

Zoe Reger, LLC

v.

Town of Lisbon

Docket No.: 19603-02PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2002 assessment of \$1,810,100 (land \$37,600; buildings \$ 1,772,500) on Map R34, Lot 006, an 11.160-acre lot developed with a health club (the “Property”). The Taxpayer also owns, but did not appeal, Map R34, Lot 006A; the parties stipulated Lot 006A was properly assessed. 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, 138 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, represented by Mark Lutter and Therese Reger, its owner, argued the assessment was excessive because:

- (1) the Property is ‘overbuilt’ and therefore its considerable construction costs do not reflect its market value;
- (2) the assessment record card incorrectly references an elevator assessed at \$112,000 but the Property only has a handicap lift with a cost of \$30,000;
- (3) operated as a health club (“Four Seasons Aquatics and Sports Center”), the Property is unprofitable and its highest and best use is as a nonprofit “like a YMCA”; and
- (4) an appraisal prepared by Morton J. Blumenthal (the “Blumenthal Appraisal,” consisting of an “Addenda” and an original – Taxpayer Exhibits 1 and 2), relying primarily on the income and sales comparison approaches, estimates the Property’s market value at \$850,000 and an abatement reflecting this value is warranted, as well as a refund of the Taxpayer’s \$65 filing fee for this appeal (as requested in Taxpayer Exhibit 6).

The Town, represented by its contract assessor, Leonard Nyberg, Jr. of Nyberg Purvis & Associates argued the assessment should be revised, as indicated below, because:

- (1) the Town performed a revaluation in 2002 and the median ratio was 101% for that year;
- (2) an adjustment to the assessment record card for a lift to accommodate the handicapped (with such a lift having a lesser value than an elevator) may be warranted;
- (3) the pictures and other information submitted in the Town’s Prehearing Statement (Municipality Exhibit A) reflect the good condition of the Property and the considerable improvements made before the assessment date;
- (4) although there is some economic obsolescence, the highest and best use of the Property is its present use;

(5) the analysis presented in Municipality Exhibit B estimates the Property's value at \$1.3 million using the income approach, \$1.3 million using a modified cost approach, and \$1.471 million using the sales comparison approach; and

(6) the Town is willing to reduce the assessment to \$1.3 million, which is well supported by the evidence and analysis presented, as well as being consistent with the Walker Appraisal estimate (contained in Municipality Exhibit A) submitted by the Taxpayer at the time of its abatement request.

Following the June 23, 2005 hearing, the board directed its senior review appraiser, Ms. Joan C. Gootee, to review the appraisals submitted and prepare a report containing an independent estimate of value. After Ms. Gootee issued her report (the "Report"), it was circulated to the parties and they were given 20 days to submit any written comments. The Taxpayer's representative submitted a timely response, noted below, but the Town did not.

Board's Rulings

Based on the evidence, the board finds the proper assessment to be \$1,089,100 for the reasons discussed below.

The Town admitted at the hearing the Property is overassessed and that an abatement is appropriate -- by approximately \$500,000 to \$1,300,000, according to Mr. Nyberg. The primary reason for this appears to be that the Property is overbuilt as a health club at its location. The health club is a modern and well-maintained facility and is operated by an entity related to the Taxpayer, but is still in the process of expanding membership to the point where it can be financially profitable. The Taxpayer's representative and owner, Therese Reger, admitted at the hearing the Property was developed as a health club for personal (a place to play indoor tennis in the winter) as well as business purposes.

As detailed in the Report, the Property has one building with tennis courts and two fitness buildings, one with squash courts and one with two pools, and these buildings have an estimated 44,350 square feet of floor area. These facilities, together with outdoor tennis courts, are available for use by approximately 400 health club members. The parties agree, despite additional usage by the local hospital and school and other groups in the area, membership and revenue from dues will have to expand for the health club to be a viable tenant in the long run; the club continues to operate, however, as it did at the time of the assessment (April 1, 2002), without clear evidence that it will cease operating as the major tenant or paying rent to the Taxpayer. In addition, the Taxpayer failed to prove any ancillary tenants could not be replaced with reasonable marketing effort and time. The Town also presented evidence of increasing real estate activity and development in the area, including property sales for Wal-Mart, Home Depot and other commercial uses, and the board finds these developments probably have a positive impact on both the rental potential and overall market value of the Property.

