Peter Thompson Associates, Inc.

v.

Town of Bedford

Docket No.: 17690-97PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1997 assessment of $4,417,900 on 30.72 acres, a portion of a development known as Village Green (the "Property"). For the reasons stated below, the appeal for abatement is granted to the Town's proposed assessment.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the assessment was disproportionately high or unlawful, resulting in the Taxpayer paying a disproportionate share of taxes. See RSA 76:16-a; TAX 201.27(f); TAX 203.09(a); Appeal of City of Nashua, 38 N.H. 261, 265 (1994). To establish disproportionality, the Taxpayer must show the Property's assessment was higher than the general level of assessment in the municipality. Id. We find the Taxpayer failed to prove disproportionality beyond the Town's proposed assessment.

The Taxpayer argued the assessment was excessive because:

1) the appraisal review (performed by Mr. Larry G. Sage) of the Town's appraisal report ("Spring Appraisal") estimated an April 1997 market value of $1,675,000 and an assessed value of $1,842,500; and

2) Mr. Sage concluded the Spring Appraisal did not appropriately account for the following:

a) discount rate;

b) on-site sales and management;

c) entrepreneurial profit;

d) administration and accounting.

The Town recommended revising the assessment to $2,937,000 based on a market value estimate $2,670,000 and argued this revised assessment was proper because:

1) the Spring Appraisal estimated a market value of $2,937,000 by valuing the building sites at their various stages of improvement based on sales of other condominiums and subdivisions at similarly uncompleted stages; and

2) Mr. Sage's review of the Spring Appraisal incorrectly deducted various expenses and entrepreneurial profit from the value indications.

Board's Rulings

Definition of Property Under Appeal and Parties' Stipulations

Initially the parties did not agree as to the number of sites and extent of the development of the Property under appeal. However, at the conclusion of the hearing, with the exception of one lot at 1 Augusta National Drive, the parties agreed that the Property could be categorized as follows.

54 sites - not subgraded
11 sites - roughed-in road
36 sites - roughed-in road and sewer or water
5 sites - subgraded, road complete, with all water and sewer infrastructure

Based on the testimony and a review of the Spring Appraisal, the board concludes the revisions to the Spring Appraisal (Municipality Exhibit C) are correct in valuing five sites with road, water and sewer complete.

The parties agreed that the department of revenue administration's 1997 equalization ratio of 110% represents the 1997 level of assessment.

Based on representation by the parties' attorneys and Municipality Exhibits B and C, the parties agreed that the off-site costs to be deducted from any market value of the sites were:

Off-site intersection commitment	$250,000
Sewer extension to school	$200,000
Contribution to school	$ 75,000
Manchester sewer payment (waterline)	$110,000
Less money paid to escrow account	($222,722)
	$412,278

Taxpayer's Burden

For 1997 the Town assessed the Property at $4,417,900. However, at the hearing, the Town recommended revising the assessment to $2,937,000 based on the Spring Appraisal (see Municipality Exhibits B and C). Therefore, the Taxpayer's burden is to show why the Town's proposed assessment is disproportionate. For the reasons that follow, the board finds the Town's revised assessment of $2,937,000 is reasonable and results in a proportionate share of the Property's tax burden for 1997.

Estimate of Market Value

The board finds the best evidence of market value is the Spring Appraisal, and its basic methodology is on point with the Property being valued. The Spring Appraisal analyzed sales of developments (both subdivision and condominium sales) at different stages of land development (at a minimum with permits in place, and in some cases, with partial infrastructure in place). These sales, therefore, are quite comparable to the various stages of development of the Property and require minimal adjustments due to their similarity. "Sales comparison is the most common technique for valuing land and it is the preferred method when comparable sales are available. To apply this method, sales of similar parcels of land are analyzed, compared, and adjusted to provide a value indication for the land being appraised. In the comparison process, the similarity or dissimilarity of the parcels is considered." The Appraisal Institute, The Appraisal of Real Estate, 324 (11th ed. 1996). (Emphasis added.) Because the market value to be determined in this case is of a property undergoing development, utilizing sales that are at similar stages of development is very appropriate and inherently captures all value that has accrued to that point in time. Specifically, the sales utilized in the Spring Appraisal (of subdivisions with permits in place), reflect the value the developer has added to the raw land including any assemblage of parcels, engineering and survey work, submission and approval of subdivision plans and the attendant entrepreneurial profit. Likewise, the sales of subdivisions with some infrastructure in place reflect not only the earlier planning and permitting phases of development, but also capture the direct and indirect costs[1] involved in the installation of roads, water and sewer, etc., and the

