

Market Basket, Inc.

v.

Town of Salem

Docket No.: 16112-95PT

**DECISION**

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1995 assessment of \$3,526,700 (land \$527,100; buildings \$2,999,600) on a 12.1-acre lot with a 105,810 square-foot building (the Lechmere Building) and a separate 16,800 square-foot building (the Strip Center) (the Lechmere Building, the Strip Center and the land shall be collectively called "the Property.") For the reasons stated below, the appeal for abatement is granted, using the Town's appraisal as the basis for the abatement.

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. While the Taxpayer failed to carry this burden based on its evidence, the board finds the

assessment should be reduced to \$3,355,700 based on the Town's appraised value of \$7,295,000 and the 1995 equalization ratio of 46% ( $\$7,295,000 \times .46$ ).

**Parties' Arguments**

The Taxpayer argued the assessment was excessive based on an April 1, 1995 appraisal by Mr. Donald Watson (Watson Appraisal), which estimated a value of \$5,100,000. The appraisal was admitted, and the board refers readers

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to the appraisal for more detail on the appraisal. The Taxpayer argued the \$5,100,000 estimate was less than the \$7,700,000 (rounded) equalized value.

To support the assessment and refute the Taxpayer's argument, the Town presented the assessor, Mr. Pelletier, who discussed the market in Salem and who critiqued the Taxpayer's appraisal. The Town also presented an April 1, 1995 appraisal by Mr. Donald Spring (Spring Appraisal), which estimated a value of \$7,295,000. The appraisal was admitted, and the board refers readers to the appraisal for more detail on the appraisal. The Town argued that while the appraisal was less than the equalized assessment, the appraisal is within a few percentage points of the equalized value, and thus, the assessment should be sustained as being within a tight range of the appraised value.

Both parties relied most heavily on the income approach even though the parties also presented limited calculations using other value approaches and analyses.

**Board's Rulings**

In brief, the board finds shortcomings in the assumptions and/or methodology of both the sales and income approach calculations submitted by the Taxpayer's representative, Mr. Mitchell W. Wilson (Wilson Analysis) and

the Watson Appraisal. However, the Spring Appraisal submitted by the Town in support of the assessment does indicate a lower market value than that indicated by the equalized assessment. In certain instances, there may be merit to the Town's argument that an appraisal within several percentages of the equalized assessment supports the assessment rather than warranting an abatement. However, in this case, given the length of time since the Town's last reassessment (greater than 15 years) and the Town's 1995 equalization ratio of 46% and the associated coefficient of dispersion of 21.25% (source: Department of Revenue Administration), the board has a low level of confidence that the market value indicated by the equalized assessment is necessarily accurate and that the assessment necessarily reflects the Property's

proportionate share of taxes. See Appeal of City of Nashua, 138 N.H. 261, 266  
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(1994) (municipalities have a preexisting obligation to establish proportional assessments). The Spring Appraisal (which the board finds for reasons detailed later in the decision to be more credible evidence than that submitted by the Taxpayer) is a fresh look at market value by the Town. Consequently, the board finds it to be the most accurate basis for the Taxpayer's assessment.

The board's findings will focus primarily on the parties' income approach estimates because: 1) the parties agreed the income approach was the most applicable approach; and 2) the Property is an income producing (rental) property and the Property's income stream is the primary motivation for owning or buying the Property.

#### Wilson Analysis

The Wilson Analysis tendered a value of \$6,386,160. The board was unable to place any significant weight on this value conclusion for several

reasons. First, only the Lechmere Building was analyzed and valued based on market data. The Strip Center and land were not analyzed based on market data. Rather, Mr. Wilson relied on the assessed value or a pro rata share of it. The board understands the logic for this was that Mr. Wilson was representing only the tenant, Lechmere, on appeal. However, the supreme court has held the board must consider a taxpayer's entire estate to determine if an abatement is warranted. See Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985). The board finds Mr. Wilson's percentage allocations to the land value and the acceptance of the Strip Center assessed value does not adequately address the market value of those components of the Property.

Second, Mr. Wilson did value the Lechmere Building by both the sales and the income approach, relying most heavily on the income approach. The board gives no weight to Mr. Wilson's sales approach for two reasons. First, the 37 sales reviewed are of department stores from all across the United States with none in New Hampshire. Second, Mr. Wilson makes an overall 33% adjustment to the average sales price for differences in time, property size, location and condition with no further documentation or discussion of this adjustment. It

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is difficult to place much weight on such a wide geographic area of sales and such a gross adjustment. In his income approach, Mr. Wilson derives market rent from numerous Lechmere, J.C. Penney, Filenes and Montgomery Ward leases throughout the Northeast. While some information is contained in the list of rents, many of the details of the rents were undeterminable. Further, these rents pertain to only similar types of users of such space and the list does not include leases for other users of large spaces such as grocery stores. As

a consequence, the board was unable to conclude that the rent used in his analysis was appropriate for the Property.

