

40 West Broadway Trust

v.

Town of Derry

Docket No.: 17098-96PT

and

Union Bay Hill Trust

v.

Town of Derry

Docket No.: 17273-96PT

DECISION

The "Taxpayers" appeal, pursuant to RSA 76:16-a, the "Town's" 1996 assessment of \$191,300 (land \$33,400; buildings \$157,900) on a .112-acre lot with a 10-unit residential building with 2 commercial spaces (40 West Broadway Trust); and the "Town's" 1996 adjusted assessment of \$278,900 (land \$35,700; buildings \$243,200) on a .19-acre lot with a 14-unit residential building with 3 commercial spaces (Union Bay Hill Trust) (the Properties). For the reasons stated below, the appeals for abatement are granted.

The Taxpayers have the burden of showing the assessments were disproportionately high or unlawful, resulting in the Taxpayers 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 Taxpayers must show that the Properties' assessments were higher than the general level of assessment in the municipality. Id. The Taxpayers carried this burden.

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◆ 40 West Broadway Trust argued its assessment was excessive because:

- (1) there is no on-site parking or room for a dumpster;
 - (2) the property suffers from a significant amount of deferred maintenance with peeling paint, a deteriorating roof, an old, inefficient furnace with asbestos-wrapped piping, and an insect infestation problem;
 - (3) the Town used inaccurate expense figures and an inappropriate capitalization rate to estimate the property's value by the income approach;
- and
- (4) lenders are not interested in using the equity in the property for financing given the property's overall condition.

The Town argued the assessment was proper because:

- (1) the property was assessed using the same model as other downtown properties with some adjustments to reflect the condition of the property;
- (2) the Taxpayer refused, despite repeated requests, to supply the Town with actual income and expense data; and
- (3) the old downtown area in Derry is a dynamic area, significantly different and improved in 1996 than during the town-wide revaluation in 1993.

◆ Union Bay Hill Trust argued its assessment was excessive because:

- (1) the property has no on-site parking or room for a dumpster;
- (2) there is a 6000 gallon underground fuel storage tank next to the

foundation that could not be removed without causing structural damage to the building;

(3) the building has an economic remaining life of approximately 3 to 5 years due to the following conditions: little or no insulation, single pane double hung windows, very old ungrounded wiring, an old steam boiler that is hard to balance given the settling of the building, asbestos-wrapped heating pipes, boxed piping in the bathrooms, the presence of lead paint, and a substantial termite infestation problem;

(4) the building's layout is inefficient given the extra large hallways;

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(5) the Town used inaccurate expense figures and an inappropriate capitalization rate to estimate the property's value by the income approach;
and

(6) lenders are not willing to use the equity in the property for financing given the property's overall condition.

The Town argued the assessment was proper because:

- (1) the asbestos is not in the tenant areas;
- (2) the Property was assessed using the same model as other downtown properties with some adjustments to reflect the condition of the Property;
- (3) the Taxpayer refused, despite repeated requests, to supply the Town with actual expense and income data; and
- (4) the old downtown area in Derry is a dynamic area, significantly different and improved in 1996 than during the town-wide revaluation in 1993.

Board's Rulings

This appeal raises two issues: 1) the Town's dismissal argument; and 2)

valuation arguments.

Dismissal Argument

In defense the Town raises the argument that the board should dismiss these two appeals because the Taxpayer did not cooperate with the Town's request for additional information during the abatement application process, and thus, the Town was unable to perform its obligation to review the assessments and to abate taxes for "good cause shown." The Town asserts the board's findings in Maloney Associates, Inc., et al. v. Town of Hanover (Docket No.: 14291-93PT) should apply and form the basis for denying the appeal. The board finds the facts are significantly different in these two appeals from those in Maloney, and thus, does not grant the Town's motion for dismissal.

First, the requests for abatements for both Properties provided specific reasons as to the basis for why the assessments were disproportionate. The arguments noted the age and condition of the buildings, the vacancy and credit

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loss Properties and, in one appeal, the existence of an appraisal at a value lower than the assessed value. The Taxpayer's specific reasons provided direction to the Town so that it could perform its own investigation and analysis of those reasons to determine if the assessments were proper or needed to be abated. The reasons provided by the Taxpayer here differ significantly from the reasons provided in Maloney. The request in Maloney gave no specifics and simply relied upon canned, perfunctory language that provided no indication to the town as to the basis for the taxpayer's dissatisfaction with the assessments.

