

**Capital Court LLC**

**v.**

**City of Concord**

**Docket No.: 17899-98PT**

**DECISION**

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “City’s” 1998 assessment of \$1,670,000 (land \$697,200; buildings \$972,800) on a 2.9-acre lot with a mixed-use building (commonly known as the “Bear Right” property) (the “Property”). For the reasons stated below, the appeal for abatement is granted.

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. The Taxpayer carried this burden.

The Taxpayer argued the assessment was excessive because:

(1) the Taxpayer purchased the Property from the City in 1998; the agreed-upon, aggregate sale

price of the Bear Right property and the gas station property was \$1,220,000 with \$742,800 allocated to the Bear Right portion;

(2) the purchase price is an indication of its market value and resulted from negotiations between the City and the Taxpayer;

(3) aggressive marketing to lease up the Property was not successful due to its unique configuration, extensive mezzanine area and the three-year period of disruption due to the Interstate 93 Exit 13 highway improvements;

(4) the uniqueness of the Property and its leasing history make it difficult to value by traditional sales and income approaches due to the lack of truly comparable sales or leases; thus, the two appraisals in the City's possession are speculative and should be given no weight;

(5) traditional financing was difficult due to the Property's poor leasing history and the environmental problems associated with the gasoline station; and

(6) the Property was resold in July 1999 for \$1,000,000 plus \$275,000 for consulting fees, providing the highest possible market value indication to be utilized for assessment purposes.

The City argued the assessment was proper because:

(1) the two estimates of value performed by Capital Appraisal Associates of \$2,100,000 and \$2,300,000 formed the basis for the City's assessed value; the original assessment was abated earlier based on these value estimates;

(2) the real estate market changed between the time the Taxpayer and the City agreed to the sale price in 1996 and the assessment date of April 1, 1998;

(3) the City's sale of the Property to the Taxpayer does not compel the City to assess the

Property at that amount because neither that sale nor the subsequent sale by the Taxpayer should be considered market transactions; and

(4) the Taxpayer offered no other evidence of value that is more detailed than the two appraisals prepared by Capital Appraisal Associates.

### **Board's Rulings**

Based on the evidence, the board finds the April 1, 1998 market value of the Property to be \$1,500,000. Based on the parties' stipulation as to the level of assessment (93%), the proper assessment is \$1,395,000 ( $\$1,500,000 \times .93$ ).

This Property is a very challenging one to value with any certainty given its unique open configuration, leasing history and the other factors testified to by both parties. However, in valuing any property for assessment purposes, the following well-established principles form the foundation for the board's determination.

First, the standard on how to appraise property is contained in RSA 75:1. For well over a century RSA 75:1 has been consistently held in a number of New Hampshire cases to mean that such value is market value and just value. See Public Service Company v. New Hampton, 101 N.H. 142 (1957) and cases cited therein.

Second, sale price of any property under consideration is not necessarily conclusive evidence of market value (see Appeal of Town of Peterborough, 120 N.H. 325, 329 (1980)); however, where it is demonstrated that the sale was an arm's-length market transaction, the sales price is one of the "best indicators of the property's value." Appeal of Lakeshore Estates, 130 N.H. 504, 508 (1988).

Third, in determining market value and whether sales prices are indicative of it, all

relevant factors that would be considered by a seller and a purchaser must be considered in determining the assessment. Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1975); Brock v. Town of Farmington, 98 N.H. 275 (1953).

The board will utilize these three well-established principles in analyzing the testimony and evidence presented in this appeal.

The parties presented four separate indications of market value for the Property:

- a) the Taxpayer's purchase of the Property in 1998 for \$742,800;
- b) the Taxpayer's sale of the Property in 1999 for \$1,000,000 plus a \$275,000 consulting fee;
- c) the September 5, 1995 Capital Appraisal Associates estimate of market value for the Bear Right portion of the Property of \$2,100,000; and
- d) the November 4, 1997 Capital Appraisal Associates estimate of the Bear Right portion of the Property of \$2,300,000.

In short, the board finds that alone none of these value indices are conclusive of the Property's market value as of April 1, 1998. The board has arrived at its estimate of market value of \$1,500,000 by weighing the evidence and testimony surrounding these four indices of market value and applying its judgement as to what a lender and a solvent debtor would agree to as the appropriate value to be set off against "a just debt due."<sup>1</sup> This process inherently assumes

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<sup>1</sup> "Given all the imponderables in the valuation process, '[j]udgement is the touchstone.'" Public Service Company v. Town of Ashland, 117 N.H. 635, 639 (1977).

that all the factors that both a lender and solvent debtor would consider relative to a property must be weighed and analyzed in determining the just value.