#### Watson's Appraisal

While performing both an income and sales approach, Mr. Watson placed the most reliance on the income approach. In a general fashion the board has concerns about Mr. Watson's inability to answer some questions during the hearing about the terms of the comparables' rents and his calculation of a capitalization rate. This lack of detailed knowledge of some of the important components of the income approach raises a question of the credibility of the Watson Appraisal's value conclusion.

However, more importantly, the greatest difference between the Watson and the Spring income approaches is the determination of market rent, and it is there where the greatest value shortcoming occurs in the Watson Appraisal.

First, the five comparables used by Mr. Watson are all outside of the Salem market (Concord, Nashua and Keene) with no adjustment made for location.

Based largely on the testimony of Mr. Pelletier, the board finds some locational adjustments would be warranted. The Salem area generally withstood the real estate market decline of the late 1980's and early 1990's whereas most other areas of the state declined in varying degrees during that period.

Also, the Property's location adjacent to a major exit on Interstate 93 close to the Massachusetts border is an excellent and generally superior location compared to most of the comparables. Further, under cross examination, a

number of the leases were shown either to have aspects that would generally

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disqualify them as arm's-length or for which adjustments would be warranted, including the following factors: 1) a relationship between the landlord and

the tenant (comparable A1 and possibly comparable A4); 2) a sublease from an original tenant under some financial duress (comparable A3 and comparable A5); 3) a rental rate based on an assumption of an older term lease; 4) the terms of the leases; and 5) the existence of any percentage leases (unknown in most instances).

While not contained in his appraisal, Mr. Watson testified that a common rental size in this market was 20,000 to 30,000 square feet called a "power tenant." Mr. Watson did not assume the highest and best use of conversion of the Lechmere space to accommodate such a power tenant size rental unit. However, such testimony raises a question whether indeed higher rents could be achieved by such a sized rental unit (see Spring appraisal, page 33) that would more than offset the renovation costs. While such rents would likely not be as high as those in the Rockingham Mall due to its superior location, it is likely they would be higher than the \$7.00 per square foot assigned for Lechmere space in the Spring appraisal because of their smaller size. Such possibility was not explored by the Taxpayer, and thus, it raises another question as to whether the Taxpayer has carried its burden of proof.

Lastly, the board also finds the divergence of the market value conclusions of the Taxpayer's experts (Mr. Wilson and Mr. Watson) raises a question as to the credibility of their basic assumptions. Again, the largest difference between Mr. Wilson's approximately \$6,400,000 market value estimate and Mr. Watson's \$5,100,000 is their initial determinations of market rent. Mr. Wilson estimated a market rent of \$5.88 per square foot (including the percentage rent) while Mr. Watson estimated a \$4.50 market rent on the larger building.

Spring Appraisal

Alone, the Taxpayer's evidence (Wilson Analysis and the Watson Appraisal) does not carry the Taxpayer's burden. However, as stated earlier, the board finds the general assumptions in the Spring Appraisal to be credible and supported and its value conclusion supports a minor abatement. The Spring Appraisal contains all three approaches to value; however, clearly the detail of the income approach and the reconciliation to the three approaches indicates that the income approach was given the most weight. Again, the most significant point of divergence between the Spring and the Watson income approaches was the choice of market rent. Mr. Spring's choice of \$7.00 per square foot is reasonable based on the rents analyzed in his report. The board recognizes that the Property is not as desirable as space in the Rockingham Mall. However, the Property is in an excellent location and certainly would demand higher rents than the Gilford and Claremont spaces that were at the low end of the rents analyzed in the Spring appraisal. Further, the board finds Mr. Spring was generally more knowledgeable about the market area, his comparable leases and his methodology and calculations contained in the income approach. Mr. Spring was asked several questions by the board about these issues, and Mr. Spring provided adequate answers.

Findings of Fact and Rulings of Law

The board responds to the parties requests for findings of fact and rulings of law as follows. 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;

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- d. the request was irrelevant;
- e. the request is specifically addressed in the decision; or
- f. in this case, the specific income approach request is

inconsequential given the board's predominant finding that the Taxpayer's market rent for the Lechmere space was inappropriately low.

