

A & C Realty Trust

v.

Town of Londonderry

Docket No.: 15753-94PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1994 assessment of \$425,700 (land \$93,100; buildings \$332,600) on a 1.45-acre lot with a shopping center (the Property). The Taxpayer also owns, but did not appeal, an abutting lot assessed for \$8,700. For the reasons stated below, the appeal for abatement is denied.

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 failed to carry this burden.

The Taxpayer argued the assessment was excessive because:

- (1) the Property has environmental contamination which was discovered around

1990 and the EPA wants the owners to clean the contaminants by installing a filtering system at a cost of \$68,000 plus \$2,000 per month for filters and monitoring;

(2) the FDIC holds the first mortgage on the Property and has offered to release the note for \$165,000;

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(3) banks were typically not lending money on non-owner occupied commercial properties;

(4) comparable leases and comparable sales were analyzed and the income approach is the best method for determining market value; and

(5) the market value as of April 1994 was \$165,000.

The Town argued the assessment was proper because:

(1) the Taxpayer owns a piece of vacant land adjacent to the Property and the Town is unsure if the contaminants are on the subject Property or the adjacent lot;

(2) the contamination has not affected the rents received by the owner and the average rents received were \$8.67 square foot;

(3) the most likely buyer of this type of Property would be an investor and financing was available for commercial properties;

(4) comparable sales and comparable leases were analyzed; and

(5) the income approach supports a value of \$465,000.

Board's Rulings

Based on the evidence, the board finds the Taxpayer did not carry its burden in proving the assessment was disproportionate.

This appeal raises three general issues: 1) what approach or approaches

to value most appropriately estimates the Property's value; 2) what is a reasonable market value for the Property "as clean"; and 3) what effect, if any, does the contamination history of the Property have on the "as clean" value.

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, Page 3
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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 the most appropriate approach because the Property is comprised of rental commercial space and would most likely be purchased and sold based on its income producing potential. Both the Taxpayer's agent, Mr. Lutter, and the Town's appraiser, Mr. Haven, while considering some comparable sales, gave most weight to the income approach.

Estimate of Value "As Clean"

The Town's assessment of \$425,700 contained no adjustment for any contamination issues. Therefore, the assessed value provides an indicated

market value "as clean" of \$438,866 ($\$425,700 \div .97$)¹.

Mr. Lutter's calculation by the income approach provides an indicated market value "as clean" of \$361,850. (This value is estimated by removing Mr. Lutter's \$24,000 expense for the filtering system to remove contaminants from the groundwater). Mr. Haven's report estimated a market value by the income approach of \$465,000. The board finds both parties' income-approach estimates to assume certain facts in favor of their clients.

The board has recalculated a value by the income approach. A short explanation of the board's assumptions drawn from the parties' analyses and the resulting calculations follow. The board reviewed all the rental information submitted by the parties and the rents of the subject Property itself. Based on this review and adjusting for common area charges and taxes, the board concludes that \$7.50 per square foot is an appropriate estimate of "triple net rent" for the Property. Mr. Lutter's \$7.00 per square foot is on the low side of the rents that were submitted while Mr. Haven's

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\$8.00 per square foot is higher than what most rents on a net basis were being signed for. The board finds a vacancy rate of 10% to be reasonable due to the Property's good location and occupancy history. The issue of high collection loss can be minimized by proper management. No evidence was submitted as to any unique issues affecting the Property's occupancy, including the contamination issues that will be discussed further in the next section. The parties' expense estimates for management, reserve for replacement and

¹ The Department of Revenue Administration determined that Londonderry's 1994 equalization ratio was 97%.

miscellaneous varied insignificantly, and the board has adopted those estimated by the Taxpayer as reasonable. The board finds an 11% to 11.5% cap rate is more reasonable than the Taxpayer's estimate of a 12% rate. The board finds some of the Taxpayer's calculations in its advanced mortgage-equity calculation to be questionable, such as the balloon payment provision and the amortization of soft costs. The board disagrees with Mr. Lutter's contention that conventional financing was not available for such properties. Mr. Haven stated he worked for banks during the time and financing was available. Recalculating a rate minus those assumptions, the board arrived at a rate of approximately 11% to 11.5%. This range is supported by the Town's estimate of the cap rate of 11%.

