MHT Hangar 5, Inc.

v.

Town of Londonderry

Docket No.: 18256-99PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the1999 tax assessment by the "Town" of $211,300 (buildings $209,100; yard items $2,200) on a prefabricated aircraft hangar building and related improvements (the "Property"), situated on leased land at the Manchester Airport. 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 land lease with the City of Manchester has an 18 year fixed term (which commenced upon completion of the aircraft hangar building), with no options to renew and no other rights to extend the lease or purchase the land;

(2) the Property is used for storage of five private airplanes by the Taxpayers' shareholders and the market rent for such space is no more than $350 per month per plane;

(3) use of the income approach in 1997 by the Taxpayer's former representative resulted in a value estimate of approximately $89,000, similar to the estimate using the cost approach, and these approaches to valuation are preferable to the comparable sales approach the Town employed in this case; and

(4) while Manchester Airport has grown in size, any locational advantages for private aviation are offset by security, congestion and other factors, and an assumption by the Town that private airplane hangar space has more market value in Manchester than in Nashua or other area airports is not valid.

The Town argued the assessment was proper because:

(1) the comparable sales approach is the best indicator of the value of the Property;

(2) no comparables exist at the Manchester Airport, but six comparable sales of hangars from Nashua Airport should be used to determine market value, if adjusted with a 20% positive locational factor for Manchester;

(3) this approach results in an indicated value range of $208,185 to $351,350 and the Property's equalized value for 1999 ($211,300 ÷ .90 equalization ratio ≈ $234,800) is well within this

range; and

(4) the Taxpayer failed to satisfy its burden of proving disproportionality.

Board's Rulings

Based on the evidence, the board finds the Taxpayer sustained its burden of proof and should be granted an abatement to an assessed value of $102,700 for the 1999 tax year. The board's reasoning is set forth below.

Property Characteristics

The Property is somewhat unique, both in terms of its function (as a private aircraft hangar) and because it has a finite remaining period of use (12 years) by the Taxpayer. The board has carefully reviewed the written lease agreement dated August 24, 1992 submitted by the Taxpayer (Exhibit 1, the "Lease"). The lessor, the City of Manchester (the "City" -- "through its Department of Aviation"), required the Taxpayer to erect, at its own expense, a pre-fabricated aircraft hangar, subject to plans and specifications approved by the City, "to be ready for use and occupancy not later than November 30, 1992." The term of this lease is 18 years from the time of completion of the hangar, with no options to renew or extend the lease or to purchase the land. At the end of the term, the Property must be conveyed to the City, free and clear of all liens. See Taxpayer Exhibit 1, Articles I, III, IV, VI and VIII. In short, the real estate rights to be valued in this case (cf. RSA 21:21) are significantly affected by the limited term and other characteristics of the Lease.

Choice of Approaches

In general, there are three accepted valuation approaches: 1) the cost approach; 2) the comparable sales approach; and 3) the income approach; but not all are of equal importance or

use in every situation. See Appraisal Institute, The Appraisal of Real Estate 71 - 72 (10th ed. 1992); and 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); the tribunal deciding the valuation issue is authorized to select any one of these approaches based on the evidence. Brickman v. City of Manchester, 119 N.H. 919, 920 (1979).

In 1997, when confronted with a prior increase in the assessment, the Taxpayer hired a representative, David Irwin, to prepare a valuation study and meet with the Town. Mr. Irwin's study applied the income and cost approaches to estimate a value range of $89,280 to $89,335. The valuation study and meeting resulted in an agreement by the Town to lower the assessment to $100,800 for the 1997 tax year.

In 1999, the Town increased the assessed value to $211,300, resulting in this appeal. The Town's Assessor decided to use the sales comparison approach as the basis for this assessment. Because there were no "recent sales of hangars that are similar" in the Town, the Town utilized six comparable sales, "all from the City of Nashua Municipal Airport," and added a "locational adjustment of 20%" to the indicated prices per square foot of these sales. See the Town Assessor's August 1, 2001 letter to the board.

