

Gilbert G. Campbell

v.

City of Manchester

Docket Nos.: 20086-03PT/20796-04PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “City’s” 2003 and 2004 assessments of:

Map 0789-0003-A – 80 Dunbarton Road - \$12,027,400 (land \$1,005,100; buildings (\$11,022,300);

Map 0789-0004 – 124 Dunbarton Road - \$38,900 (land \$29,200; buildings \$9,700);

Map 0789-0005 – 144 Dunbarton Road - \$84,000 (land \$47,900; buildings \$36,100); and

Map 0789-0006 – 158 Dunbarton Road - \$1,654,100 (land \$51,500; buildings \$1,602,600)

for a total combined assessment of \$13,804,400 on a 384-unit apartment complex known as “Manchester Gardens” which consists of 16 buildings on a total of 16.7 acres (the “Property”). For the reasons stated below, the appeals for abatement are denied for tax year 2003 and granted for tax year 2004.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the assessments were 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 assessments were higher than the general level of assessment in the municipality. Id. We find the Taxpayer failed to prove disproportionality for tax year 2003 and carried this burden for tax year 2004.

The Taxpayer argued the Property's assessments were excessive because:

- (1) it was appraised by Steven H. Berg ("Berg Appraisal") who estimated a market value of \$18,900,000 as of April 1, 2003 and April 1, 2004;
- (2) the Property has two functional inadequacies: first, the units are unusually small (25% smaller than average) in comparison to other apartment complexes; and second, the composition of the units (½ two-bedroom and ½ one-bedroom including studio) is dissimilar to standard apartment complexes;
- (3) all of the ground floor units are half below grade and do not have a patio, balcony or air conditioning;
- (4) as a result of its inadequacies, the Property's income is lower and many expenses are higher than average and it is more susceptible to vacancy in softer markets; and
- (5) the City's level of assessment is best estimated by the median ratios determined by the department of revenue administration ("DRA") as the median ratio is the preferred ratio for direct equalization.

The City argued the 2003 assessment was proper but recommended an abatement of \$88,980 on the 2004 assessment. Further, the City argued:

- (1) the actual income and expense statements were reviewed and the Property is in generally average condition, has been well maintained throughout its life and has a constant and steady stream of income;

- (2) there is an increasing, steady demand for this type of apartment complex as employment and population have increased and few apartment complexes have been added to the market;
- (3) many apartment complexes have converted to condominium ownership which has also increased the demand for this type of apartment complex;
- (4) a higher rent on the units would be more reflective of market conditions as of 2003 and 2004;
- (5) an income analysis performed by the City's commercial appraiser, Robert Gagne ("Gagne Appraisal") indicated a market value of the Property of \$24,310,000 as of April 1, 2003 or an equitable assessment of \$15,825,800 and \$24,020,000 as of April 1, 2004 or an equitable assessment of \$13,715,400;
- (6) based on the Gagne Appraisal, the City recommends an abatement of \$88,980 for tax year 2004; and
- (7)) the City's level of assessment is more appropriately estimated by the weighted mean ratios determined by the DRA as those ratios were utilized in the City for equalization, current use and abatement purposes and there can be only a single ratio in a taxing jurisdiction.

Board's Rulings

Based on the evidence, the board finds the City's assessment of \$13,804,400 not to be excessive for 2003 but should be abated to \$12,431,200 (rounded) for 2004.

Two general issues were presented in this appeal: 1) which measurement of central tendency, the median ratio or the weighted mean ratio, as determined by the DRA, is the most appropriate indication of the level of assessment; and 2) the value of the Property.

Level of Assessment

The parties disagreed as to which measure of central tendency is the best indication of the level of assessment for the City for tax years 2003 and 2004.

