

Pennichuck Square Ltd. Partnership

v.

Town of Merrimack

Docket No.: 16159-95PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1995 assessment of \$2,036,600 (land \$431,800; buildings \$1,604,800) on a 4.97-acre lot with four commercial/retail buildings identified as Map 2B, Lot 360 (the Property). While the Taxpayer did not appeal the \$36,800 assessment of the adjoining lot (Map 2B, Lot 359), the parties stipulated the two lots and assessments should be considered together in determining whether the appealed lot is properly assessed. Lot 359 consists of a .96-acre lot improved with an access drive to the northwesterly portion of Lot 360. For the reasons stated below, the appeal for abatement is denied.

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 failed to carry this burden.

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The parties stipulated the Department of Revenue Administration's 1995 equalized ratio of 97% is a reasonable estimate of the 1995 level of assessment within the Town. Further, they stipulated the net leasable area of the Property is 46,144 square feet exclusive of the basement area or 49,700 square feet inclusive of the basement area.

The Taxpayer argued the assessments were excessive because:

- (1) retail properties in the Property's area had high vacancy rates;
- (2) rents become depressed traveling west along Route 101A away from the interstate highway system;
- (3) the Property needed substantial updating as all of the HVAC units needed replacing;
- (4) visibility of some sections of the Property was limited;
- (5) portions of the Property were in two different zoning districts; and
- (6) an appraisal estimated the combined market value of the Property and Lot 359 to be \$1,600,000 on April 1, 1995.

The Town had several exhibits marked but presented no direct testimony. At the conclusion of the Taxpayer's presentation, the Town entered a motion to dismiss the appeal based on the Taxpayer's failure to carry its burden of proof. The board considered the motion to dismiss as a motion to deny the

appeal, which was granted, and the Town rested its case without any direct testimony.

Board's Rulings

As the board ruled verbally at the hearing following the conclusion of the Taxpayer's presentation, it finds the Taxpayer failed to carry its burden of proof based on the evidence it submitted.

The board finds the choice of comparables and analysis in the Taxpayer's appraisal flawed to the extent no weight can be given its value conclusion. Further, but of lesser importance, the board gives some weight to the 1993 appeal (Docket No.: 14423-93PT) settlement at \$2,200,000. The board will address both these areas in detail.

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Taxpayer's Appraisal

The appraisal estimated a market value for the Property at \$1,600,000 based on a sales comparison approach estimate of \$1,700,000 and an income approach estimate of \$1,550,000.

Sales Comparison Approach

The board finds the sales comparison approach value conclusion not convincing because the comparable sales were largely not comparable due to location resulting in adjustments of significant magnitude (25% to 50% adjustments). Further, the location adjustments were derived from a comparison of the appraiser's estimate of the Property's market rents (\$6.00 per square foot) and the actual rents of the comparables. Consequently, if either are incorrect, the adjustments are incorrect. As will be discussed in the following income approach section, the board finds the \$6.00 per square

foot estimate of market rent was improperly estimated. Further, the comparisons are between the estimate of the Property market rents and actual rents of the comparables. No comparison was made between the actuals of the Property and the actuals of the comparables; nor was any determination made by the appraiser as to whether the stated rents of the comparables were at market levels.

Income Approach

The board finds the Taxpayer's income approach inaccurate and flawed for several reasons. The primary reason is that the appraiser's estimates of \$6.00 market rent for retail space and \$5.00 for office space were derived from less visible properties in inferior locations without any adjustments being made. Upon cross examination, it was apparent that five of the seven retail rental comparables were west of the Property. Testimony was that properties west of the subject (nearer Milford) generally commanded lower rents than properties to the east (towards Nashua). No adjustments were made for these inferior locations. Further, many of the comparable rents were derived from units in complexes that were either perpendicular to the road,

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and thus, had less visibility or from interior or rear units with poor visibility. These rents, if at all comparable to the property, are only comparable to the "hinge" units (those in the corner of the U-shaped configuration of the Property) rather than the majority of the units that have better visibility from Route 101A. Lastly, several of the rents were not comparable for a number of reasons (e.g., asking rents for vacant Hannaford Brothers space, developments at locations with poor access and no

signalization; or developments without any distinct identity or anchor or "draw" tenants; units without access to public sewer, thus, limiting the type of tenants that could occupy the space).