In this case, the board finds the use of the comparable sales approach by the Town questionable (and far less preferable than the income and cost approaches) for several reasons.[1]

[1] In her letter addressed to the board, supra, the Town Assessor stated she used the comparable sales from Nashua, with a 20% positive adjustment, to estimate "a value range of $208,185 to $351, 350" for the Property. The wide

First, the Town Assessor did not review any of the leases on the Nashua properties she submitted as comparisons and therefore could not state whether they were truly comparable with respect to basic terms, such as lengths of lease, lease rates, rights to renew or extend and so forth. Second, she did not inspect the comparable hangars to determine if they were similar in style (e.g., storage, maintenance and "T-hangars" are three recognized types with different features and costs) or quality of construction, height, and other features. Third, other testimony at the hearing indicated Manchester did not have any locational advantages over Nashua and other area airports for private airplanes when additional factors (such as congestion and security) are taken into account.

Income Approach

Given the characteristics of the Property, and the constraint of a fixed term lease which will expire in approximately 12 years, a prudent third party investor is likely to value the Property based upon the stream of rental income less expenses likely to be generated over the remaining term, capitalized by an appropriate discount rate. In using an income approach to valuation, assumptions regarding the time horizon of the investment (the remaining lease term, for example) and other factors, including the discount rate, are required.

To simplify the calculations made below, the board assumed the 18-year lease term commenced on April 1, 1993, the assessment date, rather than November 30, 1992 (the latest date indicated in Section 3.2(c) of the Lease), leaving a remaining period of 12 years of use as of

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breadth of this range belies the usefulness of this approach in this case.

the assessment date. The value of the Property, unlike other leases with longer terms or leases subject to options to extend or renew, must therefore be determined based upon the estimated income and expenses (benefits and costs) accruing over this finite period. There is no evidence the Town took this significant time constraint into account in making the 1999 assessment.

Use of the income approach yields a significantly lower market value than the sales comparison approach attempted by the Town. In Attachment A, the board has utilized yield capitalization, in the form of a discounted cash flow analysis,[2] to determine the present value of the Taxpayer's possessory interest in the Property. The board modified, however, several of the assumptions previously made by the Taxpayer's prior tax representative, Mr. Irwin, in his 1997 valuation study. (Taxpayer Exhibit 2.)

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[2] See, generally, Joseph M. Davis and John A. Swain, "Possessory Interests: A Systematic Valuation Approach" Journal of Property Tax Management (Winter 2000) at p. 4 -5 ("yield capitalization or discounted cash flow . . . is most appropriate for separately valuing the possessory interest [of the lessee]. Yield capitalization converts future net operating income into a present value by discounting each year's future income . . . at an appropriate yield rate."

With regard to the discount rate, for example, the board noted a substantial drop in interest rates in the intervening period, with the prime rate falling from 9.0 % on April 1, 1997 to 7.75% on April 1, 1999.[3] Mr. Irwin also used an earlier, higher effective tax rate than would be warranted in 1999, when the effective tax rate for the Town was 2.326%.[4] Weighing these factors, the board concluded an overall discount rate of approximately 12.3 % (10 % plus effective tax rate) was more reasonable and used this estimated rate in its discounted cash flow computation.

Aside from the discount rate, the board made several other adjustments in its analysis using the income approach. The vacancy and collection loss rate of 10 percent used by Mr. Irwin was reduced to two percent because of testimony at the hearing regarding the lack of available hangar space for private aircraft at Manchester Airport and the use of the space on the Property for planes owned by the Taxpayer's shareholders, which should diminish re-rental and collection problems. Mr. Irwin used information from the Taxpayer's income tax returns and other information to estimate operating expenses at 23.4% of effective gross income; the board, however, believed a more conservative assumption of 20% was appropriate here.

Regarding market rents, the Taxpayer's representatives (shareholders Richard Letemore and Robert Coerver) testified they knew of no rental higher than $350 per month per space and this testimony was not challenged by the Town. The board used this rental rate in its analysis,

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[3] The source for this information is the Federal Reserve Bank of St. Louis, "Monthly Interest Rate Data," http://www.stls.frb.org/fred/data/rates.html.

[4] The department of revenue administration reported a full value tax rate of $23.26 per $1,000 of assessed value in 1999, an effective tax rate of 2.326% for the Town . Mr. Irwin, in contrast, used a 3.662 % rate in his 1997

but applied an inflation factor of three percent per annum to both the rental income and the operating expenses.