[1] "Direct costs are expenditures for labor and materials used in construction of improvements." Id. at 346. Examples of direct costs are construction materials, labor, rental charges for equipment used during construction and contractor's profit and overhead. "Indirect costs are expenditures or allowances that are necessary for construction, but are not typically part of the construction contract." Id. at 346. Examples of

entrepreneurial profit[2] that is associated with those actions. While entrepreneurial profit is generally market extracted (the difference between the total direct and indirect costs of development and the market value after completion of the development), entrepreneurs who take a development to a stage short of completion expect to be compensated for their coordination, expertise and risk associated with the development to that point of the project. Therefore, the board finds the Sage deduction for entrepreneurial profit from Spring's site values improperly removes all the entrepreneurial profit that has accrued to those sales.

Because the sales utilized in the Spring Appraisal are very similar in type and stage of development as the Property, very few adjustments are required. Besides the golf course and pond adjustments to some sites, the other major difference Spring adjusts for is the fact that the Property has in excess of 100 sites while most of the comparable sales have half that amount or less. Spring performs a discounted cash flow analysis, not to determine the present worth of the

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indirect costs (also sometimes referred to as "soft" costs) are engineering and surveying fees, legal and consulting fees, carrying costs, (including financing costs during construction for investment in direct costs) insurances, taxes, marketing and sales commission charges, etc..

[2] Entrepreneurial incentive is a market-derived figure that represents the amount an entrepreneur expects to receive as repayment for his expenditure (direct and indirect costs) and as compensation for providing coordination, expertise and assuming the risks associated with the development of a project. Id. at 347.

sites by discounting the future sales of completed units, but to estimate the holding cost of only the land component for the four years he has estimated it will take for the development to be fully marketed. (Spring Appraisal at 36.) Consequently, the deductions that Sage recommends are not appropriate in this analysis. They go beyond estimating the holding cost of the land component alone.

Further, the board finds the Spring Appraisal's discount rate of 10% is more appropriate than the Sage estimate of 15%. The board agrees with the Town that the Property is a "high quality project, with improvements, in a superior town, and in an excellent location, with an excellent current history of sales." (Town of Bedford's Memorandum of Law at 13.) While a higher rate might be appropriate if discounting the entire development at an earlier stage of the project before any work was initiated, the risks as of April 1, 1997, are minimized given that the Property has already been partially developed and has a good market record from which any prospective purchaser would benefit.

In short, the sales utilized and site values derived in the Spring Appraisal inherently capture all the direct and indirect costs and entrepreneurial profit attributable to the Property at its incomplete stage of development. To account for the fact that these site values are just one component of the total unit value that will not be attained immediately, it is appropriate to discount this future land component value over a four-year period. Deducting the sales commissions and other marketing expenses as proposed by Sage would only be appropriate if the discounting was of the final completed, marketed unit.

Effect of RSA 76:17-c

If the taxes have been paid, the amount paid on the value in excess of $2,937,000 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Further, the board orders the Town to use the basic methodology found in the Spring Appraisal, and adopted by the board, to value the Property for subsequent years, with good-faith revisions for changes in the stage of development. See TAX 203.05 (g) "the municipality may adjust the ordered assessment for the subsequent tax years if there is a good-faith reason for such adjustments in accordance with RSA 75:8 and RSA 76:17-c." Also see TAX 203.05 (c) (3) "good-faith reason or adjustment means a change made to an ordered assessment due to: ... b. [p]hysical change to the property."

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.

