

VRT Realty Trust

v.

Town of Northwood

Docket

No.: 17252-96PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1996 assessment of \$170,600 (land \$39,300; buildings \$131,300) on a 2.2

5-acre lot with a restaurant (the Property). The Taxpayer also owns, but did not appeal, another property in the Town with a \$593,604 assessment. For the reasons stated below, the appeal for abatement is granted.

The Taxpayer argued the assessment was excessive because:

- (1) the building could not be occupied on April 1, 1996, as it was under reconstruction and renovation following a 1995 fire that caused substantial damage;
- (2) the land assessment had changed several times in the past tax year; and
- (3) given the amount of damage and the stage of reconstruction on April 1, 1996, the building assessment should be zero.

The Town argued the assessment was proper because:

- (1) the Town was revalued in 1996, and therefore, any information concerning

previous tax years was irrelevant;

(2) the Taxpayer understated the amount of reconstructive work that had been completed on April 1, 1996;

(3) it was inappropriate to prorate a portion of the tax year due to building occupancy; and

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(4) the final 1996 tax bill accurately depicted the value of the Property on April 1, 1996.

At the close of the initial hearing on September 8, 1998, the board kept the record open and requested both parties to submit evidence of the status of the building on April 1, 1996. After receiving both parties' submittals, it was evident that the parties had vastly divergent opinions as to the building's condition. Consequently, the board found it necessary to resume the hearing, hear testimony from witnesses not present at the initial hearing and receive additional documentation relative to the building's condition on April 1, 1996. The hearing was reopened on November 16, 1998 for these purposes.

Board's Rulings

Based on the evidence submitted and the testimony given at the two hearings, the board finds the appropriate assessment for the Property to be \$109,400 as of April 1, 1996.

At the second hearing, the Taxpayer's owner presented testimony on his estimate of completion. This was done with reference to a completion list submitted by the Town and with suggested revisions to that list. During the second hearing, the board also heard testimony from Mr. George Lugg Jr. (Lugg)

as to the extent of the reconstruction and renovation as of April 1, 1996. Mr. Lugg was the general contractor for the renovation of the Property. The board finds that Mr. Lugg's testimony coupled with the Town's list of individual items to be the best evidence submitted concerning the condition of the building as of the date of the appeal. We accept Mr. Lugg's testimony over the Town's testimony because Mr. Lugg was the contractor who worked on site, and his familiarity with the Property's construction status exceeded that of the Town's witnesses who made only brief inspections. Mr. Lugg's testimony and the corresponding percentages of completion are listed in the following table and were utilized by the board in estimating the extent of the building renovation on the date of the appeal.

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Revised Johnson's Dairy Bar & Restaurant Analysis

Assessment			
Item	% of Total When Completed	% Completed as of April 1, 1996	% of Contribution on April 1, 1996
Foundation	8	100	+8
Capped	5	40	+2
Framed	8	75	+6
Subwalls	7	100	+7
Roofed	5	40	+2
Ext. Siding	8	0	0
Chimney	4	0	0
Weather Tight	5	0	0
Rough Plumb/Heat	5	0	0

Wiring & Insulation	5	0	0
Interior Walls	5	0	0
Floor & Trim	10	0	0
Finished Plumb/Heat	10	0	0
Kitchen Finished	5	0	0
Paint/Finish(Int/Ext)	5	0	0
Ext. Walks/Entrance	5	0	0
Total	100		25.0

Reviewing the previous table indicates that approximately 25% of the building was renovated or reconstructed as of April 1, 1996. Therefore, the board has applied the 25% figure to the Town's undepreciated replacement cost of \$298,490 yielding a \$74,600 (rounded) figure. To this number must then be applied the 6% normal depreciation the Town utilized yielding a final estimate of value for the building portion of the Property of \$70,100 (rounded). The parties will note that the board has not used the Town's method of adding the various depreciation components and then multiplying the total depreciation

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times the replacement cost new. The board finds it more appropriate, in this instance, to determine the value of the completed improvements and then apply the normal 6% that the Town estimated and utilized.

To the value of \$70,100 for the depreciated improvements must be added the land value of \$39,300 to arrive at a final estimate of value for the Property as of April 1, 1996 of \$109,400.

If the taxes have been paid for the tax year 1996, the amount paid on the value in excess of \$109,400 shall be refunded with interest at six percent

per annum from date paid to refund date. RSA 76:17-a. Because the Property was substantially renovated after April 1, 1996, the decision only applies to tax year 1996. The RSA 76:17-c carryover provision shall not apply to this decision.

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.

BOARD OF TAX AND LAND APPEALS

Ignatius MacLellan, Esq., Member

Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Arpiar G. Saunders, Jr., Esq., Counsel for VRT Realty Trust, Taxpayer; and Chairman, Selectmen of Northwood.