The board finds the Property's 1998 sale price of \$742,800 is not a reasonable value to be used as such a debt set off for the following reasons. First, the City was involved for a period of time in the management and marketing of the Property after it acquired title for the lack of payment of back taxes. Municipalities, however, are not typical owners of such property and, therefore, do not always have the same motivation in selling a property that a more typical owner would have. Municipalities are more routinely concerned with managing governmental affairs than owning and managing property not needed for municipal functions. Second, the Taxpayer entered into the purchase and sales agreement with the City in 1996, but did not close on the Property until 1998, to allow the Taxpayer the time to obtain a "comfort letter" from the New Hampshire Department of Environmental Services relative to the contamination of ground water on the gas station portion of the Property. This contractual arrangement between the City and the Taxpayer gave the Taxpayer the authority to lease the Property and the gas station, evict tenants, pursue environmental clean up and all other actions typical to an owner. Such an extended arrangement is not typical to arm's-length transactions. The simultaneous closing on the Bear Right property and the gas station property (with title simultaneously passing from the City to the Taxpayer on the Bear Right Property and to Gibbs Oil on the gas station portion) allowed the Taxpayer to avoid paying the real estate transfer tax and double capital gains tax on the gas station. Again, such arrangements are not typical. Further, there was little testimony and evidence as to any renegotiation between the total transaction price agreed upon between the purchase and sales agreement of April 1996 and the subsequent closing of the Property in

January of 1998. The board is aware that the general real estate market improved during that time period and, thus, some adjustment in normal circumstances would be appropriate. Third, testimony by one of the partners, Peter K. Smith, indicated that the Taxpayer intended to “create” value very quickly after the purchase and that, in his opinion, the value was somewhere between the purchase price and the Capital Appraisal’s \$2,100,000 estimate of value. All these factors lead the board to conclude that the initial transaction should be given little weight as a conclusive indication of market value.

The board also finds the Taxpayer’s July 1999 sale price of the Property cannot be considered a conclusive indication of market value for several reasons. The testimony by two of the partners and Mr. David Brady was clear that once the efforts to lease up the Property were not bearing fruit, the partners’ primary motivation was to sell the Property and “cut their losses.” This is evidenced by the listing price of the Property dropping from \$2,100,000 to \$1,900,000 and then to \$1,300,000 in a relatively short time period. As Peter K. Smith indicated, by the time the listing price had dropped to \$1,300,000 the Property did not remain on the market for very long as the purchase price was approaching a level that was acceptable to the market. Further, the nature of the negotiations and structuring of payments that the Taxpayers negotiated with the purchaser, Mr. Riley, were certainly less than ordinary and customary for property, even one as unique as this. When Mr. Riley was unwilling to place “hard money” (deposit) on the Property due to lack of certainty of an anchor tenant, the Taxpayer’s representative indicated to him that an additional charge would be likely if he returned, as he did, with an anchor tenant in hand. This additional charge was structured as a \$275,000 consulting fee (see mortgage deed-Municipality Exhibit B) which Mr. Shane Brandy testified was an estimate of the out-of-pocket

costs of the partners who were financially carrying the Property during the time the Taxpayer managed and owned the Property. This structuring of the transfer's consideration and the relatively short term of the consulting fee raise questions as to the probative value of the sale price. Further, Riley initially financed the purchase through One Dartmouth Street Realty Corporation, a corporation affiliated with one of the partners of the Taxpayer. This short term financing with a related entity at 12% interest is certainly less than conventional commercial financing for such a property and raises a question of whether it may have influenced the sale price.<sup>2</sup>

The board has also reviewed both appraisals prepared by Capital Appraisal Associates, one done for the City and one done for the Taxpayer for financing purposes. We conclude, as the Taxpayer does, that many of the assumptions in the various approaches to value are optimistic and, to some extent, border on speculative given the unique configuration and large common area of the building. The City argued the Taxpayer sought financing based on Capital Appraisal Associates' estimate of value and, thus, it should be an adequate basis for assessing the Property. However, the board notes the Taxpayer was not successful in obtaining

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<sup>2</sup> Mr. Shane Brady testified that to the best of his recollection the note had a stated interest rate of 12%. In July of 1999, based on federal reserve information ([www.federalreserve.gov/releases/H15/data/m/prime.txt](http://www.federalreserve.gov/releases/H15/data/m/prime.txt)), the prime rate was 8%. Assuming a commercial rate of prime plus 1% to 2%, the 12% rate of the mortgage was above market and could have influenced the purchase price. See generally, Appraisal Institute, The Appraisal of Real Estate 10 ed. (1992) p. 376-381.

conventional financing during its ownership of the Property and, thus, is some indication that the appraisal's estimated value is above the actual market value of the Property.

As stated earlier, it is difficult to arrive at a definitive market value for the Property in a quantitative fashion. However, the board places significant weight on the testimony of Peter K. Smith relative to the difficulty in leasing up the Property due to the building's unique configuration of the leaseable space, the large unleaseable common areas and the other factors such as the Exit 13 renovations.<sup>3</sup> Consequently, we conclude, as Peter K. Smith did, that the Property's value is somewhere between the purchase price of the Taxpayer and the appraised values by Capital Appraisal. The board's estimate of this value is \$1,500,000 as of April 1, 1998.