In addition, the board assumed a zero salvage value at the end of the lease term because of certain key provisions in the Lease. These provisions indicate the Taxpayer must maintain the condition of the Property, "reasonable wear and tear excepted," and return it to the lessor at the end of the lease term. See Taxpayer Exhibit, Lease Sections 6.2, 6.10(c) and 8.1.

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analysis. (See Taxpayer Exhibit 2).

Finally, as noted above, the board made the simplifying assumption that lease commencement occurred on the tax assessment date of April 1, 1993, rather than an earlier date on or before December 1, 1992, in order to simplify the computations and avoid partial-year calculations.[5] The outcome of the board's analysis, using the discounted cash flow method in Attachment A, is an indicated value as of April 1, 1999 of slightly over $114,000, which, when equalized, indicates an assessed value of approximately $102,700.

Reasonableness Check

The board undertook a check on the reasonableness of this value indication using the income approach by also considering the cost approach. As noted above, Mr. Irwin used the cost approach in 1997 to make a replacement cost estimate using Marshall & Swift rating factors. The board utilized the same source, but the updated 1999 edition, to derive a somewhat higher replacement cost per square foot estimate ($14.23 rather than $13.15), applied the Town's square foot estimate of 7,862 (slightly higher than Mr. Irwin's estimate of 7,644 square feet) and added a

paving assessed value of $2,200. Use of these estimates and the cost approach results in an

[5] In contrast, Mr. Irwin's methodology used direct capitalization (an assumption of a perpetual term) and did not take the termination date of the Lease into account.

assessed value indication of $102,900 -- within $200 of the estimate (reflected in Addendum A) using the income approach.[6]

In summary, the wide disparity in value estimates between the income and cost approaches, on the one hand, and the comparable sales approach employed by the Town, on the other, indicates the Town's sales are not truly comparable to the Property. While the income and cost approaches yield estimates that are closer together, the board finds the income approach is preferable in this case, especially since its primary focus is to value the Property at its highest and best use, in accord with fundamental appraisal principles.[7] For all of these reasons, the

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[6] This cost approach estimate does not reflect any physical, functional or economic depreciation. The Taxpayers presented no evidence of physical or functional depreciation that would impair the Taxpayer's use of the Property. In theory, economic depreciation could be present, given the characteristics of the Lease noted above, and may lower the value estimate if a cost approach is used. The income approach, however, through its focus on "market" rent, can take non-observable depreciation into account, but results in a higher estimate of value here, indicating economic depreciation may not actually be warranted.

[7] See, generally, International Association of Assessing Officers, Property Appraisal and Assessment Administration, supra at 90 ("Highest and best use analysis determines

Taxpayer's appeal is granted and the board orders the Town to abate the assessed value for the 1999 tax year to $102,700.

Other Issues

If the taxes have been paid, the amount paid on the value in excess of $102,700 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 overpayments made in subsequent years. The Town shall use the ordered assessment for subsequent years, until such time as there is a good faith decision to reappraise the Property under RSA 75:8 due to changes in value or until there is a general reassessment in the Town. See RSA 76:17-c, I. In this regard, the Town is not precluded from deciding whether continued use of the income approach or, alternatively, another approach or combination of approaches, could result in a more accurate valuation of the Property in future years at its highest and best use, but any change in the valuation methodology must meet the "good faith" standard set forth in the statute.

A motion for rehearing, reconsideration or clarification (collectively "rehearing motion")

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what use will generate the highest present value to the property at the time of the appraisal."); and International Association of Assessing Officers, Mass Appraisal of Real Property 17 - 20 (1999) ("Not every approach is pertinent or useful for valuing all properties. . . . In general, the appraiser should use or give greatest weight to the approach that is most supportable given the available data.")

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; and 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

Albert F. Shamash, Esq., Member

CERTIFICATION

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to: MHT Hangar 5, Inc., Taxpayer; and Karen Marchant, assessor, Town of Londonderry.

Date: September 25, 2001

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Lisa M. Moquin, Clerk

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MHT Hangar 5, Inc.

v.

Town of Londonderry

Docket No.: 18256-99PT

ORDER

The board has reviewed the "Motion for Rehearing" filed by the "Town" on October 25, 2001 (the "Motion") with respect to the Decision dated September 25, 2001.

