

Dana L. Haselton

v.

Town of Derry

Docket No.: 16932-96PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1996 assessment of \$710,400 (land \$369,100; buildings \$341,300) on a 1.343-acre lot with a 3-unit retail building containing a hair salon, convenience store with gas pumps and a laundromat (the Property). 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) an April 1996 appraisal, estimated the value as clean to be \$640,000

(which includes a \$25,000 depreciated reproduction cost of gasoline pumps and canopy);

(2) the April 1996 value of the Property as contaminated was \$544,000;

(3) the leases used in the appraisal are gross therefore the tax rate should be factored into the capitalization rate;

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(4) the convenience store is not conducive to having subtenants; and

(5) as of April 1996, three of the gasoline storage tanks had large holes and were inoperable and two of the tanks were in poor condition but operable.

The Town argued the assessment was proper because:

(1) in its 1993 decision on this Property, the board ruled on the proper methodology for valuation;

(2) the Town appraised the Property using the income/residual approach and isolated the attributes which support the gas pumping operation;

(3) the April 1996 indicated market value of the Property as clean is \$888,750; deducting a 15% contamination influence yields a proper value of \$755,400; and

(4) the assessment is not disproportionate to the Property's market value.

The parties stipulated that assessments were at 100% of market value as indicated by the department of revenue administration's 1996 ratio. The parties also stipulated the 15% adjustment for contamination found by the board in Dana L. Haselton v. Town of Derry BTLA 14962-93PT should apply in 1996.

#### **Board's Rulings**

Based on the evidence, the board finds the proper assessment to be \$596,200. This assessment is based on a market value finding of the Property

"as if clean" of \$701,400 reduced 15% for the effect of the off-site contamination.

As in the 1993 decision, the board finds the most appropriate method by which to value the Property is the income approach. Both parties again submitted appraisals which based their estimates primarily on the income approach. However, the parties again differed as to whether gross or net rents should be used. The Town used a net calculation of income (assumption that the tenant pays all the expenses related to maintaining the Property except for overall insurance and management and major capital items) while the

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Taxpayer calculated the income on a gross basis (assumption that the owner pays all of the expenses including the property taxes).

The parties disagreed as to whether any income should be added for subletting the interior space as there had been in the 1993 decision for Dunkin' Donuts. The Taxpayer also argued that certain gasoline dispensing items were not taxable as real estate while the Town argued the fuel tanks, pumps, canopy and land related to them should be added to the income approach value estimate.

This Property could be valued by the income approach by estimating either its net or gross income. Because it is primarily an owner-occupied property with two smaller subtenant areas either a gross or a net rental calculation of its rental income would be appropriate. The board has chosen to calculate the income approach on a net basis for several reasons:

- 1) adequate market evidence exists on a net basis on which to estimate rent for the Property;
- 2) notwithstanding the fact the Taxpayer changed his method of collecting

rents since the 1993 decision, staying with the net basis as used in the board's 1993 decision is sound because it reduces the number of expense estimates to be made; and

3) the income approach model used by the Town in its assessments is based on net rents.

The board wants to make it clear that either method would be appropriate in this case; however, the board has chosen the net approach largely because market evidence exists to make this determination and fewer assumptions for expenses are necessary. The board finds the Town's rents of \$7.00 for the 6,150 square foot convenience store space, \$10.20 for the 2,000 square foot laundromat space and \$14.00 for the 1,200 square foot hair salon space are reasonable and generally supported by a review of the rental rates contained in Taxpayer's Exhibit #4. The rental rates contained in Taxpayer's Exhibit #4 varied based on their size and location; however, the few larger square foot

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rentals do support the \$7.00 per square foot price. The rents applied to the two smaller areas are both supported by Taxpayer's Exhibit #4 (taking into account location and condition of rental property) and by the Property's actual modified gross rents (tenant pays electricity, water and sewer but not real estate taxes) of \$18,600 for the hair salon and \$26,400 for the laundromat. The board has also added an estimate of \$6,000 for ATM rental. Whether the ATM is leased or owned, the real estate where it is located is enhanced and an estimate of the additional rental income due to its existence should be included.

