Community Bank

v.

Town of Exeter

Docket No.: 17648-97PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1997 assessment of $509,600 (land $83,800; buildings $425,800) on a .40-acre lot with a bank building (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) the Property's location does not have good visibility or a high traffic count for a bank;

(2) the size of the lot restricts the number of parking spaces causing parking problems for the bank staff;

(3) the abutting railroad causes occasionally excessive noise;

(4) in order to meet ADA requirements the building was built one foot lower than it typically

would have been and two sump pumps in the basement run continuously to keep the lowest level dry;

(5) in order to fully utilize the bottom level, and given its low elevation, any sewerage generated in the building is collected in a basement holding tank and pumped up into the municipal sewer system;

(6) considering the changes taking place in the banking industry, the Property, if sold, would most likely be purchased for nonbanking purposes; and

(7) an independent appraisal estimated the Property's market value to be $295,000 on April 1, 1997.

The Town testified the assessment should be revised based on a new market value finding and argued the revised assessment would be proper because:

(1) the revised assessment was based on a market value estimate using data that became available subsequent to the revaluation and more accurately reflects the Property's value; and

(2) the Town annually reviews all Property and makes good faith adjustments when new data becomes available and shows that an adjustment is warranted.

In addition to this case, the board heard two additional cases on the same day, First Savings First Loan v. Town of Exeter, Docket 17663-97PT and Center One Service Corporation v. Town of Exeter, Docket No.: 17668-97PT. These cases involved the same Taxpayer's representative and the same Town representatives and the Taxpayer's representative utilized the services of the same real estate appraiser and the same group of comparable sales and lease information was submitted in each case. For these reasons, the board takes official notice of all three cases in the decisions involving the individual cases.

Board's Rulings

Based on the evidence submitted and the testimony given, the board finds the proper assessment to be $362,600 based on a market value finding of $370,000 and the Town's equalization ratio of .98 as determined by the Department of Revenue Administration (DRA) ($370,000 x .98 = $362,600). The board has not allocated the value between land and buildings and the Town shall make this allocation in accordance with its assessing practices.

There are three approaches to value: 1) the cost approach; 2) the comparable sales approach; and 3) the income approach. Appraisal Institute, The Appraisal of Real Estate 71 (10th ed. 1992).

While there are three approaches to value, not all three approaches are of equal import in every situation. Id. At 72; International Association of Assessing Officers, Property Appraisal and Assessment Administration 108 (1990). In New Hampshire, the supreme court has recognized that no single method is controlling in all cases, Demoulas v. Town of Salem, 116 N.H. 775, 780 (1976), and the tribunal that is reviewing valuation is authorized to select any one of the valuation approaches based on the evidence. Brickman v. City of Manchester, 119 N.H. 919, 920 (1979).

Given the evidence in this appeal, the board finds the income approach to be the most appropriate approach. The board reviewed the Taxpayer's appraisal in its entirety but after reviewing the Taxpayer's appraiser's comparable sales approach determined the evidence was inconclusive and that the comparable sales approach was not a reliable indicator of value. In the comparable sales approach, the appraiser relied on comparable sales B1, B3, B6 and B8. Sale B1 was initially an interbank transfer which later sold to another bank. Subsequent to the appeal date, this property resold again for $470,000. The board did not hear sufficient testimony as to whether or not this was an arm's-length transaction and gave the sale little weight. Comparable

sale B3 had a substantial amount of adjustments totaling 35%. The appraiser made one adjustment based on a land value of $100,000 per acre. The board finds that making this large an adjustment without supporting documentation or testimony makes the use of this comparable sale inconclusive. For comparable sale B6, the Taxpayer's appraiser lists a -5% adjustment in his text discussion on page B5 for the land-to-building ratio but makes no adjustment for it on his grid. It is unclear what the appraiser intended the final value to be. Comparable sale B8 was purchased by an abutter, however, little or no discussion was given by the appraiser to reflect the necessity or lack of necessity for any adjustment to reflect this condition. In general, the board finds that many of the adjustments or lack of adjustments made by the appraiser in his comparable sales approach were made with little supporting documentation such as a paired sales analysis or other comparisons that would have indicated the basis for making the adjustments included on the grid. For these reasons, the board finds the comparable sales approach used by the Taxpayer to be of little help in determining the proper assessment.

In this case, the board finds the best evidence submitted involved the income approach to value. The board reviewed the income approaches submitted by both parties and determined that neither was conclusive evidence by itself, and therefore, has revised the income approach using data submitted from each party[1]. The board agrees with the Town that the most probable method of estimating the rent for the Property would be on a triple net basis. While the Taxpayer's appraiser testified that a modified gross would be most representative, several of the leases he submitted contained triple net rents. Therefore, the board has chosen $10.00 per square

[1] 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).

foot as a triple net rent and applied that figure to the total square footage as exhibited by the Town of 4,757 square feet. To this, the board has applied a 5% vacancy and credit loss factor that both parties agreed upon. The board finds the Town's expense items to be most representative of the market for this single tenant property and has employed the Town's expense factor of 10% to the effective gross income to yield a net operating income of $39,317. In determining which capitalization rate to employ in this case, the board reviewed the methodology of both parties and concludes that the most probable purchaser of this Property would be an investor who would lease the Property on a triple net basis. Therefore, the board has used a capitalization rate of 11%. This capitalization rate should not be augmented by a tax factor as any taxes would be an expense of the tenants rather than the property owner. This capitalization rate when applied to the net operating income yields an estimated market value of $369,750 or $370,000 rounded. To this must be applied the equalization ratio of .98 as determined by the DRA to determine the assessment. This calculation results in an assessment of $362,600 ($370,000 x .98 = $362,600).

While the Taxpayer presented an in-depth appraisal of the Property, the reasoning and methodology employed in the appraisal appeared to have been based primarily on assumptions and experience rather than calculations and hard data. This was especially apparent in the comparable sales approach where little or no documentation of how adjustments were arrived at was discussed. Similarly, the Taxpayer's assumptions concerning rental situations in the income approach were inconclusive and while the Town gave limited testimony on the reasoning behind its revised market value, the board reminds the Taxpayer the burden of proof is with it and that in order to carry that burden it is necessary to make a conclusive argument for its position. However, it should be noted by both parties that the board did not consider the Town's revised

assessment to be appropriate in this case either and the board's final estimate of value is lower than that recommended by the Town. In each instance the board's responsibility is to determine what the appropriate assessment should be based on the evidence presented. Assessments must be based on market value. See RSA 75:1. In this case, the Town had undergone a town-wide revaluation in 1997 and the contested assessment is a result of that revaluation. However, at the hearing, neither the Town's assessor nor the representative of the revaluation company had inspected the Property or any of the comparable sales submitted or the comparable leases offered by the Taxpayer subsequent to the filing of the request for abatement at the town level. For the board to be convinced that the Town's revised assessment is the correct one, more testimony and substantiative data should have been provided supporting the revised figure.

Costs

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 ***."

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. The board finds the Taxpayer's arguments are not convincing that the actions of the municipality constitute bad

faith. The Taxpayer's agent and the assessor had a verbal agreement as to the assessed values of the lots; however, this agreement was contingent on approval of the board of selectmen.

If the taxes have been paid, the amount paid on the value in excess of $362,600 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 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 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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Michele E. LeBrun, Member

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Douglas S. Ricard, Member

Certification

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to Mark Lutter, Agent for Community Bank, Taxpayer; and Chairman, Selectmen of Exeter.

Date: November 10, 1999

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Lynn M. Wheeler, Clerk

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