Dana L. Haselton

v.

Town of Derry

Docket No.: 14962-93-PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1993 assessment of $658,000 (land $414,500; buildings $243,500) on a 1.71-acre lot with a one-story three-unit commercial building containing a convenience store with gas pumps, laundromat and hair salon (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 Taxpayer argued the assessment was excessive because:

(1) the Property was substantially impacted by groundwater contamination from an adjoining property;

(2) the estimated cost of remediation is $217,000;

(3) an April 1993 appraisal estimated the fair market value to be $725,000 as clean;

(4) based on comparable sales of contaminated properties, an estimated 35% discount for contamination should be applied to the "as clean" value resulting in a value of $470,000.

The Town argued the assessment was proper because:

(1) the Property was assessed as having 1.37 acres of land and a building containing 6,029 square feet when in fact it had 1.713 acres of land and building containing 9,350 square feet as of April 1, 1993;

(2) the subject is a prime property in a prime location;

(3) regarding the contamination, stigma is the only question involved with the subject because it is classified as a class 7 (with class 8 as zero impact) by the Department of Environmental Services (DES) and the cost of remediation will be borne by someone other than the Property owner;

(4) an appraisal estimated the market value as of April 1993 to be $727,700 which allocates a 5% estimated depreciation for the influence due to contamination (stigma);

(5) the fair market value when equalized by the stipulated 98% ratio for 1993 indicates an assessed value of $713,146; and

(6) therefore, the Property is in fact underassessed.

Board's Rulings

Based on the evidence, the board finds the proper 1993 assessment to be

$618,600 based on a market value finding of $631,200 and the parties' stipulated level of assessment of 98%. The board's finding of value relates only to the 1993 tax year because the Property had a reduction in land size and additional income producing components after April 1, 1993. The Town should, however, apply the board's basic findings in subsequent years making appropriate good faith changes until the next town-wide reassessment. RSA 76:17-c; TAX 203.05.

Ordinarily, a municipality's assessment is initially given the presumption of correctness and thus the burden of proof lies with the taxpayer to show that it is not correct. However, in this case where the assessment

was derived by the cost approach based on approximately two-thirds the actual building area and land area approximately one-third acre less than its 1993 actual size, the board was unable to give that initial presumption of correctness to the assessment. Consequently, in fulfilling its RSA 75:1 responsibilities, the board reviewed the two appraisals submitted by the parties and did not initially give the Town's appraisal any greater presumption of correctness than the Taxpayer's appraisal. The board simply reviewed them as competent evidence relating to determining the Property's market value. In Appeal of City of Nashua, 138 N.H. 261, 263 (1994), the court stated: "to determine the appropriate assessed value for a property, the board must make specific findings regarding the [appealed] property's market value and the equalization ratio by which to [adjust] the market value to an assessed value."

This case raised two general issues relative to determining the Property's proper assessment:

1) what approach(es) to value is (are) most appropriate in determining the Property's market value; and

2) what effect does the groundwater contamination emanating from the nearby Hadco Printed Circuits, Inc. (Hadco) property have on the Property's market value.

Appropriate Approach To Value

There are three approaches to value: 1) the cost approach; 2) the comparable-sales approach; and 3) the income approach. The Appraisal of Real Estate at 71 (10th Ed. 1991).

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 Appraisal and Assessment Administration at 108. 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 valuation is authorized to select any one of the valuation

approaches based on the evidence. Brickman v. City of Manchester, 119 N.H. 919, 920 (1979). The Taxpayer's appraiser, Brian Underwood (Mr. Underwood), considered all three approaches but analyzed and arrived at a value conclusion by the sales and income approaches. The Town's appraiser, Wil Corcoran (Mr. Corcoran), analyzed and arrived at value conclusions by all three approaches to value. Both appraisers, however, gave the most weight to the income approach. We agree. While the Property could conceivably be analyzed by the sales approach due to a large portion of it being owner occupied, the rental portions of the Property, including the Dunkin Donuts kiosk, lend this

Property to analysis by the income approach. To measure and make reasonable adjustments in the sales approach for the Property's good location, strong occupancy and Dunkin Donuts kiosk, an analysis of comparative market rents, vacancies and income (i.e. the income approach) would likely be performed. In short, the income approach is the approach that captures the value with the least amount of subjective adjustments.

Both parties arrived at similar 1993 value conclusions by the income approach, Mr. Underwood $725,000 and Mr. Corcoran $734,500. The differences between the two appraisers is that Mr. Underwood estimated the income and expenses on a gross basis, while Mr. Corcoran estimated both on a triple net basis. Further differences were 5% in the vacancy rate and slightly less than 1% in the overall capitalization rate. One last difference was that Mr. Corcoran included estimated income from gasoline sales of approximately $10,000 while Mr. Underwood included no gasoline income.