Based on these assumptions, the board has recalculated an income-approach estimate as follows:

Gross Potential Income	8,200 sf	x	\$7.50	=	\$ 61,500
Vacancy	@ 10%				<u>x .9</u>
Effective Gross Income					\$ 55,350

Expenses

Management	5% EGI	\$	2,768
Reserve for Replacement	3% EGI	\$	1,660
Leasing, Commission and Uncollected Expenses			
During Vacancy	3% EGI	<u>\$</u>	<u>1,660</u>
Total Expenses		\$	6,088

Net Operating Income		\$	49,262
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Capitalization Rate 11%	\$ 49,262 ÷ .11	=	\$447,836
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11.5%	\$ 49,262 ÷ .115	=	\$428,365
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Thus, this recalculated income approach indicates a market value range

"as clean" of approximately \$428,000 to \$448,000 and supports the assessment.

Contamination Issues

First, the board must note that it placed no weight on Mr. Lutter's evidence relative to any contamination effect on market value. In the appeal document initially submitted to the board, Mr. Lutter estimated that remediation costs were in the \$100,000 to \$125,000 range but submitted no evidence or documentation of such costs. At the hearing, Mr. Lutter stated that contamination was discovered in 1990 and that "[t]he EPA wants the owners to install a carbon polishing system. ... this system would cost \$68,000 to install and costs \$2,000 per month for filters and monitoring." Mr. Lutter had the wrong year, wrong agency and provided minimal documentation of these figures or the nature or extent of the contamination. In the future, Mr. Lutter, if he wishes to prevail in such cases, needs to document his claims of factors affecting market value and not simply state they exist and rely on conversations with his client. He should supply written documentation supporting his claims and/or have his client or any other material witness present testimony and be available for questions at the hearing.

However, because of the direction provided in Appeal of Sokolow, 137 N.H. 642 (1993) (the board's appraiser should be involved in an appeal if evidence of disproportionality is presented) and in Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1975) (in arriving at an assessment, the Town must look at all relevant factors.), the board, subsequent to the hearing, requested its appraiser (RSA 71-B:14) to inspect the public files at the New Hampshire Department of Environmental Services (DES) to determine what public knowledge existed as of April 1, 1994 relative to contamination on the Property. Mr. Bartlett reviewed the DES files, made copies of certain documents and filed a report with the board. A copy was sent to the parties

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with adequate time provided to respond to his report and documents. Neither party responded and Mr. Bartlett's report is made part of the record pursuant to RSA 541-A:31 VI (h).

Based on the evidence contained in the DES files, the board concludes the contamination issues had largely been remediated as of April 1, 1994 and that DES was simply requiring continued monitoring of the existing wells on the Property until the level of contaminants met DES water quality standards.

Because Mr. Lutter did not submit any credible evidence of the contamination affecting market value at the hearing or respond to information contained in Mr. Bartlett's report, the board finds Mr. Lutter did not fulfill, on behalf of the Taxpayer, the burden of proof to show that contamination had an affect on the Property's market value.

Based on the evidence contained in the DES files, a summary of the board's findings of the contamination issue follows.

The initial contamination was from a former dry cleaning tenant apparently disposing solvents on the ground behind the building in the mid-1970's. After the contamination was discovered in 1985, the Taxpayer hired an engineering firm which performed several environmental assessments and investigations on the site including the drilling of numerous groundwater and bedrock monitoring wells and 23 soil borings to determine the extent of both the soil and water contamination. The sampling identified various chlorinated volatile organic compounds (VOCs) including most prominently, tetrachloroethylene and several of its breakdown products including

trichloroethylene, 1, 2-dichloroethylene (CDE) and vinyl chloride (VC). Based on the soil borings, the Taxpayer in 1988 had 130 cubic yards of the most contaminated soil removed and disposed of.

Sampling of the groundwater determined all the VOCs far exceeded the maximum concentrations allowed by DES regulations. To address the groundwater contamination, DES through 1990 stated several times that groundwater remediation would be required, entailing a pump-and-treat system

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with the installation of "air stripper" and "carbon polishing" equipment to remove the VOCs from the groundwater. After a meeting in January 1990 of the Taxpayer, its attorney, its engineering firm and representatives of DES to discuss the direction of remediation, DES stated remediation should begin shortly or it would be necessary to refer the case to the attorney general's office for enforcement action. In October 1990, the Taxpayer's attorney stated his client was financially unable to go any further with remediation plans having spent to date over \$287,000 in engineering work, monitoring wells, soil removal and associated fees and costs. No further evidence of remediation or legal action was contained in the DES files submitted in Mr. Bartlett's report.