Taxpayer

1. Granted.

2. Granted.

3. Granted.

4. Granted.

5. Neither granted nor denied.

6. Granted.

7. Neither granted nor denied.

8. Granted.

9. Denied.

10. Neither granted nor denied.

11. Denied, entrpreneurial profit is not the same as return on owner equity.

12. Granted.

13. Granted.

14. Denied.

15. Denied.

16. Denied, not for property at this stage of development.

17. Neither granted nor denied.

18. Denied.

19. Denied.

20. Denied.

21. Granted, $870,000.

22. Granted.

23. Granted.

24. Denied.

Town

1. Granted.

2. Granted.

3. Granted.

4. Granted.

5. Granted.

6. Granted.

7. Granted.

8. Granted.

9. Granted.

10. Granted.

11. Granted.

12. Granted.

13. Granted.

14. Granted.

15. Granted.

16. Granted.

17. Granted.

18. Granted.

19. Granted.

20. Granted.

21. Granted.

22. Granted.

23. Granted.

24. Granted.

25. Granted.

26. Granted.

27. Granted.

28. Neither granted nor denied.

29. Granted.

30. Granted.

31. Denied.

32. Granted.

33. Granted.

Rehearing

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 that a copy of the foregoing decision has this date been mailed, postage prepaid, to Donald E. Gartrell, Esq., Counsel for Peter Thompson Associates, Inc., Taxpayer; Barton L. Mayer, Esq., Counsel for the Town of Bedford; and Chairman, Board of Selectmen of Bedford.

Date: November 9, 2000

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Lynn M. Wheeler, Clerk

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Peter Thompson Associates, Inc.

v.

Town of Bedford

Docket No.: 17690-97PT

ORDER

This order responds to the "Taxpayer's" February 9, 2001 motion to enforce compliance ("Motion"), the "Town's" February 14, 2001 objection to motion to enforce compliance ("Objection") and the parties' subsequent responses to the Motion and Objection. The board denies the Motion for the reasons that follow.

Chronology of Filings

The board issued its "Decision" relative to the 1997 tax year in this matter on November 9, 2000. The Taxpayer relied upon the subsequent year provision of RSA 76:17-c, and thus, did not file timely 1998 and 1999 requests for abatement and appeals. Consequently, the Decision related to the 1997 tax year and initially ordered the Town to "use the basic methodology found in the Spring Appraisal, and adopted by the board, to value the Property for subsequent years, with good-faith revisions for changes in the stage of development." The Town timely filed a

rehearing motion on that portion of the board's Decision. The board held a hearing on the Town's motion on February 8, 2001, and granted the rehearing motion on February 9, 2001 ("Rehearing Order"). The Decision was amended to state in part: "to the extent the Town in good faith, must reappraise the Property in subsequent years pursuant to RSA 75:8 due to changes in value, the above assessment does not apply to subsequent years. See Hanover Investment Corporation v. Town of Hanover, __ N.H. __ (November 15, 2000)." The board notes that the Taxpayer's Motion was filed the same day as the board's Rehearing Order. Consequently, the Taxpayer did not have the benefit of the board's response to the rehearing motion, whereas, the Town's Objection, which was filed several days later, did have the benefit of the Rehearing Order. Three additional filings were made prior to the board's issuing this order: the Taxpayer's Response to the Town's Objection to the Motion to Enforce; the Town's Surrebuttal to the Taxpayer's Response to the Objection to the Motion to Enforce; and the Taxpayer's Further Response to the Town's Objection to the Motion to Enforce. The parties should note that their continual filings of documents delayed the issuance of this order. These responses certainly gave the parties ample opportunity to brief the issue.

Board's Rulings

The Motion was specifically filed in accordance with TAX 203.05 (j) and (k).

> (j) If the municipality fails to comply with (f) or (h) above, the taxpayer may file a motion to enforce compliance. A motion asserting noncompliance with paragraph (f) shall be filed within the timelines set for appeals under RSA 76:16-a. A motion asserting noncompliance with paragraph (h) shall be filed no earlier than 2 months and a day after the clerk's date on the decision and no later than 3 months after the clerk's date on the decision.

> (k) At the hearing on the motion, the Board shall only hear evidence on whether the municipality had a good-faith reason for not using the ordered assessment. The Board shall not receive any other evidence or arguments. The municipality shall have the burden to make a showing that a good-faith reason existed for not using the ordered abatement. If such a showing is made, the burden shall shift to the taxpayer to prove no good-faith reason existed. The Board shall not review the magnitude of any adjustments unless the taxpayer proves the adjustments were so unreasonable as to constitute a lack of good faith by the municipality.