The board finds both Mr. Underwood's and Mr. Corcoran's valuation assumptions and calculations are reasonable with two exceptions to Mr. Corcoran's appraisal. First, the board finds Mr. Corcoran's triple net rent for the owner-occupied area of $6.00 to be low compared to the rental information submitted by both parties. Second, the board excludes the gasoline income from the Town's income calculation but includes a depreciated

replacement cost estimate of the gasoline tanks. Revising Mr. Corcoran's income approach for those two items, results in an indicated market value of $760,250. The revised calculation follows.

Gross Potential Income	$ 99,450
Vacancy	x .90
Effective Gross Income	$ 89,505
Expenses	
Insurance	$ 4,500
Management @ 8% Effective Gross Income	$ 7,160
Reserves @ 2.57 of Effective Gross Income	$ 2,238
Net Operating Income	$ 75,607
Capitalization Rate	÷ .101
Indicated Market Value Exclusive of Gasoline Tanks	$748,600
Value of Underground Gasoline Tanks (from Town's Cost Approach)	$ 11,650
Total Estimated Value	$760,250

The board finds $7.00 per square foot rent for the owner-occupied area of the convenience store to be more reflective of the market rather than $6.00 based on a review of both Mr. Underwood's and Mr. Corcoran's market rental data and the Taxpayer's statement of $8.00 rent contained in his appeal document.

The board also excludes any gasoline income from the income approach for two reasons. First, the parties submitted lengthy and conflicting evidence as to what the actual gasoline income might be and, consequently, the board is unable to determine a reasonable estimate of income. Second, the Taxpayer argued any income from gasoline sales is related to an ongoing enterprise value and not real estate value. To avoid having to attempt to dissect enterprise from real estate value in the income approach, the board values the underground storage tanks as real estate by the cost method. This method inherently ignores any possible enterprise value above and beyond that attributable to real estate. The board finds the tanks are fixtures taxable as real estate and should be taxed regardless of their ownership.

Black's Law Dictionary defines "fixture," in part, as "an article in the nature of personal property which has been so annexed to the realty that it is regarded as a part of the land.... Goods are fixtures when they become so related to particular real estate that an interest in them arises under real estate law."

Caselaw indicates that fixtures may be taxable as realty. New England Telephone and Telegraph Co. et al v. City of Franklin et al, ____ N.H. ____ (November 21, 1996). "Whether an item of property is properly classified as either personalty or a fixture turns on several factors, including: the item's nature and use; the intent of the party making the annexation; the degree and extent to which the item is specially adapted to the realty; the degree and the extent of the item's annexation to the realty; and the relationship between the realty's owner and the person claiming the item. See, e.g., The Saver's Bank, 125 N.H. at 195, 480 A.2d at 84; Automatic Sprinkler Corp. v. Marston, 94 N.H. 375, 376, 54 A.2d 154, 155 (1947); Graton & Knight Co., 69 N.H. at 178, 38 A. at 790; Dana v. Burke, 62 N.H. 627, 629 (1883); Wadleigh v. Janvrin, 41 N.H. 503, 518 (1860). The central factors are _the nature of the article and its use, as connected with the use_ of the underlying land, Langdon v. Buchanan, 62 N.H. 657, 660 (1883); see Despatch Line of Packets v. Bellamy Man. Co., 12 N.H. 205, 233, (1841), because these factors provide the basis for ascertaining the intent of the party who affixes or annexes the item in question. Wadleigh, 41 N.H. at 518." Further as stated in The Saver's Bank v. Anderson, 125 N.H. 193, 195 (1984) "A chattel loses its character as

personalty and becomes part of the realty when there exists _an actual or constructive annexation to the realty **with the intention of making it permanent accession to the freehold,** and an appropriation or adaptation to the use or purpose of that part of the realty with which it is connected._ However, if a chattel becomes an intrinsic, inseparable and untraceable part of the realty, it is deemed a fixture regardless of the intent of the parties. (Citations omitted.)"

The tanks certainly contribute towards the "use and enjoyment" of the Property and contribute towards its highest and best use. The lease of the tanks indicate there is an intent for a continuum of use of the tanks in relationship to the real estate. Further, the tanks by their very nature of being buried and piped to above ground pumps have been specially adapted and annexed to the realty.

