

Nine Seventy Six Realty Trust

v.

City of Portsmouth

Docket No.: 17951-98PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "City's" 1998 assessment of \$7,247,400 (land \$1,050,000; buildings \$6,197,400) on a 109-unit hotel with 54,734 square-feet of finished floor area and expansion capability to add 24 units (the "Property"). The Taxpayer also owns, but did not appeal, an office condominium property with an assessment of \$1,793,400 (land \$500,000; buildings \$1,293,400). The City stipulated at the hearing that the office condominium property was not underassessed. 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) approximately 60 hotel, automobile dealership and large apartment (over 8 units) properties were isolated for revaluation by the City in 1998;
- (2) the Taxpayer's assessment increased by 59.2% in one year, which was much higher than all other hotel properties, and the Property was disproportionately assessed;
- (3) the two comparable hotel sales used by the City (Motel 6 in Portsmouth and Courtyard by Marriott in Manchester) to establish a per-unit land value are high and should be adjusted;
- (4) when the City's comparables are averaged in with the Taxpayer's comparable sales, the per-unit land value does not support the valuation of the Taxpayer's land; the \$10,000 per-unit value used by the City for the Taxpayer is too high;
- (5) the cost approach is the method that should be used to determine the market value of the building improvements built by the Taxpayer and these cost \$5,300,554; and
- (6) based upon comparable per-unit land values and the cost of improvements, the market value of the Property was \$6,120,414 and the equalized assessed value, using a ratio of .82, should be \$5,018,516.

The City argued the assessment was proper because:

- (1) the income approach utilized by the City is the best method for valuing hotel and other commercial properties;
- (2) the City undertook an assessment update of hotel properties in 1998 because it felt they were

- undervalued as a group based on certain indicators;
- (3) the Taxpayer failed to provide revenue and expense information, causing the City to use pro forma estimates, which are reasonable because they are based on industry information and specific data provided by six other hotels in the City and four hotel chains;
- (4) the City used consistent methods in assessing all hotel properties and, in fact, reduced some of their assessed values as a result of the updating process in 1998;
- (5) the Taxpayer's comparables are located in Maine and Manchester, New Hampshire which have lower land values than the City;
- (6) it is reasonable to use the recent Motel 6 sale as a comparable to establish a per-unit land value;
- (7) proportionality within and between classes of properties can only be determined by taking market values into consideration; and
- (8) the Taxpayer failed to meet its burden of proving disproportionality.

Subsequent to the hearing and during the board's deliberations, the board directed its review appraiser (RSA 71-B:14), Mr. Stephan Hamilton, to review the record, inspect the Property and file a report limited to a depreciated replacement cost estimate of the improvements. This report, dated March 1, 2001 (the "Report"), and circulated to the parties for comment, concluded the depreciated cost value of the improvements was \$6,263,573 and, applying the City's 1998 equalization ratio of .82, results in an estimated contributory assessment for the improvements of \$5,136,100 (rounded).

Although the Report is not an appraisal, the board is authorized to review and treat the

Report as it would any other evidence, giving it the weight it deserves, and accepting or rejecting its conclusions.

Board's Rulings

Preliminary Issues

At the close of the hearing on October 19, 2000, the board kept the record open for the City to file comments on the Taxpayer's Exhibits 1, 2 and 3 which had been admitted for identification purposes only. The City objected to the acceptance of the exhibits for the reasons stated in its October 26, 2000 letter. After reviewing the parties' comments, the board accepts Taxpayer Exhibits 1, 2 and 3 as full exhibits, but notes the comments regarding those exhibits submitted by the City and the Taxpayer. The City's arguments did not establish a basis for excluding the exhibits, but relate more to the weight the City believes the board should give to the analyses and conclusions in the exhibits.

This appeal raised the following issues: 1) allegations by the Taxpayer of inter and intra strata disproportionality and spot assessing; and 2) the most appropriate approach to valuing the Property and determining its market value, and thus, assessed value.

Spot and Disproportionate Assessing

The Taxpayer raised two related arguments. First, the Taxpayer argued the City improperly singled out three classes of properties (hotels, multi-families greater than eight units and auto dealerships) to review and update their assessments in 1998. Second, the Taxpayer argued the Property's assessment was disproportionate to both other hotel assessments and to

commercial property values in general.

The board finds both arguments are without basis in this case.