Date: December 15, 1998

Valerie B. Lanigan, Clerk

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v.

Town of Northwood

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ORDER

This order responds to the "Town's" rehearing motion, which is denied. The motion did not demonstrate that the board erred in its decision, and thus, the motion failed to show any "good reason" to grant a rehearing. See RSA 541:3.

In its January 15, 1999 rehearing motion, the Town makes several assertions that the board disagrees with.

First, the Town maintains that the Town's recollections of the status of the "Property" were corroborated by several witnesses. The board finds this statement to be inaccurate. The Town's witnesses produced mixed recollections of the Property's status as of April 1, 1996. There was no documentation of any extensive visits by any of the Town building inspectors or appraisers that gave the board confidence that the Town's assertions were correct. During the September 8, 1998 first hearing on this appeal, Mr. Blais, representing the Town, asserted that Mr. Roberge, the Town's assessing agent, was at the site

on April 1, 1996. However, when Mr. Roberge appeared during the second hearing, he provided no testimony as to his recollections of the Property's status as of the appeal date. The memories of the two building inspectors, Mr. Freeman and Mr. Arsenault, could be characterized as general and not specific. None of the notations in the building inspector/code enforcement officer's visitation log submitted at the hearings provided insight as to the

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reasons behind the visits or the observations during the visits. Both code enforcement officers stated the primary purpose of their visit to the Property during the March 28 changeover between the two code enforcement officers was merely part of a tour of the Town to identify ongoing projects because Mr. Arsenault was replacing Mr. Freeman as the Town's code enforcement officer.

Second, the Town asserted that Mr. Lugg's testimony and recollection concerning the Property's status on April 1, 1996, was not conclusive because he was not there specifically on that date. However, the board is satisfied that Mr. Lugg offered the best testimony concerning the status of the improvements on and near that date. The board finds Mr. Arsenault's testimony that interior wall studding was taking place during the March 28, 1996 code enforcement officers' visit and the presence of sheetrock, stacked and covered with clear plastic, is not an indication that substantial interior work had been completed. Additionally, the argument that sheetrock was being installed was not substantiated by the testimony during the hearing. The mere fact that sheetrock was in the building does not clearly demonstrate that the sheetrocking was completed on April 1.

Third, the Town's comments under credibility heading 1D in its rehearing motion are inaccurate for the following reasons. Under the completion calculation, the Town questioned the board's determination and assigning of certain percentages. The board reviewed the testimony and found no clear and convincing evidence to change its decision. Some of the Town's recollections of the testimony were inaccurate. For instance, under the heading "Rough Plumbing," the Town asserted that the presence of older cast iron plumbing depicted in pictures was evidence that there was plumbing in place on April 1, 1996. However, the Taxpayer testified that: a) some old plumbing was left in place merely to save the cost of removal; b) no older plumbing was used during the renovation; and c) all new plumbing was installed for every fixture throughout the building. Furthermore, the fact that there was sheetrock

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stacked and covered in the interior does not convince the board some new wiring, insulation and plumbing must have been on going or near completion. The mere presence of sheetrock does not indicate that it was ready for installation or that the building was weather tight.

The board reiterates that the best evidence available and presented for this hearing was that of the general contractor, Mr Lugg. Mr. Lugg was the person at the site most regularly and the one most knowledgeable as to the overall status of the renovation process at any given point. The Town's testimony was found to be inconclusive and unsupporting of its assertions.

For these reasons, the board denies the Town's request for a rehearing or reconsideration. To appeal this matter, an appeal must be filed with the supreme court within thirty (30) days of the clerk's date below. RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Ignatius MacLellan, Esq., Member

Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Arpiar G. Saunders, Jr., Esq., Counsel for VRT Realty Trust, Taxpayer; and Chairman, Selectmen of Northwood.

Date: March 12, 1999

Valerie B. Lanigan, Clerk

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VRT Realty Trust

v.

Town of Northwood

Docket No.: 17252-96PT

ORDER

This order responds to the "Taxpayer's" May 19, 1999 motion for costs and the "Town's" June 2, 1999 objection thereto. The board denies the Taxpayer's motion.

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 (1972). 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 ***."

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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. In this case, the board finds the Town's January 14, 1999 motion for rehearing was not frivolously filed; further, the board finds the Town did not act in bad faith.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing order has been mailed this date, postage prepaid, to Arpiar G. Saunders, Jr., Esq., Counsel for VRT Realty Trust, Taxpayer; Avitar Associates of New England, Inc.; and Chairman, Selectmen of Northwood.

Date: June 15, 1999

Lynn M. Wheeler, Clerk