Town

- 1. Granted.
- 2. Granted.
- 3. Granted.
- 4. Granted.
- 5. Granted.
- 6. Granted.
- 7. Granted.
- 8. Granted.
- 9. Granted.
- 10. Granted.
- 11. Granted with correction (corrected from \$3,100,495 to \$3,001,495).
- 12. Granted.

13. Granted.
  14. Granted.
  15. Granted.
  16. Granted.
  17. Neither granted nor denied.
  18. Neither granted nor denied.
  19. Granted.
  20. Granted.
  21. Granted.
  22. Granted.
  23. Granted.
  24. Granted.
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25. Granted.
  26. Neither granted nor denied.
  27. Granted.
  28. Granted.
  29. Granted.
  30. Granted without ruling on how much of the \$1,800,000 should be amortized.
  31. Granted without ruling on how much of the \$1,800,000 should be amortized.
  32. Granted.
  33. Neither granted nor denied.
  34. Granted.
  35. Granted.
  36. Neither granted nor denied.
  37. Neither granted nor denied.

38. Neither granted nor denied.
  39. Neither granted nor denied.
  40. Neither granted nor denied.
  41. Neither granted nor denied.
  42. Neither granted nor denied.
  43. Neither granted nor denied.
  44. Neither granted nor denied.
  45. Granted.
  46. Neither granted nor denied.
  47. Neither granted nor denied.
  48. Neither granted nor denied.
  49. Neither granted nor denied.
  50. Granted.
  51. Granted.
  52. Granted, if the market indicates adjustments are warranted.
  53. Neither granted nor denied.
  54. Granted.
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55. Granted.
56. Granted.
57. Neither granted nor denied.
58. Neither granted nor denied.
59. Granted.

Taxpayer

1. Granted.
2. Granted.

3. Granted.
4. Granted.
5. Neither granted nor denied.
6. Granted.
7. Granted.
8. Granted.
9. Neither granted nor denied.
10. Granted.
11. Neither granted nor denied.
12. Neither granted nor denied.
13. Neither granted nor denied.
14. Neither granted nor denied.
15. Neither granted nor denied.
16. Neither granted nor denied.
17. Neither granted nor denied.
18. Denied.
19. Granted.
20. Granted.
21. Denied.
22. Denied.
23. Neither granted nor denied.

24. Denied.

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If the taxes have been paid for the tax year 1995, the amount paid on the value in excess of \$3,355,700 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 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.

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Ignatius MacLellan, Esq., Member

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Douglas S. Ricard, Member

**Certification**

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Morgan A. Hollis, Esq., Counsel for Market Basket, Inc., Taxpayer; Barbara F. Loughman, Esq., counsel for the Town; and Chairman, Selectmen of Salem.

Date: September 8, 1998

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Valerie B. Lanigan, Clerk

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**Market Basket Inc.**

**v.**

**Town of Salem**

**Docket No.: 16112-95PT**

**ORDER**

This order relates to the "Taxpayer's" September 15, 1997 motion to strike conditional default and the "Town's" September 18, 1997 objection to the motion. On September 29, 1997 the board held a telephone conference with the parties to attempt to resolve the issues raised in the motion and the objection.

The board orders as follows.

1) The Taxpayer shall submit to the Town within 10 days of the date of this order copies of any leasing agreements or rental contracts presently in effect for all the tenants of the appealed property. To address the Taxpayer's concern that the leases may contain proprietary information, the board orders the Town to use the information in these leases only for this appeal and to either keep them sealed and unavailable for public viewing and/or return them once the appeal timelines for this case have expired. Further, if such documents are presented as evidence before the board at a

hearing, the board will provide similar protection of the documents.

2) The board declines to order the Taxpayer to submit a copy of the contract between Market Basket Inc. and Ad Valorem Tax, Inc. relative to its compensation and scope of authority. However, at the time prehearing statements are filed with the board, the Taxpayer shall identify all witnesses it will call at the hearing. At the hearing, the Town will be able to examine the witnesses as to their background and impartiality.

Lastly, as stated during the telephone conference, the Taxpayer shall return the structuring stipulations sent to it on August 28, 1997, identifying the time period for finalizing discovery and the time estimated before a prehearing or hearing can be scheduled.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Michele E. LeBrun, Member

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Douglas S. Ricard, Member

CERTIFICATION

I hereby certify that a copy of the foregoing order has been mailed this date, postage prepaid, to Morgan A. Hollis, Esq., counsel for the Taxpayer; and Norman Pelletier, Chief Assessor for the Town of Salem.

Dated: October 2, 1997

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Valerie B. Lanigan, Clerk

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