Under the New Hampshire Constitution, citizens are required to contribute their share of governmental costs. N.H. Const., pt. 1, art. 12. Such contributions (i.e., taxes) must be "proportional and reasonable [in] assessments, rates, and taxes ***." N.H. Const., pt. 2, art. 5. In Appeal of Andrews, 136 N.H. 61, 64 (1992), the court held that the above-cited constitutional provisions require that all taxpayers in a municipality must be assessed at the same proportion of market value. Moreover, the court stated that to establish disproportionality, a taxpayer must show that its assessment was higher than the general level of assessment in the municipality. The court made it clear that proportionality was to be judged across the entire town rather than only by property type. The Andrews decision is in accord with an early proportionality case -- Amoskeag Manufacturing Co. v. Manchester, 70 N.H. 200, 204-05 (1899). This same principle was enunciated in Opinion of the Justices, 123 N.H. 296, 301 (1983), where the court stated that the New Hampshire Constitution requires that all property within a particular class be proportionately assessed. It is clear from reading New Hampshire case law that for purposes of real estate taxes, the class is all real estate and not different types of real estate within that class. Therefore, to comply with the constitutional obligation of proportional assessment, municipalities are obligated to ensure that properties are assessed at the same general level of assessment prevailing throughout the municipality.

In this case, the City's assessor (William Boatwright) testified he reviewed general market data for all properties in the City and determined, based on various market value indicators, to focus his attention in 1998 on updating the three types of property mentioned

earlier. It was the assessor's opinion, based on his knowledge of the market, that those properties were generally disproportionately underassessed, and thus needed to be reviewed and revised for 1998. The board finds this type of update on a limited number of properties done within the context of a city-wide review is not spot assessing and is indeed what municipalities are required to do by law. RSA 75:1 requires that property be assessed at market value and the cases cited above indicate that assessments may be a proportion of market value as long as all assessments are at the same level of market value. E.g. Appeal of Andrews, 136 at 64-5. Additionally, RSA 75:8 requires municipalities to annually review assessments and to make adjustments that are necessary to correctly assess property. Municipal officials also execute the RSA 75:7 oath, which requires them to state that all taxable property was assessed at its full value. Therefore, the board finds the City acted according to its statutory obligations in reviewing and revising the Taxpayer's assessment for 1998. Further, as the cases establish, disproportionality is not measured by interassessment comparison, but rather is the product of the determination of market value and the general level of assessment. "Our constitution mandates that all taxpayers in a town be assessed at the same proportion of ['fair market value']." Public Service Co. of N.H. v. Town of Seabrook, 133 N.H. 365, 377 (1990). Consequently, the Taxpayer's evidence relative to differing assessments of other hotels or commercial properties does not establish that the Taxpayer's assessment was disproportionate to market value.

Highest and Best Use and Market Value Estimate

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, we find the cost approach is the most appropriate approach to valuing the Property for the year under appeal for several reasons. The board will address first the other two approaches on which it placed little or no weight.

Sales Approach

Neither party submitted sales of comparably improved properties from which to directly estimate a value for the Property. As a consequence, estimating the value of the Property by the direct sales comparison approach is not applicable in this case. The parties did submit, however, various sales of land that sold for subsequent development for motels. Those sales, utilized in estimating the land component in the cost approach, are addressed later in this decision.

Income Approach

The City's assessor testified the 1998 assessment was based solely on an income

approach contained within the City's prehearing statement. The income approach calculated an assessed value of \$7,267,961. This then became the primary determinant in the City's land and building adjustment factors on the assessment-record card which resulted in the appealed assessment of \$7,247,400. The difference between the assessed value calculated by the income approach (\$7,267,961) and the actual assessed value (\$7,247,400) apparently is due to rounding from the depreciation factors of the assessment-record card. Consequently, while the City's assessment is broken down into land and building components that would normally have some relationship to depreciated replacement cost and a land value derived from the market, the total assessed value was largely driven by the City's income approach estimate and then allocated between the land and building components.

Generally, it is appropriate to estimate the value of ongoing concerns by the income approach. See generally, Appraisal Institute, The Appraisal of Real Estate, 11th ed., pages 449-468 (1996). However, the board places little weight on the City's income approach estimate for the following reasons.