The Motion asserts the Decision is "unlawful and unreasonable" because it allegedly failed to consider several statutes, RSA 72:23, I and RSA 73:10, neither of which was previously cited or mentioned by the Town. In essence, the Motion asserts, for the first time and subsequent to the full hearing and the closing of the record on August 16, 2001, that the Town is entitled to

assess the "Property"[8] as if it were owned in fee simple (combining the "Taxpayer's" "leasehold interest" for a remaining term of 12 years with the "reversionary interest" owned by the lessor, the City of Manchester) because of these statutory provisions.

TAX 201.37(f) governs the introduction of "Additional Facts or New Arguments" and provides: "Parties shall submit all evidence and present all arguments at the hearing. Therefore, rehearing motions shall not be granted to consider evidence previously available to the moving [p]arty but not presented at the original hearing or to consider new arguments that could have been raised at the hearing."

This rule is based on RSA 541:3, which limits the subject matter of a rehearing "to any matter determined in the action or proceeding, or covered or included in the order." The supreme court has applied this statute in at least two cases to exclude consideration of new factual or legal issues through a motion for rehearing, as follows: "Since this [particular] . . . argument [by the appellant] was not addressed during the course of the hearing or in the

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[8] The "Property" is situated at the Manchester Airport, on land owned by the City of Manchester ("City") but located in the Town. The "Lease" between the City and the "Taxpayer" was entered in August, 1992, prescribed an 18 year lease term with no options to renew, identified the "Leased Premises" as containing of a total of 14, 229 square feet of "Leased Land" and required the Taxpayer to erect a pre-fabricated airplane hangar building (measured at 7,862 square feet by the Town). See Taxpayer Exhibit 1, Articles I, III and IV.

[agency's] order, it was improperly included in the motion for rehearing and was therefore not properly raised on appeal." Appeal of Campaign for Ratepayers' Rights, 133 N.H. 480, 484 (1990), citing In re Appeal of Working on Waste, 133 N.H. 312, 315-16 (1990). In the Working on Waste case, the court ruled the administrative agency (the Solid Waste Management Council) correctly denied a motion for rehearing which attempted to raise a new factual and legal issue (regarding "potentially toxic land fill") not mentioned in the original hearing. Id. In the Campaign for Ratepayers' Rights case, a party sought to raise a constitutional ("due process") issue for the first time in the rehearing motion to the agency (the Nuclear Decommissioning Finance Committee), but the
supreme court dispensed with this argument and did not "allow the issue to be raised on appeal." 133 N.H. at 484.

Because of the nature of the issues posed by the Motion, the board will schedule a hearing on December 6, 2001 at 9:00 a.m. for two purposes. In the first part of the hearing, the board will require the Town to show cause why the Town should now be permitted to raise these arguments for the first time, in light of TAX 201.37(f), RSA 541:3 and the authorities cited above.

If the Town meets this obligation, then the board may proceed to a second part of the hearing to the merits of the Motion to consider (through a "rehearing") any facts or authorities pertaining to how, if at all, the exemption statute cited by the Town, RSA 72:23, I, should affect the proper assessment of the Property. The board directs the parties to address, as part of their presentations on this issue, the relevance of RSA 72:23, I and 73:10 and their application in Appeal of Reid, 143 N.H. 246 (1998).

The board also directs the parties to consider and present evidence on the impact, if any, of RSA 423:9 ("Tax Exemption" pertaining to airport property) and special legislation codified as Chapter 202 of the 1977 New Hampshire Session Laws, modifying the operation of this statute in the Town. (See Attachment A hereto). In this regard, the Town is further directed to submit to the board and to the Taxpayer, at least ten (10) days before the hearing, copies of any resolutions, minutes and other documentation which may reflect, embody or explain the right of "abatement" granted to the Town by the legislature in Chapter 202 and whether or not it has been exercised.

Finally, the board requests the parties to address the issue of waiver inasmuch as the Town's assessment-record cards and methodology to date do not appear to estimate a "Land Value" at all, but only a "Building Value" derived from study of allegedly comparable sales of leased hangar premises at Nashua Airport.[9] Cf. City of Portsmouth v. Nash, 126 N.H. 464, 468 (1985) ("The actions of the city in this case were sufficiently inconsistent . . . to constitute a waiver of [a certain] right" and "waiver may be inferred from a course of conduct").

