Mount Washington Hotel Preservation Limited Partnership

v.

Town of Carroll

Docket Nos.: 19177-01PT and 19856-02PT

DECISION

On November 8 and 9, 2005, the board held a consolidated hearing in these two tax appeals filed by the "Taxpayer" regarding the "Town's" 2001 and 2002 assessments of the following "Appealed Properties":

2001 Appealed Property Assessments					
PROPERTY	**MAP**	**LOT**	**TOTAL ASSESSMENT**	**BUILDING**	**LAND**
MOUNT WASHINGTON HOTEL	210	8	$12,418,200	$11,622,700	$795,500
SKI AREA	211	14	$3,638,300	$2,348,900	$1,289,400
HEALTH CLUB	211	19	$1,309,700	$1,225,900	$83,800
SALES OFFICE	211	13	$189,000	$113,700	$75,300
VACANT BUILDING ("Silver Fox")	419	18.1	$135,700	$83,000	$52,700
TOTAL			**$17,690,900**		
2002 Appealed Property Assessments					
PROPERTY	**MAP**	**LOT**	**TOTAL ASSESSMENT**	**BUILDING**	**LAND**
MOUNT WASHINGTON HOTEL	210	8	$12,418,200	$11,622,700	$795,500
SKI AREA	211	14	$3,638,300	$2,348,900	$1,289,400
HEALTH CLUB	211	19	$1,309,700	$1,225,900	$83,800
SALES OFFICE	211	13	$189,000	$113,700	$75,300
VACANT BUILDING ("Silver Fox")	419	18-1	$135,700	$83,000	$52,700
TOTAL			**$17,690,900**		

The Taxpayer also owns, but did not appeal, the following properties identified by the Town:

2001 Non-Appealed Property Assessments					
PROPERTY	**MAP**	**LOT**	**TOTAL ASSESSMENT**	**BUILDING**	**LAND**
STABLES	211	42	$149,900	$69,700	$80,200
FABYANS RESTAURANT	211	21	$245,500	$139,400	$106,100
GOLF SHOP/18-HOLE COURSE	210	10.2	$1,125,100	$905,600	$219,500
MT. PLEASANT GOLF COURSE	211	46	$141,000	$0	$141,000
MT. PLEASANT GOLF COURSE	211	47	$139,900	$0	$139,900
LODGE @ BRETTON WOODS	211	1	$825,500	$741,900	$83,600
BRETTON ARMS INN/ADMIN	210	7	$706,600	$657,700	$48,900
TOTAL			**$3,333,500**		

2002 Non-Appealed Property Assessments					
PROPERTY	**MAP**	**LOT**	**TOTAL ASSESSMENT**	**BUILDING**	**LAND**
STABLES	211	42	$149,900	$69,700	$80,200
FABYANS RESTAURANT	211	21	$245,500	$139,400	$106,100
GOLF SHOP/18-HOLE COURSE	210	10.2	$1,510,400	$1,290,900	$219,500
MT. PLEASANT GOLF COURSE	211	46	$141,000	$0	$141,000
MT. PLEASANT GOLF COURSE	211	47	$139,900	$0	$139,900
LODGE @ BRETTON WOODS	211	1	$825,500	$741,900	$83,600
BRETTON ARMS INN/ADMIN	210	7	$706,600	$657,700	$48,900
TOTAL			**$3,718,800**		

In addition to the above 12 properties, it appears the Taxpayer may own other properties in the Town which have not been specifically identified.

In presenting its claims of overassessment and entitlement to abatements on the five Appealed Properties, the Taxpayer relied upon: 1) separate appraisals, prepared by Morton J. Blumenthal, of the Mount Washington Hotel ("hotel") (Taxpayer Exhibits 2A, 2B and 3), the Bretton Woods Ski Area ("ski area") (Taxpayer Exhibits 6A and 6B) and the Bretton Woods Health Club ("health club") (Taxpayer Exhibits 4 and 5) and Mr. Blumenthal's testimony; and 2) separate analyses prepared by its tax representative, Mark Lutter, of the "sales office" (Taxpayer Exhibit 8) and a vacant building known as the "Silver Fox" (Taxpayer Exhibit 7) and

Mr. Lutter's testimony. Mr. Lutter presented evidence the Town may have erred in assessing certain other property (the "condominium lots") in tax years 2001 and 2002 for $252,900 (Taxpayer Exhibit 1). He also presented the testimony of Wayne Presby, an owner and officer (chairman and secretary) of the Taxpayer, on "all" the properties owned by the Taxpayer, but the Taxpayer presented no appraisal or other evidence regarding the market value of any of the "Non-Appealed Properties" or other property owned by the Taxpayer in the Town.

