

First NH Bank

v.

Town of Milford

Docket No.: 16101-95PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1995 assessment of \$1,013,300 (land \$114,600; buildings \$898,799) on a .28-acre lot with two bank buildings (the Property). The Taxpayer also owns, but did not appeal, another property in the Town with a \$555,000 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) a May 1996 appraisal (Cowell appraisal) of the Property, performed for

purposes other than tax assessment review, estimated the market value to be \$360,000; and

(2) a sale of a bank at 488 Central Avenue, Dover that occurred subsequent to the appraisal and did not involve FDIC supports the \$360,000 value conclusion; and

Page 2
First NH Bank v. Town of Milford
Docket No.: 16101-95PT

(3) the property is an older downtown bank building with more square footage than needed for today's banking standards, inefficient layout, no drive-up window and limited parking.

The Town argued the assessment was proper because:

(1) the Taxpayer has primarily relied on FDIC transfers which are not recognized as arm's-length transactions and, therefore, are not considered to be accurate indicators of market value;

(2) the Town submitted an "Assessor's Commentary" which included some recent sales and lease data that supports a higher assessment; and

(3) the Town has followed the guidelines established during the 1988 town-wide revaluation in determining the current assessment.

The parties stipulated the Town's 1995 general level of assessment to be 138% as determined by the Department of Revenue Administration.

Board's Rulings

Based on the evidence, the board finds the proper assessment to be \$600,300 based on a market value finding of \$435,000 and the Town's 1995 equalization ratio of 138% ($435,000 \times 1.38$).

First, the board finds no evidence was submitted as to the basis of the assessment other than the submission of the assessment-record card. The board

notes the last town-wide reassessment was in 1988 and the appealed assessment was originally determined in 1988 with no apparent updates or revisions. The Town's defense of the assessment was the submission of Municipality Exhibit A (Assessors Commentary) which contained an indicated market value of \$1,457,600 and an indicated assessed value of \$2,011,400. The board gives no weight to the Assessor's Commentary because its market value estimates were derived from sales, rental and cost data that were not adjusted for size, location, quality of construction or accrued depreciation. For a town to submit as defense of an assessment a valuation conclusion of twice what the assessment is, it needs to provide an excellent market analysis to support such a claim. In this case, we find that the brief analysis lacked any adjustments of market data

Page 3
First NH Bank v. Town of Milford
Docket No.: 16101-95PT

that was dissimilar in many ways to the Property and, therefore, is given no weight. (The board's comment of the Town's defense is mindful of the Taxpayer's burden of proof. However, the Taxpayer submitted a reasonable appraisal causing the burden of persuasion to move to the Town to show how the original assessment was still proper. The Town's defense failed to do that for the reasons already stated).

Turning our attention to the Taxpayer's evidence, the board finds the market data and analysis contained in the Cowall appraisal to be reasonable with several exceptions discussed below. The Cowall appraisal arrived at a market value finding of \$360,000 based on a correlation of the income approach (\$350,000) and the sales comparison approach (\$370,000).

Sales Approach

The board agrees with the Town's concern that all the sales used by Mr.

Cowall in his sales comparison approach had the FDIC as grantor. While we understand Mr. Cowall's contention that during this time period the only sellers of bank properties were either FDIC or banks, the board has consistently found that FDIC is not the typically motivated owner of property and, thus, the sales prices are suspect. It appears, however, in this case, that such concern may not be as warranted as it is for sales of non-bank building properties. As submitted in Taxpayer Exhibit 2, the sale of a bank building at 488 Central Avenue, Dover from the bank to an investor generally supports the sales prices of the FDIC sales. Nonetheless, to assure that there is no FDIC influence to a value conclusion, the board places less weight on the sales comparison indicated value and more weight on the income approach. (The board does, however, give some weight and consideration to the 488 Central Avenue, Dover as support of the value estimated by the income approach.)