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

[9] In other words, neither the subject assessment nor the comparables presented by the Town appear to be based on valuation of a "fee simple" interest (full ownership of both the land and the building and other improvements).

Albert F. Shamash, Esq., Member

CERTIFICATION

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to: MHT Hangar 5, Inc., Taxpayer; Karen Marchant, assessor, Town of Londonderry; and Robert Upton, II, Esq.

Date: November 15, 2001

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Lisa M. Moquin, Clerk

MHT Hangar 5, Inc.

v.

Town of Londonderry

Docket No.: 18256-99PT

ORDER MODIFYING DECISION

On December 6, 2001, the board held a hearing on the "Motion for Rehearing" (the "Motion") filed by Attorney Upton on behalf of the "Town." The Motion challenged the Decision issued by the board on September 25, 2001 (the "Decision") as being "unlawful and unreasonable"; the hearing on the Motion was held pursuant to the board's Order dated November 15, 2001 (the "Order").

After issuance of the Order, but before the hearing, Attorney Upton asserted the relevance of a special statute (Chapter 309 of the 1981 Session Laws, attached as Exhibit "A" hereto) for the first time and submitted a supporting Memorandum of Law on behalf of the Town. The Town's Memorandum asserts the Town has "assessed and taxed" the Property in accordance

with this special statute,[10] even though no prior mention was made of it to the Taxpayer or to the board in the entire tax abatement and appeal process ending with the Decision.

As set forth in the Order, the board held the hearing on the Motion to help resolve two issues: (1) whether the Town should be permitted a rehearing in light of RSA 541:3, TAX 201.37(f) and the case law; and (2) if the board proceeds with a rehearing, whether the Decision should be modified because of the arguments made by the Town. The board also reviewed a "Memorandum in Response to Order" submitted by Attorney Kearns on behalf of the "Taxpayer" in opposition to the Motion. In the interest of administrative and judicial economy, as well as convenience to the parties, the board directed the parties to address each issue in sequence at the hearing on December 6, 2001, with the understanding that a negative resolution of the procedural issue would make the substantive issue moot.

Procedural Issue: Entitlement to Rehearing

On the procedural issue, the board is not persuaded the Town is legally entitled to a rehearing. As noted, the Motion and the Memorandum cited tax statutes of a general and specific nature which were never mentioned by the Town at any prior time during the abatement, appeal and hearing process which culminated with the Decision. The Motion relied upon

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[10] See Town's Memorandum of Law at pp. 3-4, where Attorney Upton states: "The Town of Londonderry has assessed and taxed the Taxpayer [Property] pursuant to Laws, 1981, 309:3, under which the Selectmen of Londonderry are required to permanently exempt lands owned by the City of Manchester situated in the airport district . . . from property taxes . . ."

arguments based entirely on an interpretation of RSA 72:23, I and RSA 73:10, while the Memorandum relied upon Chapter 309 (special legislation passed in 1981 applicable only to the "Manchester-Londonderry Airport District") in relation to RSA 423:9 (pertaining to taxation at "Municipal Airports").

Under TAX 201.37(f), "rehearing motions shall not be granted to consider evidence previously available to the moving [p]arty but not presented at the original hearing or to consider new arguments that could have been raised at the hearing." See Order at pp. 2-3, citing and discussing Appeal of Campaign for Ratepayers' Rights, 133 N.H. 480, 484 (1990) and In re Appeal of Working on Waste, 133 N.H. 312, 315-16 (1990). It was incumbent upon the Town's Assessor, whether or not she was "an attorney" or represented by "an attorney" (see Motion at pp. 2-3), to understand and present each issue relevant to the proper assessment of the Property, including the alleged tax exemption of the land and taxability of the building based upon a special statute. Fundamental fairness to the Taxpayer, as well as to the dispute resolution process, are among the policy considerations supporting a rule that prohibits the introduction of new arguments or facts after a tribunal has rendered its decision.