In short, the rentals were drawn from properties inferior for various reasons and were not adjusted to reflect the Property's positive attributes of good visibility at a signalized intersection of Continental Drive and Route 101A diagonally opposite a MacDonald's restaurant location.

Further raising questions as to the accuracy of the Property's market rents was the Town's cross examination and comparison of the appraiser's estimated effective gross income of \$229,337 (estimated gross income based on \$6.00 and \$5.00 per square foot minus an estimated vacancy and credit loss of 15%) versus the Taxpayer's actual effective gross income for three years ranging from \$281,000 to \$303,584. The ability for the Property to consistently obtain higher effective gross income than that estimated by the appraiser raises two questions. Either the actual rents received were significantly above market (a scenario the board finds unlikely given the competitive rental market at this general location in 1995) or the collection loss was quite significant. Mr. Norman Wood, principle owner, testified there had been some difficulty with rent collections but the examples he provided either predated or postdated the assessment period and were not of such magnitude to explain the difference between the appraisal estimate and the actual effective gross income being reported by the Taxpayer. Further, if

collection loss was of such magnitude, the Taxpayer could have submitted
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further accounting records or Internal Revenue Service records showing the actual income reported on the Property. However, that was not done.

In short, the board arrives at the conclusion that due to the lack of comparability of the rental data and the higher actual rents and resulting effective gross income being received from the property, the market rent estimated in the appraisal is low and results in an inaccurate estimate of market value. Indeed, as the Town pointed on cross examination, if an average of the three years effective gross income is used and all other assumptions and factors in the Taxpayer's income approach are used, the resulting indication of market value is right at the value indicated by the assessed value.

1993 Appeal Settlement

The same Property, Taxpayer and Taxpayer's agent reached a settlement in 1993 with the Town at an assessment of \$2,200,000. While this earlier settlement does not constitute "conclusive proof" of the Property's market value, it can be considered by the board as evidence in determining whether the Taxpayer has met his burden in the 1995 appeal. Appeal of Public Service Company of New Hampshire, 120 N.H. 830, 832 (1980). The board does give this settlement figure some weight in determining whether the Taxpayer carried its burden for the following reasons. One has to step back, take the common sense approach and ask that if the 1993 \$2,200,000 assessment was at all market related, is there any basis to believe the Property's value has dropped over 27% in two years to an estimate of \$1,600,000. We find none was presented. Mr. Lutter, the Taxpayer's agent, stated his estimate of value in the 1993 settlement was based on an incorrect square footage of the rental space of the Property. The board reviewed the 1993 appeal document and finds that indeed Mr. Lutter overstated the rental square footage by 2,560 square feet (48,704 square feet in 1993 versus 46,144 square feet in 1995) or a 5% difference in rental area. The board finds this difference is relatively insignificant and

even if accounted for does not in any way address the difference in the value
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conclusion. Further, Mr. Lutter stated that since that settlement, he had discovered additional market evidence to warrant a lower valuation.

Presumably this market evidence is contained in the appraisal submitted which the board has already found to be flawed. Lastly, no general evidence was submitted that the market in Merrimack for this type of property had declined at such a rate. Consequently, the board finds that some weight can be given to the settled assessment arrived at in the 1993 case. However, the board cautions both sides that the weight the board gives the 1993 settlement assessment is very secondary to the Taxpayer's lack of credible evidence submitted for the 1995 appeal.

There is one further issue the board needs to address. At the hearing, after the Town made the motion to dismiss (not to proceed with its evidence), Mr. Lutter stated he had been denied his opportunity to rebut what had been submitted by the Town. Procedurally, we believe no rebuttal was necessary. The Taxpayer has the initial burden to present competent evidence that the assessment is excessive. Only if that burden is met does the burden of persuasion to defend the assessment switch to the Town. Because we found the Taxpayer never submitted competent evidence to initially raise a question as to the correctness of the assessment, the written evidence submitted by the Town in defense of the assessment was not reviewed by the board in denying this appeal. Thus, no rebuttal was necessary.

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

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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 Mark Lutter, Agent for Pennichuck Square Ltd. Partnership, Taxpayer; Jay L. Hodes, Esq., Counsel for the Town of Merrimack; and Chairman, Selectmen of Merrimack.

Date: February 19, 1998

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Valerie B. Lanigan, Clerk