Board's Rulings

At the close of the Taxpayer's case-in-chief (presented in two full days of hearings), the Town renewed a motion to dismiss the appeals. The board granted this motion and the appeals are therefore denied.

In every tax abatement appeal, the taxpayer has the burden of proving, by a preponderance of the evidence, the assessments were disproportionately high or unlawful. See RSA 76:16-a; TAX 201.27(f); TAX 203.09(a); and Appeal of City of Nashua, 138 N.H. 261, 265 (1994). As noted most recently in Porter v. Town of Sanbornton, 150 N.H. 363, 367 (2003), this burden requires a showing by a taxpayer that it is paying more than its proportional share of taxes in the municipality. For the reasons discussed further below, the board finds the Taxpayer did not make the required factual showing. Id.

In its September 21, 2005 Order, the board denied the Town's motion for summary judgment, but imposed an alternative sanction based on the deficiencies in the Taxpayer's prehearing statement (the basis of the Town's summary judgment motion) that governed the evidence that could be presented at the hearing. See also the board's November 1, 2005 Order (ruling on the Town's motion for reconsideration and clarification[1]).

Underlying these two orders is the question of who has the burden of proof when the Taxpayer owns multiple properties where: (i) not all of the properties have been appealed; and (ii) the municipality does not stipulate the Non-Appealed Properties have been proportionally assessed. The board finds, in these circumstances, the Taxpayer must bear the burden of proof by a preponderance of the evidence and that burden was not met in these appeals, even without consideration of the Town's own evidence rebutting the Taxpayer's claim of overassessment. By statute, the Town's selectmen, and the board on appeal, may grant an abatement to any "person aggrieved" by an assessment, but only "for good cause shown," see RSA 76:16 and 76:16-a, and the supreme court has construed this "good cause" requirement to mean "disproportionate assessment or inability to pay." Barksdale v. Town of Epsom, 136 N.H. 511, 514-15 (1992). No inability to pay has been asserted in these appeals. Without a showing that the Taxpayer's entire estate in the Town is disproportionately assessed, the board finds the Taxpayer failed to meet its burden of showing "good cause" exists to grant an abatement. The Taxpayer cannot shift this burden to the Town; the Town was not required to present the appraisal and other evidence (prepared and submitted with its prehearing statement) to rebut the Taxpayer's claim of disproportionality (i.e., by making an evidentiary showing of its own that the Taxpayer's entire estate was either properly assessed or underassessed).

In Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985), the supreme court confirmed that it is a taxpayer's "burden to prove such disproportionality" in a case where the taxpayer

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[1] The Taxpayer failed to submit a timely response to the Town's motion for reconsideration and clarification. See TAX 201. 37(c). The Taxpayer's own "Motion for Reconsideration & Clarification" of the board's November 1, 2005 Order, filed on November 4, 2005, was denied at the hearing on November 8, 2005.

owns multiple lots and "[t]o carry this burden, he must establish that his property is assessed at a higher percentage of fair market value than the percentage at which property is generally assessed in the town. (Citation omitted)."[2]

In a case decided several decades before Sunapee, Ainsworth v. Claremont, 106 N.H. 85, 89-90 (1964), the supreme court sustained the exceptions taken by the municipality to an abatement granted to the taxpayer by the court below because there was "no evidence" to sustain the taxpayer's claim of disproportionality: "Having failed to prove that the valuation placed by the selectmen upon his property was disproportionate to the valuation placed by them upon other properties, the plaintiff was not entitled to an abatement. (Citing) Perry v. State Tax Commission, 103 N.H. 264, 267 ((1961)." In Perry, the supreme court affirmed the grant of the municipality's motion to dismiss by the tax commission "at the close of the petitioners' evidence" because "they have failed to make a proper case." Id. at 264-65