If the taxes have been paid, the amount paid on the value in excess of \$1,395,000 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 City has undergone a general reassessment, the City shall also refund any overpayment for 1999 and 2000. Until the City

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<sup>3</sup> While the board gives some weight to the Taxpayer's argument that the Exit 13 highway construction affected the ability to lease up the Property for several years, it is somewhat offset by the realization that, while there was temporary disruption and inconvenience, in the long term the Property would likely benefit from improved traffic circulation that the construction project was intended to provide.

undergoes a general reassessment, the City 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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Paul B. Franklin, Chairman

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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: John G. Cronin, Esq., Counsel for Capital Court LLC, Taxpayer; and Chairman, Board of Assessors of Concord.

Date: November 19, 2001

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Lisa M. Moquin, Clerk

**Capital Court LLC**

**v.**

**City of Concord**

**Docket No.: 17899-98PT**

**ORDER**

On December 12, 2001, the “City” filed a motion for reconsideration (“Motion”) and on December 21, 2001, the “Taxpayer” filed an objection to the Motion. For the reasons that follow, the board denies the Motion.

The Motion raises three general areas where it believes the board erred in its November 19, 2001 decision (“Decision”): 1) the Taxpayer failed to “establish the fair market value of the property through evidence and testimony”; 2) because the Taxpayer relied upon a professionally prepared appraisal for financing purposes, it “is estopped from asserting the appraisal is not accurate”; and 3) the transient ownership of the property by the Taxpayer resulted in the property not being held for a reasonable period of time “for absorption into the rental market.”

The burden that any taxpayer has is to show that they are assessed at a greater percentage of market value than the municipality’s general level of assessment. Appeal of Town of

Sunapee, 126 N.H. 214 (1985). Said another way, proportionality is the relationship between the value of taxable property rights and a municipality's level of assessment. In this case, the board, in viewing the entire body of evidence submitted, found the Taxpayer carried its burden in showing the assessment was excessive. As the board acknowledged in its Decision, "[t]his Property is a very challenging one to value with any certainty given its unique open configuration, leasing history and other factors testified to by both parties." The board found that none of the value indications alone (purchase, sale and appraisal) definitively determined market value as required in RSA 75:1. However, for reasons stated in the Decision, collectively they indicated that the City's assessment was excessive.<sup>4</sup>

As to the second issue, an appraisal of a property done for financing purposes is not, even if accepted by the owner in an attempt to obtain financing, necessarily conclusive evidence of the property's value; it is simply one individual's opinion of its value. The board can review such appraisals and either accept or reject their conclusions based on other evidence it must weigh in its role as a trier of facts. "A fact finder has the discretion to evaluate the credibility of the

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<sup>4</sup> "The matter in issue in tax abatement proceedings is whether the taxpayer had been required to pay a disproportionately higher tax than other taxpayers in the district. Trustees of Lexington Realty Trust v. Concord, 115 N.H. 131, 336 A.2d 591 (1975); Winnipiseogee etc. Co. v. Laconia, 74 N.H. 82, 84, 65 A. 378, 379 (1906). Actual market value is not technically the matter in issue in tax abatement proceedings but, rather, is only a matter in evidence. Winnipiseogee supra; see Amsler v. Town of South Hampton, 117 N.H. 504, 374 A.2d 959 (1977)." Appeal of Public Service Co. of N.H., 120 N.H. 830, 833 (1980).

evidence and may choose to reject that evidence in whole or in part.” Society Hill at Merrimack Condo Association v. Town of Merrimack, 139 N.H. 253, 256 (1994). In addition to finding that the assumptions in the appraisal “are optimistic and to some extent border on speculative”

(Decision at p. 7), the board also noted that the Taxpayer was not successful in obtaining financing with the benefit of the appraisal in question. (Decision at p. 8.)

Lastly, the board finds that, while the Taxpayer may have held actual title to the property for only approximately one year, under its purchase and sales agreement, it performed all the “ownership” functions such as advertising and leasing up the property, for over three years. The marketing and leasing efforts of the Taxpayer spanned that three-year period, not just the year of title ownership. In weighing the evidence in determining the property’s market value, the board believes the total three-year span of management/ownership was a reasonable time period for the Taxpayer to have “held” the Property and tested the rental market.

Pursuant to RSA 541:6, any appeal of this order by the City to the supreme court must be filed within thirty (30) days of the date on this order.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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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: John G. Cronin, Esq., Counsel for Capital Court LLC, Taxpayer; and Chairman, Board of Assessors of Concord.

Date: January 10, 2002

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Lisa M. Moquin, Clerk