Further, the board finds the Taxpayer's unwillingness to provide the Town with financial information (rental income and expense information of the Properties) does not provide a basis under current law for the board to dismiss these appeals. The Town and the Taxpayer essentially have been in a debate as to the applicability of RSA 91-A (Access to Public Records) in handling the requested financial information. First, the statutes are silent relative to specifically how such information should be handled during the RSA 76:16 abatement application process. Second, given the extensive weighing of public benefit versus private protection as set out in Union Leader Corporation v. New Hampshire Housing Finance Authority, 142 N.H. 540 (1997), the board cannot ascribe any unreasonableness to either the Taxpayer's or the Town's caution in the handling of this information. Certainly, the Taxpayer's reluctance to release income and expense information without the protection of confidentiality at the Town level does not rise to the level to warrant a dismissal by this board. As stated by the board during the hearing, this issue of handling rental properties' financial information necessary for municipalities to properly assess income-producing property is an issue that is more properly addressed by the legislature.

Valuation Issues

Based on the evidence, the board finds the appropriate assessment for 40 West Broadway to be \$121,000 and for Union Bay Hill Trust to be \$231,500.
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In making a decision on value, the board looks at the Property's value as a whole (i.e., as land and buildings together) because this is how the market views value. Moreover, 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). However, the existing assessment process allocates the total value between land value and building value. (The board has not allocated the value between land and building, and the Town shall make this allocation in accordance with its assessing practices.)

During the hearing it was evident from the testimony from both parties that these two properties were difficult to value given their age, condition and tenant situation. Similarly, during its deliberations, the board found that neither side presented conclusive evidence by itself, and therefore, the board has used evidence from both parties in determining the appropriate assessments.

The Taxpayers submitted a memorandum in each case outlining the position differences between the Town and the Taxpayers. In the 40 West Broadway case, the Taxpayers estimated a market value, and therefore, an assessment (equalization rate for 1996 for the Town of Derry is 100%) of \$78,591. This figure is shown on page 4 of the July 16, 1998 Taxpayers' memorandum. However, the board noted there were some mathematical miscalculations in the Taxpayers' estimate of assessment. On page 4 under the heading of Net Operating Income under the Taxpayers' column is a figure of \$24,990. If one subtracts the \$36,010 for the expenses from the effective gross income of \$51,000 the correct figure should be \$14,990 for the net operating income. If one takes the correctly calculated net operating income of \$14,990 and capitalizes it by the Taxpayers' suggested .22 capitalization rate, the estimated value becomes \$68,136 rather than the incorrectly estimated value of \$113,591. From this amount must be deducted the Taxpayers' estimate for deferred maintenance, if one agrees with the Taxpayers' position, of \$35,000

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resulting in an estimated assessment of \$33,136. The board finds these assumptions and calculations are illogical and unsubstantiated. For these reasons the board places little confidence in the Taxpayers' figures for the 40 West Broadway property. As a result, the board has reviewed the Union Bay Hill Trust calculations and applied any resulting percentages to the 40 West Broadway property.

In the Union Bay Hill Trust case the Taxpayers and the Town were not far apart in their estimation of the potential gross income and the board has adopted the Taxpayers' estimated potential gross income. The board found the Town's 15% estimate of vacancy and credit loss to be more reflective of the market than the Taxpayers' 18.5% and has applied the 15% to the Taxpayers' potential gross income. The board reviewed the expenses given by the Taxpayers and found that the actual expenses for several of the items did not seem out of line, and therefore, were used as submitted. However, where the Taxpayers allocated an expense from an accounting sheet covering several properties, the board utilized the Town's percentage or per-square-foot figure when calculating the overall expenses. In essence the board has used some expense figures from the Taxpayers and some from the Town based on the Taxpayers' potential gross income and the board's experience. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence. See RSA 541-A:33 VI; Appeal of Nashua, 138 N.H. 261, 264-65 (1994); see also Petition of Grimm, 138 N.H. 42, 53 (1993) (administrative board may use expertise and experience to evaluate evidence).

Upon review of the total estimated expenses, the board found that the expense estimate was in the 50% to 55% range, and while this is not a range that

typically exemplifies good property management, given the nature of the appealed Properties inasmuch as they are older, multi-tenant, below-average quality buildings with a lower income, more transient-nature tenant mix, the higher expense ratio is not unexpected and does not seem inappropriate.

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In estimating the value of each of the Properties the board has applied the expense ratio estimated in the Union Bay Hill Trust property to the 40 West Broadway Trust property as well. The net operating income for each of the Properties has been capitalized at the Town's 15% capitalization rate which includes the tax factor. The board found this figure to be more appropriate and more reflective of market conditions than the Taxpayers' estimated capitalization rate of 22%. The Property manager for the Properties, Mr. Dupont, suggested during testimony that the capitalization rate might be more appropriate in the 25% to 30% range including the tax factor. The board sees no justification in the market for capitalization rates in the 20% to 30% range.