When cases are decided by a jury (unlike the present appeals before the board), the "prima facie" case standard ("taking all evidence introduced and resolving all conflicts in the plaintiff's favor") is customarily applied at the close of the presentation of the plaintiff's case to determine if it can meet its burden of proof or whether dismissal is proper at that stage; in cases tried by judges rather than by juries, however, a less stringent standard for dismissal governs. See, generally, Renovest Co. v. Hodges Development Corp., 135 N.H. 72, 75-78 (1991): "We hold that when the trial judge is sitting as the trier of fact, he or she appropriately may make findings of fact at the close of the plaintiff's case-in-chief, and may use such facts to determine whether the plaintiff has established the case by a preponderance of the evidence." This

[2] As noted in the board's September 21, 2005 Order, the supreme court in Sunapee confirmed the board's "truly appellate jurisdiction" and reversed an abatement granted on a house lot owned by the taxpayers because they had not made a timely request for abatement on the house lot with the municipality. Id. at 215, 216.

approach "is a common-law, court-developed, doctrine based upon a weighing of the benefits of an expedited trial, and the resulting judicial efficiencies, against the risk of losing what might be developed in extended proceedings." Id. at 76.

The board, sitting as the trier of fact, weighed such considerations (judicial efficiency versus deferring a ruling until after a lengthy defense presentation) before granting the Town's motion to dismiss at the close of the Taxpayer's case-in-chief. The board could have considered the Town's evidence submitted with its prehearing statement of substantial underassessment (rather than overassessment) of the Taxpayer's entire estate (as reflected in the Spring Appraisal of all 12 properties listed above, including the Non-Appealed Properties, and/or the two bank appraisals prepared in 2001 for the benefit of the Taxpayer), but did not have to do so because of the Taxpayer's own failure to establish its entitlement to abatements on the Appealed Properties by a preponderance of the evidence. In the following sections, the board will discuss the gaps in the evidence presented by the Taxpayer and why it finds the Taxpayer failed to meet the preponderance of the evidence standard for an abatement.

1. The Hotel

The hotel constitutes the bulk of the five discrete assessments the Taxpayer chose to appeal ($12.4 million out of $17.6 million in each tax year). The Taxpayer attempted to establish disproportionality by relying on Mr. Blumenthal's appraisal estimating the market value of the hotel at $8.35 million in 2001 and $9.75 million in 2002. The board finds these estimates of value to have serious limitations in terms of consistency and the methodology and assumptions used by Mr. Blumenthal to arrive at them, resulting in a substantial understatement of the market value of the hotel.

In consolidated appeals for two prior years, Mr. Blumenthal estimated the hotel's market value at $5.5 million in 1999 and $12.8 million in 2000. See the board's November 26, 2003 Decision, Docket Nos. 18306-99PT and 18658-00PT, at p. 2.[3] The appraisal for the hotel submitted by Mr. Blumenthal in the present appeals (consisting of Taxpayer Exhibits 2A, 2B and 3, titled a "Complete Appraisal," "Addenda" and certain corrections/amendments, respectively) makes no mention of the earlier appraisal and no attempt to reconcile the differences (a drop in his own estimates of market value of almost 35% and 27% in 2001 and 2002, respectively, compared to 2000). The board finds these inconsistencies seriously undercut the credibility of the value estimates calculated by Mr. Blumenthal for 2001 and 2002.

While the "9/11" (2001) attacks on the World Trade Center and the Pentagon may have impacted travel and tourism in general, the Taxpayer made no showing that concerns regarding terrorism or any other factor adversely affected the long term value of the hotel. As noted above, Mr. Blumenthal's own estimates of the market value of the hotel increased by $1.4 million ($8.35 to $9.75 million) between the two assessment dates straddling "9/11" (April 1, 2001 and April 1, 2002) and the Taxpayer's reported hotel revenues and net profit increased substantially between 2001 and 2002. See Taxpayer Exhibit 2A, p. 53. As noted below, the Taxpayer continued to invest millions of dollars in hotel renovations and upgrades after "9/11."

Turning to Mr. Blumenthal's methodology and assumptions, Mr. Blumenthal focused entirely on the income approach to value and, notwithstanding the "Complete Appraisal" title of his report, described his work as a "limited appraisal" consisting of a "Summary Appraisal Report" made only to determine "the value subject to ad valorem property tax[]" purposes.