The board reviewed the City's income approach calculations and supporting documentation and concludes the basis for the analysis is too general for the board to give it significant weight. The City was unable to obtain specific income and expense information from the Taxpayer, and thus mainly utilized general industry estimates for such information. While the parties agreed the gross operating income estimated by the City was reasonable, there was no agreement as to the appropriate amount of expenses to be deducted or the amount of deduction for personal property and any business value. Even with the best information available,

estimating a value attributable to the real estate component of an ongoing concern such as the Property is problematic because of the difficulty of definitively quantifying the expenses and the non-realty components. The City argued that its 60% expenses included deductions for franchise and management fees which stripped out any business value from the resulting market value. However, no definitive evidence was submitted as to what percentage of the City's 60% total expenses was attributable to those two items. As an example of the unreliability of the income approach and its indication of value when based on general estimates, the board revised the City's income approach by only changing the expense ratio from 60% to 65%, keeping all other calculations the same. This revision reduced the indicated assessed value to \$6,317,000, more than a \$930,000 reduction in estimated assessed value. As already stated, this example does not account for other variables, such as personal property and business value, which need to be carefully extracted based on thoughtful and documented evidence from ongoing concern values. Such evidence was not presented in this case.

Cost Approach

The board finds the cost approach is an appropriate method to estimate the Property's market value for several reasons. First, the Property was recently constructed as a hotel and no significant physical or functional obsolescence needs to be estimated. Second, hotels are a special-purpose type property, not easily adapted to other uses. The general concept of special-purpose buildings is that they are uniquely adapted to a single use and any conversion to other uses would require extensive renovations. In general the cost approach is appropriate for special-purpose properties. See Appraisal Institute, The Appraisal of Real Estate 316-17 (11th

ed. 1992); International Association of Assessing Officers, Property Appraisal and Assessment Administration 169 (1990); and Joan Youngman, Legal Issues in Property Valuation and Taxation: Cases and Materials 14 (1994). Third, the cost approach does not include any value attributable to personal property or business, and thus solves the problem of key deductions inherent in the income approach. Fourth, the cost approach requires an estimate of the land value by the sales approach utilizing sales of comparable parcels of land. While the parties extensively disputed the comparability of the various sales submitted, there were at least several land sales/leases from which a land value can be estimated.

Building Value

The board is unable to place much weight on the Taxpayer's original construction cost of \$5,300,554, as no documentation was submitted to support that number. Because it was constructed by an affiliated entity, the Taxpayer's construction costs do not include some indirect costs which are appropriate components of a replacement cost estimate.

Also, as stated earlier, the board does not place much weight on the City's computed replacement cost estimate on the assessment-record card because it appears to be simply a calculation to conform to the City's income approach.

Because the Taxpayer presented some evidence that the assessment may be disproportionate (Appeal of Sokolow, 137 N.H. 642, 643-44 (1993)) and because no reliable replacement cost estimate of the improvements were submitted, the board directed Mr. Hamilton to perform such an estimate. The parties were provided an opportunity to file comments on the Report, but only the City responded. Based on a review of the Report and the parties'

comments, the board finds Mr. Hamilton's depreciated cost value of \$6,263,573 is the best evidence submitted of the value of the improvements. The board has reviewed the City's concerns about indirect costs and entrepreneurial profit not being included in Mr. Hamilton's replacement cost estimate developed from Marshall Valuation Service. The board disagrees with the City's representation that Marshall Valuation Service's replacement costs do not include "indirect costs." The board compared the page submitted by the City from Marshall Valuation Service detailing what costs are included and not included with the description of direct and indirect costs contained on pages 346 and 347 of The Appraisal of Real Estate, (11th ed.). The board finds the Marshall Valuation cost estimates include almost all the indirect costs detailed by the Appraisal Institute. Those that may not be included, such as interest and taxes on land during construction, are relatively minor and would not significantly affect the replacement cost estimate.

Entrepreneurial profit is a factor that should be considered as a possible inclusion in any replacement cost. Id. at 347. However, no evidence (other than the City Assessor's opinion) was submitted as to the appropriate amount of entrepreneurial profit such as comparable market data, either regional or national, showing that entrepreneurial profit should be considered. While entrepreneurial profit is a factor to be considered, it is not always present in the market; for the board to find that it is a part of the market value of the Property, there needs to be evidence submitted as to its existence and magnitude. In theory, a comparison of a replacement cost estimate with sales or income approach estimates of similar properties could reveal the presence and magnitude of entrepreneurial profit; however, for all the reasons stated earlier, no sales were

submitted and the income approach estimate that was submitted is too general from which to draw any definitive conclusions.