In conclusion, the board finds both the Town's revised income approach estimate of $760,250 and Mr. Underwood's estimate of $725,000 to be based on reasonable and market related assumptions. (For example, the board reviewed the two appraisers' capitalization rate calculations in an attempt to adopt one or the other. However, the board found both appraisers' slightly differing assumptions plausible and reflective of the market and, thus, could not favor one over the other). Consequently, the board gives equal weight to both parties' value indications and estimates the Property's market value before considering contamination to be $742,600.

Effect of Contamination

The Property is located southwest across Route 28 from a property owned by Hadco. An environmental Phase II report was conducted on the Hadco site in

October 1992 which included two monitoring wells located on the Property (identified as wells 210L and 211L). The results of sampling of those wells in October 1992 showed a high level of volatile organic compounds (VOCs) in the ground water in well 210L closest to the Property's building. The Phase II report indicated the ground water flow was in a radial fashion primarily in a southerly and southeasterly direction from the Hadco property in this area. Based on all the existing public documents, including the Phase II report of the Hadco site, the board finds there was clear public knowledge as of April 1, 1993 of the Property's groundwater contamination from the Hadco site. (There was further testimony submitted relative to gasoline contamination resulting from the Property's fuel tanks in 1991. However, it appears that as of 1993 the gasoline contaminated soil had been removed and aerated and was

no longer a serious contamination issue. There was still some contention and uncertainty whether the Town had inadvertently replaced some of the partially aerated, contaminated soil in back-filling a new sewer line across the Property. However, the board finds any gasoline contamination on the Property was relatively insignificant as of the assessment date.)

Once contamination is documented the question next becomes what effect does it have on the Property's market value?[1]

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[1] The board has reviewed several articles, case summaries and definitions relative to the issue of "stigma" resulting from contamination. Stigma is an evolving term for negative reactions to undesirable or unknown aspects of property that covers a broad spectrum from a fairly rational business decision to a quantifiable negative factor to an emotional reaction bordering on hysteria of the unknown. William N. Kinnard, Jr. *The Stigma Effects of Contamination on Real Property Values, (November 1995); Thomas A. Jaconetty, Stigma, Phobias, and Fear: Their Impact on Valuation (1995); International Association of Assessing Officers Standards on the Valuation of Property Afflicted by Environmental Contamination (1992) Richard Roddewig, Stigma, Environmental Risk and Property Value; 10 Critical Inquiries, The Appraisal

The board agrees with the Town's comments contained on page 61 of Municipality's exhibit A which states that the effects of contamination are quite varied and must consider a number of factors. The Town listed many factors such as the nature of the contaminants, the extent of the contamination, the cost of clean-up and monitoring, the stage or phase of remediation, the availability of financing for the property, any restrictions in the property's use and the party liable for ultimate clean up. We find any stigma associated with the Property to be relatively minimal primarily due to the identification of the contamination, its source, who's responsible for clean-up, the Property's continual use and its off-site water and septic utilities. In short, we find the stigma is best described as an uncertainty of financing by conventional sources and, thus, the possible need for private financing and the potential for interference in the use of the Property during any further remediation. Other than these two factors, other aspects of the Property showed little effect of the contamination. The Property, as testified to by both parties, is in an excellent location commercially and has

a strong occupancy rate. The Property's actual rents, reflective of market rents, show no effect of the contamination. The Property has public off-site water and sewer. There was clear evidence submitted of Hadco's liability for any clean-up costs associated with remediation of the groundwater contamination. DES had classified the Property as a class 7 contamination on a scale of 1 to 10 with 1 being the worst contamination. In May 1993 the Property's most westerly .4-acre was transferred to the adjoining lot to be

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Journal 375 (October 1996).

part of a subsequent Applebee restaurant site. While the board notes this westerly portion included the area that contained well 211L which had shown a low level of VOCs, the fact that it transferred is some indication that the adjoining higher level of VOC concentrates found in well 210L did not chill the "transfer."

The next issue then becomes what adjustment or discount should be applied to the "as if clean" market value. Various literature and other states' tax appeal cases indicate two general methods of measuring the effect of contamination. First, the method on which some evidence was submitted in this case is to measure from sales or aborted sales the effect of contamination. Second, if using the income approach, the risk factor in the capitalization rate can be adjusted to reflect the higher risk taken on by either the lending institution or the equity portion of the investment or both. No evidence was submitted in this case as to this second method.

The board reviewed the three general areas of market data submitted by the parties to measure the effect of contamination: 1) the various contaminated properties contained in Mr. Underwood's appraisal which indicated a discount range for contamination of 19% to 52%; 2) the Safety First lease contained in Mr. Corcoran's report; and 3) the sale by the Taxpayer of the adjoining lot and a portion of the Property in May 1993 for an Applebee restaurant site.