RSA 541:3, for its part, limits the subject matter of a rehearing "to any matter determined in the action or proceeding, or covered or included in the order." Neither the Town nor the Taxpayer, or the board in its Decision, cited any claim of exemption, either under RSA 72:23, I or elsewhere. Nonetheless, as a basis for rehearing the Town argues the board in its Decision "create[d] an exemption under RSA 72:23(I) [sic]. . . To the extent the [b]oard ruled that the value of the building was significantly affected by the limited term and other characteristics of the lease, it was in essence creating an exemption under RSA 72:23 (I) that the Town could not

anticipate." Memorandum at pp. 1-2.

The board questions this characterization of the Decision. A careful review reflects the abatement granted to the Taxpayer is supported by two alternate methods of valuation: the income approach and the cost approach. While the income approach, applied in the form of a discounted cash flow analysis, utilized the remaining 12-year term of the Lease as a factor in the calculations, and made other simplifying assumptions, it did not explicitly assume any part of the Property was tax exempt because this issue was not raised by either party at or before the hearing. The cost approach, which was also used by the board, did not consider the remaining term of the Lease, but still arrived at a remarkably close value estimate ($102,900 compared to $102,700 using the income approach) focusing only on the replacement cost of the building (without any physical, functional or economic depreciation deducted) and adding the nominal paving assessed value. See Decision at pp. 5-9 and fn. 6.

Although one could argue the income approach might reflect an attempt to value the "leasehold" interest of the Taxpayer, rather than the "reversionary" interest of the City (the Lessor), such an argument, made by the Town in the Memorandum at ¶ 7, is logically distinct from the process of valuing the land separately from the building which the Town allegedly should have, but did not, undertake in the assessment process. In a lease context, the lessee (the Taxpayer in this case) has a present or "leasehold" interest in both the land and the building and the lessor (the City of Manchester in this case) has a future or "reversionary" interest in both the land and the building.

Significantly, the Town itself took the approach it now criticizes when it defended the assessment at the hearing before the board by relying on comparable "sales" of leased hangar

facilities at Nashua Airport. These comparables value the "leasehold" interests of the lessees rather than the "reversionary" interests of the lessor (the City of Nashua) because these were the only interests the lessees in these comparables would have been able to sell. The Town compounded this alleged error by adding a "locational adjustment" of 20% for the Property situated at Manchester Airport. A locational adjustment of this sort pertains to the land, not the building, but the Town now asserts the land is exempt and cannot be assessed.

Despite these questions, and the flaws in the Town's legal position[11], the board believes it can and should exercise its "sound discretion" in this matter to consider the special statute now cited by the Town for the first time. Cf. Farris v. Daigle, supra, 139 N.H. at 454-55 ("Whether to receive further evidence on a motion for reconsideration rests in the sound discretion of the trial court"), citing Brown v. John Hancock Mut. Life Ins. Co., 131 N.H. 485, 492 (1989).

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[11] The Town's reliance on Farris v. Daigle, 139 N.H. 453 (1995) and Appeal of Lisbon Regional School District, 143 N.H. 390 (1999) is somewhat misplaced. Farris involved application of a superior court rule, not RSA 541:3 or any administrative rule based upon it; in that case, the superior court judge erroneously concluded a signed version of a previously submitted (unsigned) agreement was "new evidence" and refused to consider it in ruling on a motion for reconsideration; based on "these facts . . . [and] the unusual procedures followed in this case" the supreme court reversed and remanded to require the judge to determine the "validity" of the document. Farris, supra at 454-55. In the Lisbon case, the issue was the "technically untimely" submission of evidence pertaining to a motion for reconsideration more than 30 days after the decision. Appeal of Lisbon, supra at 397-98. The timeliness of the Town's Motion is simply not an issue here.

As discussed more fully below, the recent discovery by the Town's Attorney of an uncodified statute (Chapter 309), one that applies specifically to the Property because it is in the airport district on land owned by the City but one not used by the Town in the assessment process, constitutes very unique circumstances for the board to reconsider the Decision in light of the special statute. The proper application of the tax statutes, including any exemptions provided by general or special legislation, is a matter of overriding importance, and the board can take due notice of the law without reopening the record. The board also notes the Taxpayer will suffer little, if any, actual prejudice if the special statute is applied, even at this late stage of the abatement and appeal process, for the 1999 tax year.