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[3] In those appeals, unlike the present ones, only the hotel assessments were at issue and the Town did not question or make any arguments concerning other properties owned by the Taxpayer. Thus, the board had no occasion to consider or rule in the prior appeals on the valuation issues raised here.

Exhibit 2A at pp. 6 and 8. Although making substantial so-called “Cost to Cure” adjustments (described below), Mr. Blumenthal relied exclusively on the income approach, and did not perform a cost approach or a sales comparison approach. While sales of comparable properties may be limited, Mr. Blumenthal could have analyzed available cost information as a check on his value conclusions using the income approach, but did not do so, making his analysis (as in the ski area and health club appraisals discussed below) at best a “limited appraisal” which has substantially less weight than a “complete” appraisal.

Another serious flaw is Mr. Blumenthal’s focus on the hotel property in isolation, a focus he testified was made based upon instructions received from Mr. Lutter. Except for including income from the “stables,” his analysis of the hotel disregarded the other “hospitality” properties owned by the Taxpayer, which included not only the ski resort and health club, but also the golf courses and other lodging properties identified above as Non-Appealed Properties.
Mr. Blumenthal was clearly aware of the unified ownership of these properties and the fact they were operated as an integrated whole; in fact, this recognition led him to conclude the property met the definition of a “resort hotel” in his “highest and best use analysis.”

As brought out more fully in the Town’s cross-examination of Mr. Blumenthal, he applied the following “resort hotel” definition: “A hotel, usually in a suburban or isolated rural location, with special recreational facilities.” Taxpayer Exhibit 2A, at p. 14. On page 38, Mr. Blumenthal further described the hotel as having a highest and best use as a “grand resort.” Along with its historic features (built in 1902 and the site of the Bretton Woods Conference in 1944), the hotel relies heavily upon the other “special recreational facilities” owned by the Taxpayer (namely, the golf courses, ski area and health club) and these properties are operated as an “assemblage”: Mr. Blumenthal himself acknowledged the special nature “of the overall complex and the assemblage of hospitality and recreational components associated with the entire resort." Id. at 38.

The board finds it was erroneous for Mr. Blumenthal to fail to recognize the value enhancing attributes of the "assemblage" of properties owned by the Taxpayer and instead attempt to isolate values in three separate appraisals (of the hotel, ski area and health club). Such a segregated approach distorts and undervalues both the hotel and the Taxpayer's entire estate, whose aggregate value is dependent on the synergy of related properties in common ownership and under unified control (which lessens risk) and economies of scale stemming from joint operation of multiple hospitality properties in one location. Cf. 590 Realty Co., Ltd. v. City of Keene, 122 N.H. 284, 285-87 (1982) (valuing property with specialized features at its highest and best use because "fair market value encompasses 'use of the property for the special purpose for which it . . . is being employed . . .' (Citation omitted)").

As one important example, the board finds Mr. Blumenthal should have recognized and made an adjustment to his capitalization rates used in the income approach to reflect the lower risks stemming from investment diversification when a taxpayer owns multiple hospitality properties; an investor is likely to recognize such lowered risks when valuing the properties as a whole. Mr. Blumenthal's market value estimates using the income approach are predictably quite sensitive to the capitalization rates chosen: reducing the capitalization rates shown on page 51 of Taxpayer Exhibit 2A by just one percent increases the market value estimate by about

$0.75 million in each year.[4]

Both of the Taxpayer's witnesses (Mr. Blumenthal and Mr. Presby) testified it would be possible for some of the recreational properties to be owned by parties unrelated to the Taxpayer and still provide some synergy and benefits to the hotel (such as increased occupancy and revenues) through cross-marketing and/or other arrangements. While this may be true in theory, such an approach would not result in lowering risk the way unified ownership and management of these properties can. For example, if the ski area (discussed below) was separately owned and not optimally managed with the best interests of the grand resort as a whole in mind, such mismanagement (where the testimony indicated extensive snow-making and diligent grooming were critical factors for attracting skiers) would adversely affect hotel occupancy and revenue and increase its risks, resulting in higher capitalization rates. Another example of the impact of non-optimal management is furnished by the health club (discussed below), where the Taxpayer took active steps to assume more direct control because of mismanagement by a third party.