In summary, the board finds the estimated value, and therefore, the assessment for 40 West Broadway Trust should be \$121,000 and for Union Bay Hill Trust the value and assessment should be \$231,500.

If the taxes have been paid for the tax year 1996, the amount paid on the value in excess of \$121,000 for 40 West Broadway Trust and \$231,500 for Union Bay Hill Trust 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. 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

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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.

Findings of Fact and Rulings of Law

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;
- d. the request was irrelevant; or
- e. the request is specifically addressed in the decision.

The board responds to the Town's 40 West Broadway Trust's requests as follows:

Findings of Fact

- 1. Granted.
- 2. Granted.
- 3. Neither granted nor denied.
- 4. Neither granted nor denied.
- 5. Neither granted nor denied.
- 6. Neither granted nor denied.
- 7. Neither granted nor denied.
- 8. Neither granted nor denied.

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- 9. Neither granted nor denied.
- 10. Neither granted nor denied.
- 11. Neither granted nor denied.
- 12. Neither granted nor denied.
- 13. Neither granted nor denied.
- 14. Denied.
- 15. Granted.
- 16. Granted.
- 17. Granted.
- 18. Granted.

19. Granted.
20. Granted, deleting "to determine income stream."
21. Granted.
22. Neither granted nor denied.
23. Granted.
24. Neither granted nor denied.
25. Granted.
26. Denied.
27. Granted.
28. Granted.
29. Denied.
30. Denied.

Rulings of Law

31. Granted.
32. Granted.
33. Granted.
34. Denied.
35. Denied.
36. Denied.
37. Denied.

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38. Granted.
39. Granted.
40. Denied.
41. Denied.
42. Denied.

43. Denied.

44. Neither granted nor denied.

45. Denied.

The board responds to the Town's Union Bay Hill Trust requests as follows:

Findings of Fact

1. Granted.

2. Granted.

3. Granted.

4. Neither granted nor denied.

5. Neither granted nor denied.

6. Neither granted nor denied.

7. Neither granted nor denied.

8. Neither granted nor denied.

9. Neither granted nor denied.

10. Neither granted nor denied.

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. Denied.

17. Granted.

18. Granted.

19. Granted.

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20. Granted.
21. Granted.
22. Granted.
23. Granted.
24. Neither granted nor denied.
25. Granted.
26. Neither granted nor denied, addressed in decision.
27. Granted.
28. Neither granted nor denied.
29. Granted.
30. Granted.
31. Denied.
32. Denied.

Rulings of Law

33. Granted.
34. Granted.
35. Granted.
36. Denied.
37. Denied.
38. Denied.
39. Denied.
40. Granted.
41. Granted.
42. Denied.
43. Denied.
44. Denied.
45. Denied.

46. Neither granted nor denied.

47. Denied.

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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 John G. Cronin, Esq., Counsel for Taxpayer; Steven A. Clark, Esq., Counsel for the Town; and Chairman, Selectmen of Derry.

Date: February 19, 1999

Valerie B. Lanigan, Clerk

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ORDER

An oral hearing was scheduled in the above-noted matters for Thursday, July 16, 1998 at 9:00. At the beginning of that hearing, the "Taxpayer" and the "Town" agreed to having an informal prehearing conference instead due to the similarity of issues in both cases. This order confirms that despite detailed discussions between the parties at the conference, the parties were unable to reach a settlement in these cases and agreed to proceed to a final hearing. Therefore, the board, on its own motion, continues the hearing to a later date. The board has the following dates open in its docket: the 10th, 13th, 18th, 19th and 25th of November, 1998. The parties are ordered to confer with each other and their respective witnesses and experts as to a mutually acceptable date and thereafter advise the board's clerk of the date

all parties agreed to. The parties shall also specify how much time will be needed for each appeal. Upon notification of the date, the board will issue hearing notices and distribute prehearing statements to the parties, which will be due 14 days prior to the scheduled hearing date. The parties are ordered to notify the board of the agreed upon hearing date within 10 days of the date of this order.

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SO ORDERED.

Paul B. Franklin, Chairman
Presiding Officer

CERTIFICATION

I hereby certify that copies of the foregoing order have this date been mailed, postage prepaid, to John G. Cronin, Esq., Counsel for both Taxpayers; Steven A. Clark, Esq., Counsel for the Town of Derry; and Chairman, Selectmen of Derry.

Dated: February 19, 1999

Valerie B. Lanigan, Clerk

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