However, in 1992 a preliminary assessment performed by DES in conjunction with New Hampshire Division of Public Health Services discussed the nature of the contamination, the potential for surface water contamination and the proximity of surrounding water supply wells.

In July of 1993, additional samples and testing of the groundwater indicated a decrease in the concentration of the VOCs as confirmed by the September 13, 1994 letter from DES to the Taxpayer. Significantly, DES stated

in the letter the decrease in contamination was most likely due to "continued contaminant attenuation by dispersion, dilution, volatilization and/or biodegradation. Using the present criteria of ENV-Ws 410, Groundwater Protection Rules (effective 2/91), DES has concluded the existing nature and extent of groundwater contamination at this site does not warrant implementation of a pump-and-treat remedy at this time." The only remaining issue at the site was the establishment of a Groundwater Management Permit which would entail the continuation of the monitoring of groundwater quality to the point that the contaminants met DES' Ambient Groundwater Quality Standards.

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To assist it in determining what possible affect on value the above summarized findings may have, the board reviewed several publications and articles relative to contamination and its effect on value, including the following: Standard on the Valuation of Property Affected by Environmental Contamination, International Association of Assessing Officers, August 1992; 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 Journal 375 (October 1996). It is clear from these publications that valuing contaminated property is not a simple calculation nor is it consistent from case to case. Many factors specific to each

contaminated property must be considered including 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 of the Property's use and the party liable for any ultimate clean up.

In this case, the board finds that while earlier in the 1980s and early 1990s the Property had contamination that warranted remediation, as of 1994, the contamination issue was minimal enough for DES only to require continuing monitoring of the groundwater until the levels of VOCs met DES' standards. This reduction in the groundwater contaminants was the result of the removal of the worst contaminated soils in 1989 and the continued dilution, volatilization and diffusion of the remaining contaminants. Further, the Property and affected adjoining properties all have been connected to public water supply alleviating any concern of on-site water. As far as the use of the Property, no evidence was submitted that the rents and/or vacancies have been impacted by the contamination.

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Some evidence was submitted relative to the possible effect of contamination on the transferability of the Property. Mr. Lutter testified that the owners were unable or unwilling to accept the FDIC's offer of \$165,000 (and later of \$145,000) for the owners to acquire the outstanding note held on the Property by FDIC. However, no evidence was submitted to whether FDIC's desire to relinquish the Property was related to the contamination issues or to other financial or portfolio liquidation issues on FDIC's part. Mr. Lutter stated FDIC's offer of \$165,000 was based on its

appraisals and environmental reports but they were not available at the hearing. Further, no evidence was submitted as to exactly why the owners were unwilling or unable to finance the acquisition of the outstanding note from FDIC except for the statement of Mr. Lutter that the previous owner held a second mortgage on the Property and was not able to be located due to the outstanding contamination liability of the Property. While it is conceivable that a difficulty in obtaining a discharge of a second mortgage could affect the transferability of a property, in this case, Mr. Lutter presented no evidence as to any of the facts relating to the second mortgage.

Specifically, no evidence was submitted as to the amount of the mortgage, whether payments were being made by the current owner to the previous owner and what Mr. Lutter means by the statement "he could not be located". Again, Mr. Lutter raises an issue that conceivably could affect market value but provides no documentation of the details of his argument or how it actually affects market value. Mr. Lutter also argued the tax collector stated the Town would not accept title by tax deed to any property with contamination issues. Such a general statement is of little merit because it is without any specifics relative to the Property. Further, the board notes that RSA 80:19-a provides towns with the authority to conduct environmental site assessments on any property prior to proceeding with a tax lien or a tax sale proceeding and RSA 80:38 allows towns to not accept a deed on a property that would subject the town to a potential environmental liability.

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In summary, the board finds Mr. Lutter's gathering of evidence relative to contamination was woefully inadequate. In fact, much of his testimony was incorrect based on the public documents at DES. The Property has had

significant remediation and the remaining level of contamination is such that DES only requires monitoring of the groundwater. The Property's use has been unaffected. Further, no evidence was submitted as to any market effect of the remaining monitoring requirements by DES. Therefore, the board finds no contamination adjustment to the "as clean" value is warranted.

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

Michele E. LeBrun, Member

Douglas S. Ricard, Member

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Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Mark Lutter, Agent for A & C Realty Trust, Taxpayer; and Chairman, Selectmen of Londonderry.

Date: March 18, 1997

Valerie B. Lanigan, Clerk

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