

Ronald and Linda Rose

v.

City of Berlin

Docket No.: 14780-93PT

DECISION

The "Taxpayers" appeal, pursuant to RSA 76:16-a, the "City's" 1993 assessment of \$255,600 (land \$36,900; buildings \$218,700) on a .27-acre lot with a retail store (the Property). 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 Taxpayers argued the assessment was excessive because:

- (1) the Property's assessment-record card contains errors that could easily have been corrected if an adequate inspection had been done by the City;
- (2) the heat pumps and air conditioners are inoperable;

(3) due to the fact the building is not fully heated and has inadequate parking, the Taxpayers have lost tenants;

(4) the City has applied inconsistent and inaccurate methodology in assessing the Property;

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(5) the best approach to estimating the value of the Property is by the sales comparison approach despite the only comparable sales were forced sales and all significantly smaller; the value is estimated at \$150,000.

(6) the laundry area has minimal finish and not similar retail space; and

(7) the measurements of the building indicate the City's square footage is excessive.

The City argued the assessment was proper because:

(1) the square footages are close to the measurements of the Taxpayer's appraiser;

(2) the heating was recognized both in the base rate and the functional depreciation; and

(3) the assessment equates to \$13.64 per square foot and is supported by several sales within the City.

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, the board finds the proper assessment to be \$181,300. This assessment is based on a market value finding of \$185,000 and the City's 1993 equalization ratio of 98% ($\$185,000 \times .98$).

This is indeed a difficult property to value because of its unique combination of uses and the lack of comparable market data. One portion of the building is comprised of fairly typical retail space on the first floor with residential rental space on the second and third floors. The rear portion of the building, however, is of a different construction type and has minimal finish more similar to light manufacturing space.

The board's finding of market value is based on Mr. Bartlett's income approach and modified sales approach contained in his report. While the board is well aware that his two approaches rely on general market data with some modification to the specific property, we find it the best evidence presented in this case.

The board placed little weight on the City's assessment and on its summary of value estimate (Municipal Exhibit D). The City's assessment was primarily done by the cost approach. It contained substantial depreciations which the City did not show were related to the market by either the market or

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income approaches. Further, the sales contained in the City's summary of value estimate are generally for smaller square foot properties and with more intensive uses (office, apartment and retail uses).

The board placed no weight on the Taxpayers' appraisal performed by Goddard and Associates (Goddard Appraisal). Goddard Appraisal market approach included six sales that were all forced or auction sales with no adjustments

made for these selling conditions. The appraiser stated that due to the fact so many sales in Berlin were forced in nature that that was the market. However, the board has consistently held that bank or forced sales do not meet the requirements of arm's-length transactions. "An arm's-length transaction is "[a] transaction freely arrived at in the open market, unaffected by abnormal pressure or by the absence of normal competitive negotiation as might be true in the case of a transaction between related parties." B. BOYCE, REAL ESTATE APPRAISAL TERMINOLOGY 18 (REV. ED. 1984)." Appeal of Lakeshore Estates, 130 N.H. 504, 508 (1988). We find that these sales do not reflect the open market competitive negotiations that should occur for sales to be arm's length. See also Society Hill Merrimack Condominium Association & a. v. Town of Merrimack, 139 N.H. 253, 255 (1994).

The board also places no weight on the Goddard Appraisal income approach estimate as it is based on undocumented actual income rent from the Taxpayer who is the only tenant. Curiously, the actual gross income equated to the actual expenses showing a zero net operating income (except for some potential income estimated for the office and storefront area). The board finds this income approach calculation totally unreliable because it does not give the basis of the actual income and expenses nor did it explain how it related to general market data. As we have already stated, while indeed this a difficult property to value, an estimate by the income approach can be produced using reasonable comparable market rents as Mr. Bartlett did in his report.

In short, the board finds Mr. Bartlett's report contains the most

balanced and reasonable value estimate for this unique property. Due to the shortcomings found by the board in both the Goddard Appraisal and the City's analysis, the board gives them little weight.

Refund

If the taxes have been paid, the amount paid on the value in excess of \$181,300 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

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Robert J. Goddard, Agent for Ronald and Linda Rose, Taxpayers; and Chairman, Board of Assessors, City of Berlin; and John J. Ratigan, Esq., Counsel for the Municipality.

Date: January 15, 1997

Valerie B. Lanigan, Clerk

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