town's equalization ratios and coefficients of dispersion from 1991 to 1995 indicate assessment equity has continued;

(3) the assessments should not be abated based on bank sales; and

(4) the Town did not have adequate funds appropriated for abatements to negotiate in good faith with the Taxpayers.

Board's Rulings

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

TAXPAYER	LOT NO(S).	ASSESSMENT
Allen	25	$ 39,300
	26	$ 39,300
	27	$ 45,000
Kaya	56	$ 42,350
	57	$ 42,350
Global Investment Trust	42	$ 48,400
	43	$ 42,350
Oliver	40	$ 42,350
Banester	30	$ 39,300
	31	$ 45,000

Hayward	36	$ 48,400
	37	$ 48,400

The board has adopted the Taxpayers' estimated market value because it finds that they are supported primarily by the income approach with supportive evidence of the sales approach, the asking prices of similar units and the sales of similar industrial condominiums in the region.

Income Approach

Mr. Lutter, the Taxpayers' agent, is correct that the income approach for rental properties can be a good approach to estimate market value when good sales data does not exist. In this case where a plethora of bank-related sales exists, the board gives the most weight to the income approach in estimating the Properties' values. No evidence was submitted by the Town to counter the income and vacancy information submitted by Mr. Lutter. Based on the evidence, the board finds the $6.00 per-square-foot gross rental rate and vacancy rate of 10% to be reasonable.

The board finds the expense estimates of Mr. Lutter are also reasonable. While a management fee of 5% may be slightly high, because some management aspects are already included in the $165 per-month condominium fee, a revision to 2% for management does not substantially affect the value conclusions by the income approach. This revision only increases the estimated price per square foot from $27.50 to $28.79. The Taxpayers' final correlated value per square foot of $28.00 is reasonable based on either management calculations.

Consequently the board finds the estimated market value of $28.00 per square

foot for the unfinished units is reasonable. While Mr. Lutter indicated that the market evidence and rental evidence was inconclusive as to any added value for units having finished office space, the board agrees with Mr. Lutter that an estimate of $32.00 per square foot for those units that do have office space is reasonable given the initial fit-up costs for such space and the potential utility for some tenants.

Sales Approach

With the exception of unit 21, which resold in December 1994 for $34,000, all sales presented by the Taxpayers and the Town were bank sales or sales that were considered to be nonarm's-length due to extenuating circumstances. The board has consistently held that bank sales are by definition not arm's-length transactions and require some adjustment. Banks are not your typically motivated sellers. The board has consistently seen, both through its own studies and the studies of others, that bank sales typically sell for less than market sales. Mr. Lutter attempted to adjust the bank sales by doing a paired-sales analysis of properties sold by a bank and then subsequently resold to a third party. The board places less weight on those adjustments than it might normally because the paired sales are not from the subject complex and are too few in number to give a reliable indication of what is an appropriate adjustment to factor. Notwithstanding that finding, however, the 15% adjustment appears to be reasonable due to the heavy influence of bank sales on the market and the correlation of value conclusion relative to the income approach.

The board places no weight on the sales of units 32 and 33 in July of 1991 for $143,000 in total. The sale prices were actually an assumption of the outstanding mortgages on these two units. Additionally, the sales were conditioned upon the

purchaser acquiring, at auction, two adjoining units that the purchaser was renting and in which the purchaser had some tenant improvements. The board finds this transaction not to meet the definition of an arm's-length transaction because the purchaser was under some duress to remain in the units he was occupying.

Asking Prices

While the board rarely relies on listing prices as evidence of market value, they do at least indicate conceivably the highest end of any value range for a property. In this case, the asking prices are significantly lower than the equalized assessments indicating that some abatement is warranted. Further, the asking prices submitted by Mr. Lutter generally comport with the adjusted sales prices and the values as indicated by the income approach.

Sales of Similar Units

Mr. Lutter submitted evidence of industrial units at a complex known as Barker's Square in Somersworth, New Hampshire. The three sales ranged from $22.50 to $25.00 per square foot. The board places little weight on these sales other than as confirmatory information. Little evidence was submitted as to the comparability with the Autumn Pond units other than some locational comments, quality of construction and lease versus owned land. Further market study would have to be done to determine what adjustments need to be made to these comparables sales to make them similar to the subject Properties.

Conclusion

In conclusion, the board finds the income approach reasonably indicates a market value of $28.00 per square foot for the unfinished units and $32.00 per square foot for units containing some office finish. The additional evidence submitted by

the Taxpayers support the income approach findings.

Costs

The board orders the Town to reimburse the Taxpayers for their filing fees pursuant to RSA 76:17-b as the facts presented in this case clearly indicated the equalized assessments substantially exceeded market value. The Page 7
Allen et al. v. Town of Greenland
Docket No.: 13990-93PT et al.

board disagrees with the Town's argument that they were constrained by the budgetary limit for abatements. The selectmen have the authority under RSA 76:6 to request an overlay at the time of setting the tax rate with the department of revenue administration to cover such abatements or, in the alternative, to enter into settlement agreements with taxpayers and request the board accept the settlements so as to have the force of a judgement pursuant to RSA 32:9.

The board denies all other requests for costs. The board's general authority to assess costs is in RSA 71-B:9. In these cases no attorney was involved. However, an argument could be made that Mr. Lutter acted as an agent (see TAX 101.03) on behalf of other Taxpayers performing some of the functions an attorney might normally do. Nonetheless, the supreme court has allowed the assessment of attorney's fees against the state or one of its political subdivision only where there has been a finding of bad faith. See Harkeem v. Adams, 117 N.H. 687 (1977); see also Taber v. Town of Westmoreland, __ N.H. __, slip op. at 4, (January 31, 1996) (no award of attorney's fees was justified against a municipality's quasi-judicial body even if the municipality subjectively believed the quasi-judicial body was legally incorrect).

In Harkeem, 117 N.H. at 691, the court stated: "Where an individual is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention, an award of counsel fees

on the basis of bad faith is appropriate." The court further stated that bad faith is shown where the party in question has acted vexatiously, wantonly, obdurately or obstinately. The board finds that such

severe actions did not occur in this case, and thus, there is no finding of bad faith on the part of the Town. While the board believes the Town improperly interpreted the statute as to how abatements are to be funded, such interpretation by itself is not an act of bad faith.

Refund

If the taxes have been paid, the amount paid on the values in excess of the amounts found above shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Additionally, the Town shall reimburse each Taxpayer the RSA 76:16-a $65 filing fee. 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 1994 and 1995. 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.

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.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

_____
Paul B. Franklin, 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 Mark Lutter, Agent for Parker and Jennie Allen, Taxpayers; and Chairman, Selectmen of Greenland.

Date: July 30, 1996

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Valerie B. Lanigan, Clerk

0006