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Effect of adjusted cap rate:		
From Taxpayer Ex. 2A, p. 51:	2001	2002
NOI	$1,264,758	$1,482,500
Cap rate	0.128998	0.13229
Subtotal	$9,804,478	$11,206,440*
(*$20 difference due to rounding)		
adjust for:		
1 % lower cap rate	0.118998	0.12229
Adjusted Subtotal	$10,628,397	$12,122,823
Business Value (10%)	$1,062,840	$1,212,282
Adjusted Value	$9,565,557	$10,910,541
"Cost to Cure" estimate used by Mr. Blumenthal	($486,667)	($352,562)
Adjusted Total	$9,078,890	$10,557,979
Rounded	$9,100,000	$10,500,000
Blumenthal unadjusted estimate	$8,350,000	$9,750,000
Market value estimate increase based on adjusted cap rate	$750,000	$750,000
Percentage change	9.0%	7.7%

Another factor which distorts Mr. Blumenthal's isolated value estimates for each property is that, in using the income approach, he relied upon cost information and allocations prepared by the Taxpayer without independent investigation to determine if the allocations were proper. To the extent costs such as "centralized" food purchasing, administrative, marketing and other common expenses were allocated between the individual property "cost centers," the accuracy of such allocations directly impacts each estimate of value using the income approach.

The board also questions the substantial "Cost to Cure" adjustments made by Mr. Blumenthal in each tax year. He assumed the "Cost to Cure" items for so-called "Environmental Issues" totaled \$1.46 million in 2001 and \$1.057 million in 2002, and amortized each "over 3 years." Taxpayer Exhibit 2A at p. 37 and 51. These very high estimates are subject to question, especially when compared to estimates that were at least twelve times lower in his prior appraisal (\$108,000 for 1999 and \$87,000 for 2000). See November 26, 2003 Order at pp. 12-13. Since the high "Cost to Cure" estimates were directly deducted by Mr. Blumenthal in his calculations (see footnote 4), more reasonable cost assumptions in 2001 and 2002 would have increased his market value estimates significantly.

Upon consideration of these and other serious flaws in the Taxpayer's presentation, the board finds there was a lack of evidence to support any conclusion the hotel, even if viewed in isolation from the other properties owned by the Taxpayer, was disproportionally assessed.

2. The Ski Area

The board finds many of the same errors noted above reoccurred in Mr. Blumenthal's separate appraisal of the ski area, which is described as a "limited appraisal" and relies entirely on the income approach to determine value.[5] The ski area has a total of approximately 900 acres, with the vast majority of the improvements situated in the Town (84.2 acres) and the remainder (814.32 acres) in the neighboring Town of Bethlehem ("Bethlehem"). See Taxpayer Exhibit 6A, p. A and map on p. A-23. The ski area was purchased in 1997 for $4.3 million. Id. at A-12. In his "highest and best use analysis," Mr. Blumenthal describes the ski area "as an integral part of the Mount Washington Hotel, Bretton Woods Resort Complex." Id. at A-17.

One key assumption made by Mr. Blumenthal is that the ski area deserves a markedly higher capitalization rate than the hotel. He used a "Modified Capitalization Rate" of 15.9% in 2001 and 16.23% in 2002, about three percentage points higher than his capitalization rate assumptions for the hotel. There was no credible evidence presented to support his assumption that "ski businesses is [sic] riskier than hotels and other businesses." Simply lowering the risk premium by two of the three percentage points used by Mr. Blumenthal raises his market value

[5] In the "comment section" of his limited appraisal of the ski area (Taxpayer Exhibit 6A at p. C-1), Mr. Blumenthal does briefly summarize one sale of a ski area in Rangely, Maine in September, 2003, but did not provide sufficient evidence to assess the comparability of this sale for $7.5 million or explain how, if at all, this sale affected his work.

estimates by 23.7% in 2001 and 30.2% in 2002.[6]

Another significant effect on Mr. Blumenthal's estimate was his $1.95 million adjustment for a so-called "Cost to Cure (base lodge)" in each year. Id. at B-10. Mr. Blumenthal apparently developed this substantial number by applying either 40% or 70% factors to various cost items listed in a construction contract dated July 16, 2002 entered into by the Taxpayer with a builder to renovate the ski area: the contract is set forth in the Addendum to Mr. Blumenthal's appraisal, Taxpayer Exhibit 6B, and calls for a total expenditure of approximately $4.5 million. The basis for Mr. Blumenthal's percentage applications (40% and 70%) is not clear, but they were apparently intended to capture the "Deferred Maintenance" component of these expenditures. See Taxpayer Exhibit 6A at p. B-15.

