

Arliss J. Hill, William A. Johnson and Carol J. Hennum

d/b/a Mountain Valley Mall Associates

v.

Town of Conway

Docket No.: 15289-94PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1994 assessment of \$9,888,500 (land \$2,547,000; buildings \$7,341,500) on a 27.28-acre lot containing the Mountain Valley Mall (the Property). The Taxpayer also owns, but did not appeal, another property in the Town with a \$367,600 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 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 appraisal indicates a market value of \$6,900,000 as of April 1, 1994;
- (2) actual rents based on long term tenancies more accurately reflect the market;
- (3) the mall is the only enclosed mall in North Conway and is not visible from Route 302; and

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- (4) the Town's reliance on strip mall values is incorrect because they are not comparable properties to the subject's enclosed mall (strip malls have better visibility, command higher rents, pay less for CAM charges).

The Town argued the assessment was proper because:

- (1) the Taxpayers' appraiser valued the Property's leased fee value, not its fee simple value;
- (2) the leased fee appraisal created a lower appraised value because many of the leases were old with existing contract rents below market rents and does not capture the value of tenant improvements;
- (3) comparable competing space in the Town lease at higher contract rents than the Property;
- (4) a review of comparable anchor tenants in the State support higher market rents than the Property's contracted rents; and
- (5) a limited scope appraisal estimates the Property's value at \$11,500,000 as of April 1994.

Parties' Stipulations

The parties stipulated that the general level of assessment within the Town was 100% due to the Town having conducted a Town-wide reassessment in 1994. Consequently, the board's finding of market value equates to the

assessed value. The parties also stipulated that the income approach to value was the most appropriate method for estimating market value.

BOARD'S RULINGS

Based on the evidence, the board finds the proper assessed value to be \$9,093,000. The board did not allocate this value derived by the income approach between the land and building components of the Property. The Town, if it wishes to break out the two components, shall do it consistent with their methodology at the time of the reassessment.

The board was unable to place any weight on the value conclusion of the Taxpayers' appraisal (Schubert) because the interest valued was only the leased fee interest and not the fee simple interest.

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In appraising property for tax purposes, the fee simple interest is valued. RSA 72:6; RSA 21:21 (all real estate is taxed; real estate includes all lands, improvements and "all rights thereto and interests therein"). Often fee simple interests in income producing property is fragmented into two partial interests: the leased fee interest (the interest the landlord has subject to rights of others to occupy and use property as conveyed by a lease) and the leasehold interest (the interest held by a tenant to use and occupy property under certain conditions contained in the lease). Appraisal Institute, The Appraisal of Real Estate 11th Edition (1996) pgs. 7, 8 and 592. See Demoulas v. Salem, 116 N.H. 775 (1976) and Gowen v. Swain, 90 N.H. 383 (1939) (court rejects leased fee analysis). If only one of these partial interests is valued, as was the case in the Schubert appraisal, the total property rights as defined in RSA 21:21 have not been valued.

Specifically, Schubert used contract rents for the anchor tenant rents and for a portion of the smaller tenant areas. Consequently, his appraisal estimated only a portion of the fee simple interests of the Property, i.e. leased fee interest.

Despite the Schubert appraisal not valuing the fee simple estate, the board reviewed and considered all market evidence submitted by the parties including the Schubert appraisal and the Town's appraisal in calculating its own estimate of market value by the income approach. The board's calculation which follows is based on a number of findings:

(1) in estimating market value by the income approach for tax purposes, it is more appropriate to include taxes in the capitalization (CAP) rate rather than as an expense; consequently, the board finds the Town's methodology more appropriate on this issue;

(2) market rents for the anchor tenants and smaller tenants were estimated (based on the evidence) on a net basis minus the actual common area maintenance (CAM) charges (including prorated real estate taxes) actually reimbursed to the Taxpayers and percentage rent income; the board's estimate of rents considered the Property's location and diminished visibility from Route 16 and its two access points;