While 203.05 (k) envisions a hearing on an enforcement motion, the board, after deliberations, determines such a hearing is not necessary given the extensive discussion of the effect of the subsequent-year provisions of RSA 76:17-c and, in general, TAX 203.05 that occurred at the February 8, 2001 hearing on the Town's rehearing motion. See also TAX 201.41 and Appeal of Land Acquisition, LLC, __ N.H. __ (December 8, 2000) (the board has reserved the right to waive its rules). TAX 203.05 (k) limits the scope of such a hearing to whether there exists a good-faith basis for the municipality to not use the ordered assessment in a subsequent year. It is clear from the extensive record created in the hearing on the merits of this appeal and the hearing on the Town's rehearing motion that the Property is a condominium development which was being rapidly improved and developed during the 1998 and 1999 time period. Consequently, there was obviously a physical change to the Property in the subsequent years,[3] and thus, a good-faith reason, as defined in TAX 203.05 (c) (3), existed and required the Town

[3] For example, the parties represented to the board at the hearing on the rehearing motion that the total number of lots in 1998 in which the Taxpayer retained an interest was 60 as opposed to 101 sites in 1997. Further, the stage of development of the remaining sites was more advanced compared to the majority of the sites in 1997.

to reassess the Property in 1998 and 1999 in accordance with RSA 75:8. Given the changing nature of the Property, the Taxpayer cannot reasonably rely upon the subsequent year provision of RSA 76:17-c and should have filed timely applications for abatement and appeals for 1998 and 1999 to preserve its appeal rights for those years.

The last sentence of TAX 203.05 (k) limits the board's review to the magnitude of the adjustments "unless the taxpayer proves the adjustments were so unreasonable as to constitute a lack of good faith by the municipality." First, given the general testimony and evidence submitted in both hearings as to the changing nature of this Property, the board finds the Taxpayer's attempt to rely upon this provision to have a full hearing on the Town's 1998 and 1999 assessments at this venue is inappropriate within the entire context of RSA 76:17-c and TAX 203.05. In short, the Taxpayer should not be afforded a back door appeal for 1998 and 1999, having slept on its front-door appeal rights provided in RSA 76:16 and 16-a.[4] Second, the Taxpayer did not submit any evidence in its Motion to support the assertion that the Town's adjustments for subsequent years were so unreasonable as to constitute a lack of good faith by the municipality. The board is aware from the Town's representation at the hearing on the rehearing motion that the subsequent assessments were based on an earlier methodology utilized by the Town in 1997 and if the subsequent methodology that the Town presented, and was adopted by the board (Spring Appraisal methodology), was applied in 1998 and 1999 it would result in higher assessments. The Taxpayer's representation that the subsequent-year assessments improperly contained building assessments is not by itself convincing because, as

[4] The board notes that the subsequent-year issue on which the Taxpayer has filed the Motion, at this point, applies to the 1998 and 1999 tax years as the RSA 76:16-a or 76:17 appeal time-line for the 2000 tax year is still open.

the Town argued, if the Spring Appraisal methodology was applied, it would result in even higher subsequent-year assessments. Bemis Brothers Bag Co. v. Claremont, 98 N.H. 446, 451 (1954) ("Justice does not require the correction of errors of valuation whose joint effect is not injurious to the appellant.")

In short, the board is not convinced by the Taxpayer's arguments that it should be entitled to argue under 203.05 (k) the magnitude of the adjustments (or lack thereof) in subsequent years given the extensive changes that occurred to the Property since 1997. The Taxpayer should have timely filed abatement applications and appeals in order for the board to have jurisdiction to hear the valuation arguments relative to 1998 and 1999.

A motion for rehearing, reconsideration or clarification (collectively "rehearing motion") of this order must be filed within thirty (30) days of the clerk's date below, not the date this order is received. RSA 541:3; TAX 201.37(a). 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(f). 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 that a copy of the foregoing Order has this date been mailed, postage prepaid, to Donald E. Gartrell, Esq., counsel for Peter Thompson Associates, Inc., Taxpayer; Barton L. Mayer, Esq., counsel for the Town of Bedford; and Chairman, Board of Selectmen of Bedford.

Date: March 9, 2001

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Lynn M. Wheeler, Clerk

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