The board finds the Taxpayer failed to establish by a preponderance of the evidence that the "Cost to Cure" adjustments of $1.95 million in each year were necessary to properly value the ski area using the income approach. Mr. Blumenthal did not attempt to amortize the cost

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Ski Area		
Effect of adjusted cap rate		
From Taxpayer Exhibit 6A, p. B-10	2001	2002
NOI	$893,441	$955,541
Cap rate	0.1590	0.1637
Subtotal	$5,619,126	$5,837,147
adjust for		
2 % lower cap rate	0.1390	0.1437
Adjusted Subtotal	$6,427,633	$6,649,555
Business Value (10%)	$642,763	$664,955
Adjusted Value	$5,784,870	$5,984,599
"Cost to Cure" estimate used		
by Mr. Blumenthal	($1,950,000)	($1,950,000)
Adjusted Total	$3,834,870	$4,034,599
Rounded	$3,835,000	4,035,000
Blumenthal unadjusted estimate	$3,100,000	$3,100,000
Market value estimate		
increase based on		
adjusted cap rate	$735,000	$935,000
Percentage change	23.7%	30.2%

over three years (as he did with the hotel, as discussed above) and the board finds an insufficient basis for assuming the lack of renovations adversely impacted the market value of the ski area in the two years under appeal. The board notes that eliminating the "Cost to Cure" adjustment would result in valuations of the ski area at approximately $5.8 million for 2001 and $6.0 million in 2002 (see footnote 6). Mr. Blumenthal's allocation of 68% of the total value of the ski area to the Town and 32% to Bethlehem appears to be based entirely on the equalized values of the assessments in each town in the two tax years. See Taxpayer Exhibit 6A at p. A and B-9. The board finds a less circular and more accurate approach, when a taxpayer's property extends into two or more jurisdictions, is to make an allocation on either an original cost or a replacement cost basis.

For these principal reasons, the board finds, as with the hotel, that there was a lack of evidence to support any conclusion that the ski area, even if viewed in isolation, was disproportionally assessed.

3. The Health Club

According to Mr. Blumenthal, the health club was built in 1988 and purchased by the Taxpayer in April, 1997 with other "development land" for approximately $3 million. See also Taxpayer Exhibit 4 at pp. A-3 and A-12. The health club has 4.75 acres of land with outside tennis courts and a 2.75 story building containing 32,903 square feet of space, including an indoor pool, four racquetball courts, an exercise room, reception and office areas. Id. at A.

There was evidence the health club was mismanaged in 2001 and 2002 by a third party (Crawford Management) which probably had an adverse effect on membership rates and realized income in those years, but not necessarily on the value of the real property. The health club is used by property owners who are members of the condominium association for condominiums developed and sold by the Taxpayer and are required to join, and by guests of the hotel and members of the public, who may include users of the ski area and the other resort properties owned by the Taxpayer. The board finds Mr. Blumenthal failed to take proper account of the value of the health club as part of the "assemblage" put together by the Taxpayer, including its present and future real estate development activities. Mr. Presby testified at some length regarding the Taxpayer's overall efforts to maintain a quality resort complex and this emphasis no doubt augments the value of the entire estate. Renovating and improving the health club appears to be part of this concept and strategy of increasing the value of the whole of the Taxpayer's estate. Using the income approach and a discounted cash flow analysis (with a hypothetical sale in 2006), however, Mr. Blumenthal concludes the value of the health club in those years was $565,000 in 2001 and $720,000 in 2002.

In light of the factors noted above, and viewing the health club as part of the "assemblage," the board does not find Mr. Blumenthal's market value estimates to be credible or to establish, by a preponderance of the evidence, the basis for an abatement.

