

**First Savings First Loan**

v.

**Town of Exeter**

**Docket No.: 17663-97PT**

**DECISION**

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1997 assessments of: \$673,600 (land \$137,400; buildings \$536,200) on "Lot 216," a .44-acre lot with a bank building; and \$85,700 on "Lot 205," a .26-acre lot used for parking (the "Property"). For the reasons stated below, the appeals for abatement are granted.

The Taxpayer has the burden of showing the assessments were 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 Properties' assessments were higher than the general level of assessment in the municipality. Id. The Taxpayer carried this burden.

The Taxpayer argued the assessments were excessive because:

- (1) an independent appraisal estimated the market value for both lots combined to be \$426,000 on April 1, 1997;
- (2) the single drive-up window is insufficient and additional drive-up windows must be provided at an alternative site to provide adequate service;

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- (3) the building does not meet ADA requirements; and
- (4) the heating system is obsolete and inefficient.

The Town agreed the highest and best use of the Property was as one economic unit and recommended a market value of \$480,000 for the two lots. The Town argued the market value was proper because:

- (1) data collected subsequent to the revaluation indicates an adjustment is warranted; and
- (2) a sales analysis and an income analysis indicated a range of values of \$476,900 to \$485,730.

In addition to this case, the board heard two additional cases on the same day, Community Bank v. Town of Exeter, Docket 17648-97PT 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 comparables 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, the board finds the proper assessment to be \$474,300. This assessment is based on a market value finding of \$484,000 and the Town's equalization ratio of 98%. Further, the board finds it is reasonable to deduct the \$14,000 one time cost to remove the underground storage tank for an indicated 1997 assessment of \$460,300. The board finds the highest and best use of the Property is as one economic unit; therefore, the assessment has not been broken down by lot. The Town can make the lot 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. The Appraisal of Real Estate at 71 (10th Ed. 1991).

While there are three approaches to value, not all three approaches are of equal import in every situation. The Appraisal of Real Estate at 72; Property Appraisal and Assessment Administration at 108. 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 agrees with the parties the income and market approaches are the most appropriate approaches to value.

#### Income Approach

The board arrived at its own estimate by the income approach based on the following assumptions:

1) market rent on a triple net basis of \$10.00 per square foot for the first floor consisting of 4,221 square feet; \$8.00 per square foot for the second floor consisting of 2,668 square feet; and \$2.50 per square foot for the basement area consisting of 2,500 square feet;

2) a vacancy rate of 10%;

3) expenses of 13% of the effective gross income; and

4) a capitalization rate of 11%.

#### Market Rent

The board based its market rents primarily on the information supplied in the Taxpayer's appraisal report. The Taxpayer's appraiser (Mr. Blumenthal) testified that he used a modified gross rental based on lease data (comparables R-2, R-3, R-4, R-6 (for basement only),

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R-8, R-10 and R-15) and on the Property's current rents. The board gave some weight to the Property's contract rents but also reviewed the market rents submitted in the appraisal. Of the rents reviewed, most were triple net leases. Mr. Blumenthal's method of adding in taxes to determine a modified gross rent was confusing at best and was inconsistently applied; therefore, the board has analyzed the rents on a triple net basis.

#### Vacancy Rate

The Town estimated vacancy at 10% and Mr. Blumenthal estimated vacancy at 5%. The board finds 10% vacancy is reasonable for this type of potentially multi-tenant property and has used it in its analysis.

#### Expenses

The Town estimated expenses at 10% and Mr. Blumenthal's estimate was 13%. Again, given the type of property (its size, probability of multiple tenants), the board finds 13% for expenses is reasonable and has used it in its analysis.

#### Capitalization Rate

The Town estimated a capitalization rate of 11%. Mr. Blumenthal also used an 11% capitalization rate but then adjusted for the effective tax rate because he estimated rents on a modified gross basis. The board has used a capitalization rate of 11%. This capitalization rate does not include an effective tax rate because the board's estimated rental rate was on a triple net basis assuming taxes to be paid by the tenant. Again, the board finds the market evidence submitted in Mr. Blumenthal's appraisal indicates that most rents for this type of property are on a triple net basis with the tenant actually paying the taxes.

In summary, the board's estimate by the income approach is as follows:

First floor - \$10.00 per sq. ft. X 4,221 sq. ft. =	\$42,210
Second floor - \$8.00 per sq. ft. X 2,668 sq. ft. =	21,344
Basement - \$2.50 per sq. ft. X 2,500 sq. ft. =	<u>6,250</u>
Potential gross income	= \$69,804
Vacancy & credit loss @ 10%	= <u>6,980</u>
Effective gross income	= \$62,824
Expenses @ 13%	= <u>8,167</u>
Net operating income	= \$54,657
Capitalization rate	<u>11%</u>
Total value by the income approach	= \$496,880 (rounded)

Comparable Sales Approach

Based on the comparable sales approach, the board finds an indicated market value of \$70.00 per square foot for an overall value of \$484,000 rounded (\$70 X 6,909 square feet).

Mr. Blumenthal testified that he gave the most weight to comparables B-1, B-6, B-9 and B-10. The board has reviewed all of the evidence and has specifically analyzed these four comparables.

The board gave little weight to comparable B-1 because the testimony and a review of the evidence left questions as to whether or not this sale was an arm's-length transaction. Mr.

Blumenthal's comments in Taxpayer's Ex. #1 regarding this sale indicated Peoples Heritage conveyed the property in a merger. The property was subsequently resold to Concord Savings in an interbank transfer for \$425,000 on August 29, 1997. Mr. Blumenthal testified that this was an arm's-length sale; however, without significantly more information regarding the transfer, the board is unable to place much weight on this sale especially given the fact that the property was then resold on November 17, 1998, for \$470,000.

The board considered but placed less weight on comparable sale B-6 because of the high percentage of adjustments made to that sale (40%). The range of indicated per-square-foot values using comparable sales B-6, B-9 and B-10 was \$55.98 to \$85.92. The board found \$70.00 per square foot to be reasonable based on its review of these three sales.

#### Correlation

In reviewing the two approaches to value, the board finds the comparable sales approach carries the most weight, and therefore, finds a market value of \$484,000 for an indicated assessment of \$474,300. The Taxpayer testified the cost of removal of an underground storage tank should be deducted from this assessed value. The Taxpayer supplied no information as to why the tank required removal, however, the Town did not object to removing the \$14,000 value; therefore, the board orders the assessment of \$474,300 to be reduced by \$14,000 for the 1997 tax year only.

#### 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,

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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 \$460,300 (\$474,300 minus \$14,000 for removal of the storage tank) 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

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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**

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

Date: November 10, 1999

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Lynn M. Wheeler, Clerk

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