Land Value

The board finds the City's assessed land value of \$1,050,000 to be a reasonable estimate of the site's contributory value to the Property's overall value. The board reviewed the many sales submitted by the parties and finds the most comparable sales were the Motel 6 sale in Portsmouth and two land leases of properties at the Portsmouth Development Authority that were submitted in evidence in a companion appeal (Resport, LLC v. City of Portsmouth, Docket No.: 17952-98PT) of which the board took official notice. The board finds the sales in Manchester, New Hampshire, and Scarborough and Portland, Maine to be in such different markets that to make them comparable to the Property would require additional market research to quantify appropriate adjustments. Further, conflicting evidence was submitted on several of the sales (in particular, the Huse Road sale in Manchester) that made them difficult to analyze.

The board acknowledges the Motel 6 sale in Portsmouth, based on the testimony and the board's view of the location, may reflect a premium price paid by the purchaser for that location. While not discounting it entirely, the board places more weight on the two ground leases analyzed in Resport LLC v. Portsmouth. Those two leases indicated a base five-acre site value of approximately \$1,000,000. While those sites are generally larger than the condominium site being valued in the Property, they do provide for the same real estate rights (right to build an approximate 100-unit hotel in Portsmouth) and provide an estimate of what a similar purchaser would pay for a similar site regardless of its exact size. The Resport site was developed into a

90-suite, limited-service, extended-stay hotel. Both parties agreed it was appropriate to multiply the 90 suites by an approximate conversion factor of 1.25 to reflect the larger suite layout versus a more typical hotel room configuration. This results in a comparative “hotel room” count of 112.5 for the Resport site. Dividing the \$1,000,000 site estimate by 112.5 rooms indicates a per-room value of \$8,889. The Property has the capability for 133 rooms which multiplied by the per-room value derived from the Resport land leases results in a market value indication for the land of \$1,182,237 (133 x \$8,889). The indicated market value of the land assessment (calculated by dividing the land assessment by the City’s 1998 equalization ratio of .82 (\$1,050,000 ÷ .82)) is \$1,280,488 or approximately 8% more. This difference, especially in the context of the entire value of the Property, is slight enough and does not warrant a correction of the City’s land assessment. “Absolute mathematical equality is not obtainable in all respects if taxation is to administered in a practical way.” Duncan v. Jaffrey, 98 N.H. 305, 307 (1953); accord City of Berlin v. County of Coos, No. 98-699 (March 1, 2001), ___ N.H. ___, <http://webster.state.nh.us/courts/supreme/opinions/0103/berli033.htm>.

While the resulting per-unit value is higher than some of the sales submitted by the parties, the board finds the site is in an excellent location at the first Interstate 95 exit adjacent to Maine and is in an attractive campus setting. While not in a downtown location such as the Portsmouth Sheraton, the Property is well located, as is the Resport site, to the business and shopping areas of Portsmouth.

Conclusion

Therefore, the board concludes the proper 1998 assessed value for the Property is

summarized as follows: land \$1,050,000; buildings \$5,136,100; total \$6,186,100.

Findings of Fact and Rulings of Law

1. Granted.
2. Granted.
3. Neither granted nor denied.
4. Granted.
- 5,. Denied.
6. Denied.
7. Neither granted nor denied.
8. Denied.
9. Denied.
10. Neither granted nor denied, issue generally addressed in decision.
11. Neither granted nor denied, issue generally addressed in decision.
12. Neither granted nor denied, issue generally addressed in decision.
13. Neither granted nor denied, issue generally addressed in decision.
14. Denied.
15. Denied.
16. Denied.
17. Denied.
18. Denied.
19. Granted.

20. Neither granted nor denied.

21. Denied.

22. Denied.

23. Denied.

24. Granted.

25. Denied.

26. Denied.

27. Granted.

28. Denied.

29. Granted.

30. Denied.

31. Denied.

32. Denied.

Refund

If the taxes have been paid, the amount paid on the value in excess of \$6,186,100 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

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.

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

Paul B. Franklin, Chairman

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Page 17
Nine Seventy-Six Realty Trust v. City of Portsmouth
Docket No.: 17951-98PT

CERTIFICATION

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to Thomas M. Keane, Esq., Counsel for Nine Seventy Six Realty Trust, Taxpayer; and Chairman, Board of Assessors of Portsmouth.

Date: June 1, 2001

Lisa M. Moquin, Temporary Clerk

0006