Underwood Appraisal

The five transactions summarized on page 79 of Taxpayer's Exhibit #1 indicated a contamination discount range of 19% to 52%. This analysis was essentially an attempt to do a paired sales analysis of properties that had some indication as to what they would be worth clean versus what they ultimately sold for or what the clean up cost was. While the board finds the general methodology of this analysis to be reasonable, Mr. Underwood neglected to isolate at least one significant factor, namely, the effect of any bank or FDIC ownership in these transactions. We understand Mr. Underwood's contention that his goal was to find a general discount range associated with contamination. However, any paired sales analysis should attempt to isolate the primary influence being analyzed, in this case, the effect of contamination. In reviewing the details of these five transactions, the board notes the three transactions indicating a higher discount (#4, #5, and #11) all had FDIC or bankruptcy related issues. Therefore, the board has given those three transactions little weight. The remaining two transactions (#3 and #12) indicated a 19% to 21% contamination discount. Of those, the board notes transaction #3 is in Berlin, New Hampshire which is a quite dissimilar market than the Property, and thus, it is given some less weight than #12 which is in Manchester, New Hampshire.

Safety First Lease

The board considered the evidence relative to the Safety First lease contained on page 67 of Mr. Corcoran's report. The board finds the 8% estimated loss of rent due to the interference of the remediation process is reasonable in measuring the effect of the contamination in that case and may provide some indication of discount in this case.

Applebee Sale

The board reviewed the May 1993 Applebee purchase of the adjoining

parcel for $415,000. The Town argued this sale showed no discount for any contamination concerns. The board gives this transaction no weight in

measuring the effect of contamination on the Property. The Applebee Phase I report indicated a minimal concern of contamination on that site. While the Phase I report was not definitive in its conclusion of the lack of contamination on the Applebee site, it indicated, based on the data available at the time, that the contamination from the Hadco property was flowing in a generally more southerly direction than the Applebee site. Thus, the Phase I report would provide, to anyone reading it, some assurance that the site was reasonably clean.

Thus, in conclusion, the evidence submitted indicates a contamination discount range of 8% to 21%. The board determines a 15% discount is reasonable. As stated earlier, this determination is heavily influenced by several facts: 1) the Property continues to be used at its highest and best use and has a high occupancy rate; 2) the party responsible for any clean-up costs is not the Taxpayer and Hadco has committed to pay for those costs; and 3) the primary affects of the contamination appears to be impact on conventional financing and the potential for some interference during remediation.

Thus, the "as clean" value of $742,600 adjusted by the 15% factor results in a market value of $631,200 and an assessed value of $618,600.

If the taxes have been paid, the amount paid on the value in excess of $618,600 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 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.

Findings of Facts and Rulings of Law

In these responses, "neither granted nor denied" generally means one of the following:

a. the request contained multiple requests for which a consistent response could not be given;

b. the request contained words, especially adjectives or adverbs, that made the request so broad or specific that the request could not be granted or denied;

c. the request contained matters not in evidence or not sufficiently supported to grant or deny; or

d. the request was irrelevant.

Taxpayer

1. Granted.

2. Denied, Haselton and Diamond were owners until its transfer on July 30, 1994, appeal was filed with board on August 24, 1994.

3. Neither granted not denied.

4. Granted.

5. Granted.

6. Granted.

7. Granted.

8. Granted.

9. Granted.

10. Granted.

11. Granted.

12. Granted.

13. Granted.

14. Denied.

15. Granted.

16. Neither granted nor denied.

17. Addressed in decision.

18. Addressed in decision.

19. Neither granted nor denied.

20. Addressed in decision.

21. Denied.

22. Denied.

23. Granted.

24. Granted.

25. Granted.

26. Denied.

27. Addressed in decision.

28. Addressed in decision.

29. Neither granted nor denied.

<u>Town</u>

1. Denied, see TAX 203.03(g).

2. Denied, see TAX 203.03.

4. Denied.

5. Denied.

6. Denied.

7. Addressed in decision.

8. Neither granted nor denied.

9. Granted.

10. Neither granted nor denied.

11. Neither granted nor denied.

12. Neither granted nor denied.

13. Granted.

14. Granted.

15. Neither granted nor denied.

16. Addressed in decision.

17. Neither granted nor denied.

18. Denied.

19. Addressed in decision.

20. Denied.

21. Denied.

22. Denied.

23. Granted.

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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Michele E. LeBrun, Member

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Roland E. Morneau, Jr., Esq., counsel for the

Taxpayer; and Wil Corcoran, consultant for the Town of Derry; and Chairman, Board of Assessors of Derry.

Date: December 20, 1996

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Valerie B. Lanigan, Clerk