

**Driscoll Realty, Inc.**

**v.**

**City of Dover**

**Docket No.: 13165-92PT and 15672-94PT**

**DECISION**

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "City's" 1992 assessment of \$784,800 (land \$197,900; building \$586,900) and 1994 assessment of \$737,800 (land \$197,900; building \$539,900) on a 1.31-acre lot with a restaurant (the Property). In 1992, the Taxpayer also owned, but did not appeal, another lot in the City assessed at \$16,900. For the reasons stated below, the appeals for abatement are granted.

The Taxpayer has the burden of showing the assessments were disproportionately high or unlawful, resulting in the Taxpayer 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 Taxpayer carried its burden.

The Taxpayer argued the assessments were excessive because:

- (1) a December 1994 appraisal estimated the fair market value to be \$528,000;
- (2) the fair market value as of April 1992 is the same as 1994, \$528,000; and
- (3) utilization of the cost approach to value is a poor basis for determining value in a down economy.

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The City argued the assessments were proper because:

- (1) the Property is located in Dover's "miracle mile" which is a point of destination for local shoppers and a prime location;
- (2) three comparable restaurant sales support the value;
- (3) it is apparent through a review of comparable restaurant leases that the subject lease is below market rent when considering its location; and
- (4) there was no information in the market that was relevant to indicate the Property was overassessed.

#### Board's Rulings

Based on the evidence, we find the proper assessments to be the following:

1992 - \$679,000

1994 - \$665,000

These assessments are based on market value finding for both 1992 and 1994 of \$700,000 and the City's equalization ratios of 97% and 95% respectively.

In reviewing all the evidence submitted by the parties, two significant factors stood out. First, due to the Property's original construction and use as a grocery store, the Property's 15,000 square feet is significantly larger than the prevailing commercial structures in the neighborhood and the comparable properties submitted by the parties. This fact affected how the board analyzed and gave weight to the sales and rental information submitted. Second, the contributory value of the Property's full basement was overstated in the City's assessment and understated in the Taxpayer's appraisal.

The board approached its findings in two fashions: (1) estimating market value based on the market data submitted by the parties and (2) adjusting the depreciation on the property-record card to account for the functional obsolescence of the Property's basement and the building's size and configuration.

### **Market 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). Given the evidence in this appeal, we find the income approach is given the most weight followed by the market approach because of the income stream generated by the Property and the existence of comparable sales. The cost approach, which is essentially what the City used in calculating the assessment, is difficult to calculate accurately due to the age of the building and its incurable functional features such as size and basement. However, the board will briefly discuss the revision of the City's cost approach in the next section.

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### **Income Approach**

The board arrived at its own estimate by the income approach based on the

following assumptions:

- 1) market rent on a triple net basis of \$5.50 per square foot;
- 2) vacancy rate of 10%;
- 3) expenses estimated at 10% of the effective gross income; and
- 4) capitalization rate of 9.8% estimated by the mortgage equity technique.

### **Market Rent**

The board based its market rent of \$5.50 primarily on the rental information contained in the Taxpayer's appraisal. The board gave little weight to the City's rental information. While the City's rental information was for restaurants, the size and nature of the restaurants were generally significantly different than the Property. Consequently, the higher rental rates of \$10.00+ per square foot was determined not to be appropriate for a larger restaurant such as the Property. The board gave some weight to the Taxpayer's testimony as to the contract rent of the Property, but also reviewed the market rents submitted in the appraisal. The board found the market rent of \$6.10 for the Taxpayer's rental comparable #1 to be most comparable. However, due to the larger size of the Property (15,000 square feet versus 9,600 square feet), an adjustment to \$5.50 per square foot is appropriate.

### **Vacancy Rate**

The board agrees with the Taxpayer's appraiser's estimate of vacancy of 10%. While the board noted the City's testimony that vacancies were generally quite low in the area, the board finds 10% vacancy is reasonable for this size property considering the effort and time that could occur in locating a tenant to fully

occupy the space if a vacancy occurred.

### Expenses

Because the potential gross income is based on triple net rent, the only expenses to the owner would be for management, reserve for replacements and miscellaneous. The board's estimate of 10% expenses is supported by the Taxpayer's appraiser's estimate of expenses in the 7% to 8% range and the City's testimony on closing.

### Capitalization Rate

The board estimated a capitalization rate of 9.8% by the mortgage equity technique based on the following assumptions:

- . 75% loan to value ratio;
- . mortgage rate of 9%;
- . equity rate of 15%;
- . 10 year holding period;
- . 20 year mortgage term; and
- . annual appreciation over the holding period of 2%.

This capitalization rate does not include an effective tax rate because the board's estimated rental rate was on a triple net basis assuming taxes to be paid by the tenant. While the Taxpayer testified they had assumed

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payment of the real estate taxes despite it being the responsibility of the tenant, the market evidence submitted in the Taxpayer's appraisal indicates that most rents for this type of property are on a triple net basis with the tenant actually paying the taxes.

The board placed no weight on the Taxpayer's appraiser's estimate of a

direct capitalization rate from the market because little information was supplied about the sales and net operating income used to derive the rates.

Further, the board placed no weight on the Taxpayer's appraiser's estimate of a mortgage rate of 12.5% because it was based on a prime rate of 8.5% as of the original December, 1994 date of his appraisal. Based on general financial information, the prime rate in the 1992 through early 1994 time period was generally in the 6% range.

In summary, the board's estimate by the income approach is as follows:

Potential gross income - 15,000 square feet X \$5.50 = \$82,500	
Vacancy - 10%	<u>X.90</u>
Effective gross income	\$74,250
Expenses - 10%	<u>X.90</u>
Net operating income	\$66,825
Capitalization rate - .098	<u>÷.098</u>
Indicated value	<u>\$681,900</u>

### **Market Approach**

First, due to the uniqueness of the Property, none of the sales submitted by the parties are truly comparable without significant adjustment for size.

Nonetheless, given the sales submitted, the board considered the  
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Taxpayer's comparable building sales numbers 3, 5, 6 and 8 and the City's comparable sales 1 and 3. The board excluded the Taxpayer's other comparable sales as they were all bank related transactions which the board has consistently held 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 excluded the City's sale #2 because it was significantly different as to size, quality and style.

These six sales indicated a sales price per square foot range from \$33.63 to \$84.99. (The Taxpayer adjusted the sales for time and existence of basement. The City made no adjustments except for renovation costs of sale #3.) While it is not possible to document actual adjustments from the sales submitted, the board has adjusted the sales taking into account their location, size, configuration for rental and use. After such adjustments, the board finds the Property's value range to be \$45.00 to \$50.00 per square foot or \$675,000 to \$750,000. As stated earlier, this indicated value range by the market approach was given some weight by the board; however, the income approach was given greater weight.

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### Cost Approach

While the board placed little weight on this approach for the reasons stated earlier, we reviewed the property-assessment card and determined that the functional obsolescence for the oversized basement needed to be increased by 5%. Such an adjustment would have resulted in a revised assessment for 1994 of \$681,200 or an equalized market value of \$717,000. This revision closely comports with the board's market value findings by the income and market approaches.

Based on all the analyses above, the board concludes a market value for both years of \$700,000 equalized to assessments of \$679,000 for 1992 and \$665,000 for 1994.

If the taxes have been paid, the amount paid on the value in excess of \$679,000 for 1992 and \$665,000 for 1994 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 1993 and 1995. 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.

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

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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

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Paul B. Franklin, Member

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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 Driscoll Realty, Inc., Taxpayer; and Chairman, Board of Assessors, City of Dover.

Dated: July 19, 1996

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Valerie B. Lanigan, Clerk

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