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(3) the Town's income attributable to tenant improvements is not added to the potential gross income (PGI); while the board agrees there may be certain tenant improvements that are real estate and thus taxable, the testimony relative to the building permits, Marshall Valuation Service build-out estimates and comparable rental rates was inconclusive as to the \$82,000 income estimated by the Town; however, the inclusion of some tenant fixtures

was a factor the board considered in estimating the market rents;

(4) the board estimated a 6% vacancy rate based on the Property's actual vacancy as of the assessment date and the prudent and aggressive management testified to by the owner;

(5) the Town's additional income for percentage rents, association income, CAM income and insurance income is reasonable based on the appraisals and testimony;

(6) the Town's estimates of expenses for CAM, insurance, management and reserves are reasonable (many expenses were based on actuals submitted by the Taxpayers);

(7) the Town's CAP rate of 12.70% inclusive of effective tax rate (ETR) of 2.542% is reasonable for this type of property and, if anything, is favorable to the Taxpayers based on Schubert's CAP rate of 8.9% exclusive of ETR; and

(8) in the final analysis, the board agreed with Mr. Schubert that the immediate need to replace a portion of the roof at an estimated cost of \$350,000 (see page 23) is appropriate to be deducted from the value estimated by the income approach; (as an alternative method, the board calculated what the additional annual expense in principal and interest would be for a ten to fifteen year loan for the roof and included that as an annual expense item in the income CAP approach; the affect on final market value was similar to subtracting it as a one-time expense); obviously, once the roof is replaced, the Town can make a good faith adjustment (RSA 76:17-C and TAX 203.05) to the 1994 assessment.

Board Calculations

TENANT	SQUARE FEET	SQUARE FOOT MARKET RENT	INCOME	
Shop & Save	53,100	7.00		371,700
K Mart	40,318	4.00		161,272
JC Penney	34,364	5.00		171,820
Vacant Rentable	12,591	7.50		94,433
So-Fro	11,350	7.00		79,450
Fashion Bug	7,300	7.00		51,100
Cinemas IV, VII	5,900	7.00		41,300
Marianne's	5,000	7.00		35,000
Walden Books	3,880	8.00		31,040
All For A Dollar	3,582	8.00		28,656
Payless Shoe	3,500	8.00		28,000
Yankee Sports	3,376	8.00		27,008
Hallmark (Yorks)	3,238	8.00		25,904
Papa Gino's	3,000	10.00		30,000
Music Shop	2,500	8.00		20,000
Animal House	2,284	8.00		18,272
Dream Machine	2,105	8.00		16,840
G.N.C.	2,000	8.00		16,000
Dairy Queen	1,127	10.00		11,270
Vacuum Village	1,108	8.00		8,864
Comic Book Shop	875	10.00		8,750
TLC Lunch	610	12.00		7,320
Petals Plus	520	10.00		5,200
U.S. Post Office				1,200
Federal Express				100
Carousel				700
Valley Fudge				9,000
SUBTOTAL	203,628			1,300,199
Percentage Income			40,000	40,000
Assoc. Income			12,770	12,770
CAM Income			240,893	240,893

TENANT	SQUARE FEET	SQUARE FOOT MARKET RENT	INCOME	
Shop & Save	53,100	7.00		371,700
K Mart	40,318	4.00		161,272
JC Penney	34,364	5.00		171,820
Insurance Income			8,971	8,971
POTENTIAL GROSS INCOME				1,602,833

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Potential Gross Income (PGI)	\$1,602,833
Vacancies (6%)	(96,170)
Effective Gross Income (EGI)	\$1,506,663
Expenses:	(307,405)
CAM, Insurance, Management - \$277,272	
Reserves (2%) - \$30,133	
Net Operating Income (NOI)	\$1,199,258
CAP Rate	12.70%
Capitalization	\$9,443,000 (rounded)
Cost to replace roof	(350,000)
INDICATED VALUE	\$9,093,000

If the taxes have been paid, the amount paid on the value in excess of \$9,093,000 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 1995 and 1996. 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.