Substantive Issue: Application of Special Statute to Assessment of the Property

Chapter 309 created an "airport district" in accordance with an "intermunicipal agreement made on March 3, 1981" on land located in the City of Manchester ("City") and the Town. 1981 Session Laws, §309:1. Based on mutual considerations, these parties agreed to "permanently exempt the property taxes or the payments in lieu of taxes on the airport lands owned by the City situated within the airport district in the town of Londonderry, notwithstanding the provisions of RSA 423:9 to the contrary." §309:3 (Emphasis added).[12] The

[12] RSA 423:9, enacted in 1941, is a general statute exempting from taxes,

parties agree the Property is located on land in the Town owned by the City within the airport district created by this statute.

The Town's Assessor certainly should have known about the special statute (Chapter 309), but apparently did not and therefore did not communicate its existence to the Taxpayer when making the assessment for the 1999 tax year. Instead, the Town's Assessor increased the assessment of the Property by almost 100% (from $111,000 to $211,300); in doing so, she relied upon "comparable sales" of airplane hangar property at another airport not subject to the same exemption with leases of unknown terms and conditions and added in a 20% "locational adjustment" to defend the assessment. This does not constitute acceptable assessment methodology and cannot be condoned by the board.

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under certain circumstances, "All property and rights acquired by a city or town outside its boundaries . . . relative to aeronautical facilities" but providing for alternative payments in lieu of tax. As noted in the board's Order, this legislation was modified by another special statute enacted in 1977 (as Chapter 202), which states "The selectmen of the town of Londonderry may abate the taxes or the payments in lieu of taxes on airport property . . ." under certain provisions. Attorney Upton indicated at the hearing that the Town has not exercised its discretionary authority under this statute to abate taxes.

Nonetheless, the board finds Chapter 309, on its face, exempts the "land" on which the Property is located from taxation by the Town. Since the land is exempt from taxation, the only property interest that can be taxed is the building (a pre-fabricated airplane hangar) and another improvement made by the Taxpayer (paving). This property interest can be assessed using a method already applied and discussed in the Decision: as noted by the board, "the cost approach results in an assessed value indication of $102,900" for the Property. Decision at pp. 8-9.[13]

The Decision is therefore modified (commencing at page 9) as specifically set forth below; anything to the contrary in that document is of no further force or effect.

The Taxpayer's appeal is granted and the board orders the Town to abate the assessed value for the 1999 tax year to $102,900.

If taxes have been paid, the amount paid in excess of $102,900 shall be refunded with interest at six percent per annum from the date paid to the 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 overpayments made in subsequent years. The Town shall use the ordered assessment for subsequent years, until such time as there is a good faith decision to reappraise the Property under RSA 75:8 due to changes in value or until there is

[13] At the hearing on the Motion, the Town's Attorney indicated the Town deferred the issue of valuation to the board and did not present any evidence of an alternate assessment value. The Town's main interest, as expressed at the hearing, was recognition of the application of the special statute and the prospective effect of the Decision on taxation of other properties within the airport district.

a general reassessment in the Town. See RSA 76:17-c, I. The Town may use the cost approach, taking into account any relevant depreciation factors, or, alternatively, another approach or combination of approaches to value the portion of the Property that is not exempt under the special exemption statute, Chapter 309 of the 1981 Session Laws, but any change in valuation methodology must meet the good faith standard set forth in RSA 76:17-c, I.

Any appeal of this abatement must be filed with the supreme court within thirty (30) days of the clerk's date shown below. See RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

_____
Paul B. Franklin, Chairman

Albert F. Shamash, Esq., Member

CERTIFICATION

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to: MHT Hangar 5, Inc., Taxpayer; Peter F. Kearns, Esq., attorney for the Taxpayer; Karen Marchant, assessor, Town of Londonderry; and Robert Upton, II, Esq., attorney for the Town.

Date: January 2, 2002

_____
Lisa M. Moquin, Clerk

RECERTIFICATION

I hereby recertify that a copy of the foregoing decision has this date been mailed, postage prepaid, to: MHT Hangar 5, Inc., Taxpayer; Peter F. Kearns, Esq., attorney for the Taxpayer; Karen Marchant, assessor, Town of Londonderry; and Robert Upton, II, Esq., attorney for the Town.

Date: January 10, 2002

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Lisa M. Moquin, Clerk