Page 4
First NH Bank v. Town of Milford
Docket No.: 16101-95PT

Income Approach

The board finds the Cowall appraisal's income approach to be reasonable with two exceptions. First, on a fairly minor point, Mr. Cowall agreed the actual Chamber of Commerce rent was slightly below market, and, consequently, if market rent was used instead, the net operating income would increase by \$700. Second, the board finds it more appropriate to account for real estate taxes as a part of a overall capitalization rate rather than including taxes as an expense. Using actual taxes as an expense will inappropriately drive

down the resulting indicated value in the income approach if the market value finding is less than the appealed equalized assessed value.

The board finds Mr. Cowall's rental assumptions and 14% capitalization rate reasonable and supported. The inherent functional problems of size, layout, parking, no drive-up window, etc. are properly reflected in his choice of rental and capitalization rates.

Consequently, the board has revised Mr. Cowall's income approach as

summarized below.

Cowall Net Operating Income	\$48,566
Add'l Income for Chamber of Commerce Space at Market Rent	\$ 700
Real Estate Taxes	<u>\$26,831</u>
Total Net Operating Income	\$76,097
Cowall Capitalization Rate	14%
Effective Tax Rate	<u>3.513%</u>
Overall Capitalization Rate	17.513%
Capitalized Value (\$76,097 ÷ .17513)	\$434,517
	\$435,000 (rounded)

Costs

At the close of the hearing, the Taxpayer's representative, Mr. Gary Stern, requested costs be assessed against the Town because the Town had not attempted to settle the case and had defended it with unreasonable valuation conclusions.

Page 5
First NH Bank v. Town of Milford
Docket No.: 16101-95PT

The board's authority to assess costs is contained in two statutes:

(1) RSA 76:17-b, which states, "(w)henever, after taxes have been paid, the board of tax and land appeals grants an abatement of taxes because of an

incorrect tax assessment due to a clerical error, or a plain and clear error of fact, and not of interpretation, as determined by the board of tax and land appeals, the person receiving the abatement shall be reimbursed by the city or town treasurer for the filing fee paid under RSA 76:16-a, I."; and

(2) RSA 71-B:9, in part, which states, "(c)osts may be taxed as in the superior court."

Generally, the courts and this board do not have the authority to award costs against a municipality in a tax abatement case unless there is a specific statute authorizing such an assessment of costs. See Tau Chapter of Alpha XI Delta Fraternity v. Town of Durham, 112 N.H. 233, 235 (1978). RSA 76:17-b does give the board specific authority to have the filing fee reimbursed by the Town if the tax assessment was due to a "clerical error or a plain and clear error of fact and not of interpretation as determined by the board of tax and land appeals ***."

In this case, the board finds no clerical error or plain, clear error of fact to justify a refund of the filing fee.

Under the board's RSA 71-B:9 authority to assess costs, the court has allowed the assessment of attorney's fees against the state or one of its political subdivisions only where bad faith is found in the process of securing "a clearly defined and established right". Harkeem v. Adams et al, 117 N.H. 687, 691 (1977). The court further states that bad faith is shown where the party in question has acted vexatiously, wantonly, obdurately or obstinately. The board finds the Town's actions in this case did not warrant bad faith.

While the board has found that the Town's defense in this case is unreasonable, the Town's argument that the FDIC sales are questionable is not unreasonable. The board finds no bad faith on the part of the Town to justify awarding costs under 71-B:9.

Reassessment

At the conclusion of the hearing, the board questioned Mr. David McMullen, Town Assessor, as to the Town's plans for a reassessment. The board had concerns of the lack of adequate defense of the Town's assessment and the disparity of the Town's and Taxpayer's market value conclusions. Mr. McMullen responded that he and the board of selectmen had proposed funding a reassessment, but the budget committee had cut the funding for this proposal.

Consequently, the concern raised in this case for the possible need of a reassessment in the Town of Milford is addressed in a separate order, Docket No.: 17330-97RA, a copy of which is attached.

If the taxes have been paid for the tax year 1995, the amount paid on the value in excess of \$600,300 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 Town has undergone a general reassessment, the Town shall also refund any overpayment for 1996 and 1997. 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
Page 7

First NH Bank v. Town of Milford
Docket No.: 16101-95PT

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

Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Gary Stern, Agent for First NH Bank, Taxpayer; and Chairman, Selectmen of Milford.

Date: January 7, 1998

Valerie B. Lanigan, Clerk