The board has not added any income estimate for any sublet area such as

it did in the 1993 decision for the Dunkin' Donuts space. There was significant testimony that following the decision of Dunkin' Donuts to move to another location, the subletting of interior space to other pastry/luncheon vendors was, at best, a break-even proposition. The board finds the Taxpayer's decision not to renovate to accommodate a drive-up window for Dunkin' Donuts is reasonable. First, the Taxpayer had indicated that it would have entailed significant reorganization of the convenience store's interior space, and second, the Taxpayer was concerned about the potential loss of business for his other trade by not having people entering the building. Given all the evidence, the board has concluded that any prospective purchaser of this Property would not count on any significant additional rent from subletting space, and consequently, none has been included as additional

income <sup>1</sup>. The board's potential gross income is summarized as follows:

Convenience Store (6,150 sf x \$7.00 per sf)	\$43,050
Laundromat (2,000 sf x \$10.20)	\$20,400
Hair Salon (1,200 sf x \$14.00 per sf)	\$16,800
ATM (estimated actual)	<u>\$6,000</u>
Total	\$86,250

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The board finds the vacancy rate of 2% as estimated by the Taxpayer's appraiser to be reasonable. This estimate is based on the strong occupancy history of the Property, the excellent commercial location and the fact that approximately two-thirds of the space is owner occupied.

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<sup>1</sup> The board also notes that the Town's inclusion of \$18,000 for the Subway space, even if assuming such income was indeed possible, double counts the square footage of that area in its income calculation. Subway occupied approximately 680 square feet of the 6,150 square-foot convenience store area; consequently, the Town's square-foot calculation for the convenience store would need to be reduced by that area so as not to double count the rental income for that space.

Because the income is calculated on a net basis, the board finds only three expenses need to be deducted: insurance, management and reserves for replacement. The board has adopted an insurance expense of \$6,600 which is indicated in the Taxpayer's appraisal as a stabilized number based on actual expenses. Management is estimated at \$7,500 based on both the Taxpayer's indication of 6% of gross income (\$7,315) and the Town's estimate of 8% of effective gross income (\$8,023). The board has estimated a replacement for reserves at approximately 2.5% of effective gross income or \$2,113 ( $\$86,250 \times .98 \times .025$ ). The Town estimated a similar percentage while the Taxpayer neglected to include such a calculation.

A summary of the board's income, expenses and net operating income is as follows:

Potential Gross Income	\$86,250
Vacancy @ 2%	<u>x .98</u>
Effective Gross Income	\$84,525
Expenses	
Insurance	\$ 6,600
Management	\$ 7,500
Replacement for Reserves	
2.5% for Eff. Grs. Inc.	<u>\$ 2,113</u>
Total Expenses	<u>-16,213</u>
Net Operating Income	\$68,312

Because the method used here in calculating the income assumed the tenant paid the real estate taxes, no effective tax rate needs to be included with the capitalization rate. The board finds an overall capitalization rate of 10.1% is still appropriate for 1996.

The board finds the Taxpayer's appraiser's capitalization rate is too high for several reasons. The appraiser changed a number of the capitalization rate factors from his 1993 appraisal to his 1996 appraisal. The mortgage interest was increased by .25%, the equity rate was increased from 11% to 13%, the loan-to-value ratio was dropped from 75% to 70%, and the term decreased

from ten to five years. All these adjustment tend to reduce the value conclusion and indicates the Property has become a higher risk and less desirable to own during those three intervening years. The board finds no evidence to support such a change. Further, the board finds the appraiser's capitalization rate did not include a reduction for equity build-up during the holding period of the Property. Such an adjustment would reduce the indicated rate by approximately 1%.

Applying the capitalization rate of 10.1% to a net operating income of \$68,312 provides an indicated value of \$676,400 (rounded).

Gasoline Dispensing Items

The board has excluded any gasoline income from the above income analysis for the reasons stated in its 1993 decision. The board finds the gasoline tanks, pumps and canopy are taxable as real estate and need to be accounted for on a depreciated cost basis. The board has ruled that gasoline tanks and pumps are realty, and thus, are taxable (see attached decision VSH Realty Inc. v. Town of Tilton, BTLA 16224-95 which the board incorporates by reference). While not specifically addressed in the VSH Realty Inc. decision, the board finds the canopy is also part of the integrated dispensing system for the sale of gasoline and by the owner's intent and the physical incorporation with the site are taxable as real estate<sup>2</sup>.