<u>4. The Sales Office</u>

The Town assessed the sales office at $189,000 in 2001 and 2002. The Taxpayer challenged this assessment with an analysis prepared by Mr. Lutter (Taxpayer Exhibit 8). Mr. Lutter admitted on cross-examination that he is not a licensed appraiser and that his compensation is contingent upon the abatement the Taxpayer might receive from the Town, which are factors adversely affecting his competency, impartiality and credibility.

Mr. Lutter estimated market rents and used Mr. Blumenthal's capitalization rate assumptions in his income analysis. He failed to consider, however, the property's strategic location and its effect on market value. The testimony reflected the sales office is located on

Route 302 at a key intersection proximate to the hotel and ski area. Mr. Lutter noted in his analysis the sales office is "used to sell condominiums that are being constructed by" the Taxpayer. Id. at 2. It therefore appears to be extremely valuable to the Taxpayer's real estate and other operations because of the amount of traffic and visibility associated with this site and the board finds this locational advantage would be of considerable value to potential purchasers as well.

The board finds the Taxpayer failed to establish by a preponderance of the evidence that the sales office was disproportionately assessed.

5. The Silver Fox

The Town assessed the "Silver Fox" for $135,700 in 2001 and 2002. This property is also located on Route 302 and consists of 2.7 acres of land and a building with 3,676 square feet. The building was constructed in 1955 and was given 42% depreciation, by the Town, which addresses at least some of the condition concerns mentioned by Mr. Lutter, including the described roof repairs.

As noted above, Mr. Lutter's lack of appraiser qualifications and compensation arrangements diminish his competency, impartiality and credibility. Mr. Lutter used only an income approach in his analysis. The highest and best use appears to be as a tear down of the existing structure and alternate commercial development, but Mr. Lutter failed to perform such an analysis of this property. His market value estimate of $50,000 is also open to question because the assessment-record card notes the property is for sale and Mr. Presby testified the Taxpayer's asking price is $500,000. While this asking price might be open to negotiation, as Mr. Presby suggested, it is a multiple of almost four times the assessed value and ten times Mr. Lutter's value estimate.

The board finds the Taxpayer did not establish by a preponderance of the evidence that the Silver Fox was disproportionately assessed.

6. Other Issues

The above points with respect to each of the five Appealed Properties reflect the board finding the Taxpayer was unable to prove disproportionate assessment on any of them. Even if the Taxpayer could have made a sufficient showing on any of these properties in isolation, however, the board still finds the Taxpayer was not disproportionally assessed on the five Appealed Properties considered in the aggregate, and makes this finding without considering the Town's evidence (disclosed in its prehearing statement) of substantial underassessment when the seven Non-Appealed Properties (or any other Taxpayer properties) are considered.

The board also carefully reviewed Mr. Presby's testimony. He has an extensive background in real estate construction, development and investment. His business partner, Joel Bedor, who was present at the second day of the hearing but did not testify on the Taxpayer's behalf, is a certified public accountant, has invested with Mr. Presby for several decades and is the individual most identified with the grand resort hotel. Mr. Presby's testimony confirmed that the primary and unobjectionable motivation for developing the resort was for the Taxpayer to make money, not historic preservation or some other motive. This motivation explains why the Taxpayer would expend millions of dollars on the hospitality properties it owns, despite claiming the Town overvalued them for tax purposes. Mr. Presby testified, for example, that the Taxpayer has made $10 million in renovations, upgrades and improvements to the hotel alone (a sum including $3 million in "FF&E" – furniture fixtures and equipment), as well as a $5 million renovation of the ski area. The board finds these investments, to some extent, augmented the value of the real property and were not done simply to keep its condition from detiorating. Mr. Presby also stated the Taxpayer was engaged in significant cost-cutting to improve profitability. It strains logic and common sense to believe knowledgeable and astute investors, such as the Taxpayer's owners, would make the magnitude of these investments simply to keep its unique property from falling in value.