While there are three approaches to value, not all three approaches are of equal import in every situation. Appraisal Institute, The Appraisal of Real Estate, 62 (12th Ed. 2001); International Association of Assessing Officers, Property Appraisal and Assessment Administration, 108 (1990). In New Hampshire, the supreme court has recognized that no single approach 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 one valuation method over the others, based on the evidence. Brickman v. City of Manchester, 119 N.H. 919, 920 (1979).

The Report discusses the approaches to value undertaken by Mr. Blumenthal, who, with the assistance of Edward Doherty prepared an appraisal for the Taxpayer, (the “Blumenthal Appraisal”), James C. Walker who had prepared an appraisal for the Taxpayer as of December 5, 2000 (the “Walker Appraisal”) and Mr. Nyberg’s analysis on behalf of the Town. The Report

gives the most weight to the income approach (over the cost approach) and estimates a market value of \$1,100,000 for the Property as of the April 1, 2002 assessment date. This estimate compares to market value estimates of \$850,000 in the Blumenthal Appraisal, based on a somewhat different conclusion regarding highest and best use, and \$1,300,000 in the Walker Appraisal and in Mr. Nyberg's presentation at the hearing. The latter two analyses, like the Report, conclude the highest and best use is "the current improvement and use" rather than operation as a "nonprofit community center," the possibility stated in the Blumenthal Appraisal.

The board finds the Taxpayer failed to prove an alternative highest and best use assumption, such as the possibility presented by Mr. Blumenthal, was preferable to the current use described above or that it should necessarily impact the value conclusion as suggested in his appraisal. The Town noted the Taxpayer presented the Walker Appraisal, with its estimate of a \$1,300,000 market value, to the Town in support of the Taxpayer's request for an abatement. Mr. Blumenthal's assumptions and later prepared, but much lower, market value estimate conflict substantially with this other evidence.

The board further finds the Report, relying primarily on the income approach, is the best evidence of the Property's market value. The Report gives due weight to the somewhat unique nature and operating characteristics of the Property and makes reasonable assumptions regarding rental rates, capitalization rates, vacancy and other factors needed to reach a sound conclusion that requires no detailed review or elaboration here. The parties appear to agree that this is a rather unique property to appraise because of the nature and scope of the facilities built and the location. The board finds the assumptions contained in the Report to be reasonable and supportable; the possibility that varying assumptions could have been made by another appraiser is not probative and does not suggest a need for further adjustments to the market value estimate.

The board has considered the comments of Mr. Lutter, but, based on the board's own judgment and experience, does not find they provide a sufficient basis for favoring the lower market value estimated in the Blumenthal Appraisal over the Report. For example, while, as Mr. Lutter suggests, "second quarter" rather than "third quarter" 2002 cost data (from Marshall and Swift Commercial Cost Explorer) might have been used, had it been available, the Report states the data was "adjusted to April 1, 2002." The board finds this is an appropriate resolution¹ and therefore that there was no material effect on the value conclusion reached. The board will not dwell on Mr. Lutter's other comments except to state we find the rent, vacancy, capitalization rate and other assumptions made in the Report to be reasonable and supportable in light of the evidence presented. The Taxpayer failed to meet its burden of proving varying such assumptions is necessary to achieve a proportional assessment.

In summary, the evidence, considered as a whole, indicates the Property had a market value of \$1,100,000 as of the assessment date. Applying the 101% level of assessment in the Town for tax year 2002, the board finds the assessment should be abated to \$1,089,100.

If the taxes have been paid, the amount paid on the value in excess of \$1,089,100 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Until the Town undergoes a general reassessment or in good faith reappraises the property pursuant to RSA 75:8, the Town shall use the ordered assessment for subsequent years. RSA 76:17-c, I and II. In light of the standards set forth in RSA 76:17-b and TAX 201.39 (b), the Taxpayer's request that the Town refund the \$65 appeal filing fee is 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, not the date this

¹ Upon review of page B-3 of Taxpayer Exhibit 2, it appears the Blumenthal Appraisal made a comparable type of adjustment: that adjustment 'indexed' the cost estimates "to April 2002" to reduce building cost by a substantial amount (\$274,418).

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(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

Douglas S. Ricard, Member

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, representative for the Taxpayer; and Chairman, Board of Selectmen, Town of Lisbon, Post Office Box 222, Lisbon, New Hampshire 03585.

Date: October 25, 2005

Anne M. Stelmach, Clerk