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.

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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

Michele E. LeBrun, Member

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Randall F. Cooper, Esq., Counsel for Arliss J. Hill et al, Taxpayer; Peter J. Hastings, Esq., Counsel for the Town of Conway; and Chairman, Selectmen of Conway.

Date: November 19, 1997

Valerie B. Lanigan, Clerk

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Arliss J. Hill, William A. Johnson and Carol J. Hennum

d/b/a Mountain Valley Mall Associates

v.

Town of Conway

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ORDER

This order relates to the "Town's" motion for rehearing and reconsideration (Town's Motion) and the "Taxpayers'" objection to motion for rehearing or in the alternative motion for rehearing on issue of market rents (Taxpayers' Motion). The board denies both the Town's Motion and the Taxpayers' Motion for the following reasons.

The Town's Motion argues the board erred in subtracting the entire cost of the roof replacement (\$350,000) from the market value found by the income approach. The Town argued that a more appropriate method would be to amortize the cost of the new roof over a 20 to 30 year term and include that cost as an expense.

First, the board finds the Town's argument is conceptually appropriate but the term for the amortization is too long. The board reviewed Marshall Valuation Service as to the life expectancy for a build-up type roof. Life

expectancy for such a roof approximates 15 to 20 years. Thus, the board concludes it would be reasonable to amortize the cost of such improvements over a 15 to 20 year term as opposed to the longer term proposed by the Town. Further, as discussed in the board's decision on page 4, the board did during its deliberations estimate the additional expense of borrowing \$350,000 at 10% interest rate for the term of the roof. The board did not, however, show its

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calculations in the decision. However, its estimate was that an annual principle and interest expense for a 15-year loan at 10% is \$45,133, which if capitalized by 12.7% (the capitalization rate used in the board's income approach) would reduce the market value estimate by approximately \$355,000 ($\$45,133 \div .127 = \$355,000$ rounded). Consequently, the board determined deducting the cost of the roof from the income value estimate was not inappropriate based on this alternative calculation.

The board denies the Taxpayers' Motion as the Motion does not present any fact or law the board misapprehended or overlooked in the decision. The board's explanation of its choice of rental rates is adequately described in the decision.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Randall F. Cooper, Esq., Counsel for Arliss J. Hill et al, Taxpayer; Peter J. Hastings, Esq., Counsel for the Town of Conway; and Chairman, Selectmen of Conway.

Date: January 7, 1998

Valerie B. Lanigan, Clerk

0006

Arliss J. Hill, et al

v.

Town of Conway

Docket No.: 15289-94PT

ORDER

This order addresses the issues of who represents the "Taxpayer" and whether the appeal will be heard, as scheduled, on October 10, 1997.

The representation issue was raised by three letters (copies attached):

- 1) July 21, 1997 appearance filed by Attorney Cooper;
- 2) September 15, 1997 letter from Robert C. Lucas (Lucas refuses to withdraw appearance without payment); and
- 3) October 2, 1997 letter from Attorney Cooper (Attorney Cooper says he is representative for the Taxpayer).

The board rules as follows.

- 1) Lucas' appearance is stricken. The Taxpayer can terminate representation at will. The compensation issue is outside the board's jurisdiction.
- 2) Attorney Cooper is the Taxpayer's representative. All future correspondence shall be copied to Attorney Cooper as representative for the

Taxpayer.

Because of the confusion regarding representation, the board, on its own motion, continues the October 10, 1997 hearing. The appeal is rescheduled to be heard on Tuesday, October 28, 1997 at 9:00 a.m. All information and instructions from the original hearing notice shall apply to this new date.

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Valerie B. Lanigan, Clerk

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Arliss J. Hill, Taxpayer; Robert C. Lucas, CPA; Randall F. Cooper, Esq., Counsel for the Taxpayer; Peter G. Hastings, Esq., Counsel for the Town; and Chairman, Board of Selectmen for the Town of Conway.

Date: October 9, 1997

Valerie B. Lanigan, Clerk

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