Based on the evidence received at hearing, the board places no value on

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<sup>2</sup> The board also notes evidence received during eminent domain hearings (RSA 498-A), that canopies are frequently part of an estimate of eminent domain damages when widening of roads either impact their utility or are actually taken by the widening.

the gasoline tanks. Of the five tanks three were unusable due to large holes in them and only two were marginally operable in 1996, having small holes that required water to be pumped out on a regular basis. While the tanks may have had some continued value in use, the board finds it is unlikely that any prospective purchaser would have placed any value in exchange on the tanks.

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This is supported by the fact the tanks were replaced in 1997 due to their poor condition.

The Town also argued that 2,000 square feet of the land encumbered by these gasoline dispensing items should be valued separately as it had not been captured by the income approach of the other improvements. While this argument may have merit and the board does not wish to preclude such methodology in the future, the Town did not present any evidence as to the \$8.33 per square foot value for the land nor did it present arguments that the rents assumed for the building do not inherently reflect the presence of the gasoline enterprise on the Property. It is conceivable that a choice of market rent for the improvements could be influenced by the increased traffic that a gasoline enterprise generates. However, since the Town did not present such evidence and because its calculation was not part of the assessment (and therefore, does not have any presumption of correctness), the board declines in this case to add a separate value for the land supporting the gasoline dispensing items. Based on the estimates of both parties, the board concludes the gasoline pumps and canopies have a depreciated market value of approximately \$25,000.

Conclusion

Combining the income approach estimate with the depreciated value for the gasoline dispensing items provides an indicated value of the Property as clean of \$701,400 (\$676,400 + \$25,000). Applying the 15% factor found by the board in its 1993 decision as agreed to by the parties for the contamination issue, results in an indicated market value and assessment of \$596,200 (rounded).

If the taxes have been paid for the tax year 1996, the amount paid on the value in excess of \$596,200 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 1997 and 1998.

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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.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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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 Roland E. Morneau, Esq., Counsel for Dana Haselton, Taxpayer; Wil Corcoran, Agent for the Town of Derry; and Chairman, Board of Assessors, Town of Derry.

Date: January 15, 1999

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Valerie B. Lanigan, Clerk

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Dana L. Haselton

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Town of Derry

Docket No.: 16932-96PT

ORDER

This order responds to the "Town's" February 3, 1999 request for clarification, the "Taxpayer's" February 8, 1999 objection and the Town's February 12, 1999 response to the Taxpayer's objection. The Town inquired how to tax in 1998 the fuel tanks that had been replaced in the spring of 1997.

The board finds the Town's request for clarification is appropriate under board rule 201.37 as an attempt to seek guidance in carrying out the effect of the board's March 20, 1997 decision (Decision).

The board's Decision and jurisdiction is limited to the year of the appeal, 1996.

**TAX 203.05 (d). Subject Matter of Original Appeal.** For an Original Appeal, the Board shall only consider and issue a decision on the property and the assessment for the Original Tax Year. The Board shall not consider or issue a decision on Subsequent Tax Years unless a Subsequent Appeal was filed and consolidated with the Original Appeal.

However, RSA 76:17-c I and TAX 203.05 (c) (3) b and (f) allow municipalities to reappraise property in subsequent years, if a good faith

basis exists. The Town has an obligation under these statutes and the board's rules to revise the board's ordered assessment for subsequent years if a change in the property occurs. Therefore, the Town should grant the abatement for 1998 in keeping with the board's decision but with a revision of the valuation of the gasoline tanks if it deems appropriate. The Taxpayer's

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remedy if dissatisfied with the Town's revision, if any, is detailed in TAX 203.05 (j) and (k). The Taxpayer should note that the board does not have jurisdiction to review the magnitude of the adjustment, only if there was a good-faith basis for such adjustment.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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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 Roland E. Morneau, Esq., Counsel for Dana Haselton, Taxpayer; Wil Corcoran, Agent for the Town of Derry; and Chairman, Board of Assessors, Town of Derry.

Date: March 12, 1999

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Valerie B. Lanigan, Clerk

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Town of Derry

Docket No.: 16932-96PT

ORDER

This order is being issued to correct the board's March 12, 1999 order in which there was an error in paragraph 2. The paragraph should read:

"The board finds the Town's request for clarification is appropriate under board rule 201.37 as an attempt to seek guidance in carrying out the effect of the board's *January 15, 1999* decision (Decision)."

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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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 Roland E. Morneau, Esq., Counsel for Dana Haselton, Taxpayer; Wil Corcoran, Agent for the Town of Derry; and Chairman, Board of Assessors, Town of Derry.

Date: March 17, 1999

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Valerie B. Lanigan, Clerk

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