The board is also cognizant of the evidentiary rulings made during the hearing which limited the potential scope of evidence the Taxpayer could present. Mr. Lutter attempted to introduce the "Spring Appraisal" as evidence during his presentation of the Taxpayer's case-in-chief, candidly acknowledging his expectation that the board would rule against this attempt, which it did. The Spring Appraisal, commissioned at the Town's expense and performed by a certified general appraiser, valued 12 properties (the five Appealed Properties and the seven Non-Appealed Properties) as an integrated whole in amounts considerably greater than their assessments. Mr. Lutter presented no market value evidence of the Non-Appealed Properties but intended to use the Spring Appraisal, after pointing out some alleged "errors" made by Mr. Spring, to meet his burden of proving disproportionality. (As noted above, this burden would have required proof by a preponderance of the evidence that the assessments on the Taxpayer's entire estate in each year exceeded its market value, adjusted by the level of assessment in the Town.)

The board finds this attempted approach to meeting the Taxpayer's burden would not have been productive, as well as being convoluted and fundamentally unfair to the Town. The Town was not required to spend money on making an appraisal of its own to respond to the Taxpayer's abatement requests and appeals. The fact that it did so in preparation of its defense of the assessed values (in anticipation the Taxpayer might have been able to put on a prima facie case) should not be exploited by the Taxpayer to satisfy its own evidentiary obligations.

The board also considered in its deliberations the relevance of Taxpayer Exhibit 1 which estimates the allegedly mistaken assessments made by the Town on the "condominium lots" at a total of $252,900. The Taxpayer did not appeal those assessments but intended to use this evidence as an offset to any claim by the Town that other properties it owned were "under-assessed." The board finds the evidence on the condominium lots is not material to the Decision for at least two reasons. First, as noted above, the Taxpayer failed to make a sufficient showing that the five Appealed Properties, either individually or in the aggregate, were disproportionally assessed. Second, the relatively small amount of alleged overassessment on the condominium lots (approximately $ 0.25 million) pales in comparison to the millions of dollars of underassessment reflected by the Spring Appraisal, if the board were to consider the Town's market value evidence.

Mr. Lutter also attempted to show flaws in the Town's assessment methodology, particularly in the information shown in the assessment manual (Taxpayer Exhibit 10) regarding determination of land values. Mr. Lutter's attempt sheds more light on his lack of attention to basic appraisal principles (e.g., land to building value ratios) than on any deficient methodology by the Town. In addition, standard assessment methodologies, developed for more typical residential and commercial properties in a "CAMA" (computer assisted mass appraisal) system and reflected in the Town's assessment manual, are not readily applicable to a very unique property like a grand resort hotel. Moreover, in Porter v. Town of Sanbornton, 150 N.H. 363, 369 (2003), the supreme court held merely demonstrating possible flaws in a municipality's assessment methodology is insufficient to prove disproportionality and, notwithstanding such alleged flaws, a taxpayer still bears the burden of proving "he or she is paying a higher amount [of taxes] than he or she ought to pay." The Taxpayer did not meet this burden.

Finally, the board disagrees with Mr. Lutter's arguments regarding how much laxity should be afforded to taxpayers in complying with the board's procedures and rules. Mr. Lutter stated that he accepted responsibility for the errors and deficiencies noted in the Taxpayer's prehearing statement which resulted in the board's November 1, 2005 Order limiting what evidence could be presented at the hearing. Such errors reflect both on the quality of representation and on whether there was a good faith basis for filing the appeals; therefore the board was unable to overlook them to permit the introduction of additional evidence not disclosed in the Taxpayer's prehearing statement. Taxpayers have a choice of appealing their assessments to either the superior court, RSA 76:17, or the board, RSA 76:16-a, but the same legal standards must govern: the procedural rules of each tribunal are deserving of respect and compliance and do not impinge upon the application of the same burden of production of evidence, burden of proof by a preponderance of the evidence or other standards.

For all of these reasons, the board finds the Taxpayer failed to establish disproportionality by a preponderance of the evidence and has granted the Town's motion to dismiss. The appeals for each tax year are therefore denied.

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, <u>not the date this decision is received</u>. 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(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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Douglas S. Ricard, Member

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Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Mark Lutter, Northeast Property Tax Consultants, Post Office Box 735, Derry, New Hampshire 03038, Taxpayer's representative; Adele M. Fulton, Esq., Gardner Fulton & Waugh P.L.L.C., 78 Bank Street, Lebanon, New Hampshire 03766-1727, Town counsel; and Chairman, Board of Selectmen, Town of Carroll, Post Office Box 146, Twin Mountain, New Hampshire 03595.

Date:

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Melanie J. Ekstrom, Deputy Clerk