The Taxpayer argued the median ratios of 63.6% and 56.4% for tax years 2003 and 2004 respectively, as determined by DRA, were most indicative of the level of assessment. The Taxpayer utilized the median ratios both in determining the overall capitalization rate in its income approach appraisal (Taxpayer's Exhibit No. 3) and in equalizing the indicated market value to an assessed value. The Taxpayer argued both DRA and the New Hampshire Assessing Standards Board ("ASB") preferred the median ratio for direct equalization and the supreme court had indicated its preference for the median ratio in Public Service Company of New Hampshire v. Town of Seabrook, 133 N.H. 365, 378 (1990).

The City argued the weighted mean ratios of 65.1% and 57.1% for tax years 2003 and 2004 respectively were the appropriate indications of the levels of assessment. First, the City argued those ratios were utilized by DRA in its annual indirect equalization process. (See RSA 21-J:3, XIII and RSA 21-J:9-a). Second, the City stated it had utilized the weighted mean ratios for granting abatements in both tax years and for equalizing current use assessments. (See RSA 79-A:5, I). The City argued, given the exclusive use of the weighted mean within the municipality during the tax years in question, that ratio alone must be continued to be used so as to have only one level of assessment as required by the holdings in Appeal of City of Nashua, 138 N.H. 261 (1994); Appeal of Andrews, 136 N.H. 61 (1992); and Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985).

For the following reasons and for these specific appeals, the board rules the weighted mean ratio is the most appropriate ratio to utilize in determining the proper assessed value. The board acknowledges there are conflicting bases, as presented by the parties, for estimating the proper level of assessment. The board, on one hand, acknowledges and generally agrees the median ratio is the preferred ratio for direct equalization. This preference is stated by the DRA (see Taxpayer Exhibit No. 7), the International Association of Assessing Officials, Standards on Ratio Studies, 7.3.1 (July 1999)

and the supreme court in Seabrook where it observed the median ratio is the preferred ratio because it gives equal weight to each sale similar to the “one taxpayer one vote method”. The board has been aware that some conflict with the holdings of Seabrook has existed since 2002 when DRA shifted from generally using the median ratio for indirect equalization purpose to using the weighted mean ratio. (See RSA 21-J:14-d generally; also Equalization Standards Board: Recommendations Regarding Equalization Standards at:

http://www.revenue.nh.gov/property_tax/esb/equalization_recommendations.htm).

However, notwithstanding the preference of the median ratio for direct equalization, the board finds the more compelling argument is the mandate that there be but one ratio or one level of assessment within a community for each tax year. Here, the City testified for the two tax years in question it had consistently utilized the weighted mean in granting abatements and equalizing current use assessments. To switch to the median ratio at this point in determining the Taxpayer’s assessments would result in the Property being assessed at a different level than all other property in the City. In essence, this would result in there being two classes of property assessed at different levels which is prohibited by a number of holdings by the supreme court. Appeal of Andrews, 136 N.H. 61 (1992); Appeal of Town of Seabrook, 133 N.H. 365 (1990); Appeal of Town of Sunapee, 126 N.H. 214 (1985); and Stevens v City of Lebanon, 122 N.H. 29 (1982).

Further, the board finds there is some merit to the City’s argument that the statistical calculations performed by DRA, as summarized in Municipality’s Exhibits No. A and B, show that at the 90% confidence interval, the ranges of the median ratios and the weighted mean ratios overlap.

This indicates that with a 90% level of confidence one cannot rule out that the weighted means for both years utilized by the City could not have been the median ratios.¹

Last, the board finds, in keeping with Appeal of City of Nashua, 138 N.H. 261 (1994), the City disclosed its “preferred equalization ratio” as the weighted mean and indicated it has been consistently utilized throughout the two tax years in question. The Taxpayer did not perform its own ratio study but rather relied upon and argued the application of the DRA’s median ratio is more applicable than the weighted mean. “In the event of a disparity, the board, in its role as finder of fact, ... shall determine the equalization ratio most reasonably representative of the general level of assessment.” Nashua at 267. Given the facts presented in this case, the board finds the weighted mean ratio is reasonably indicative of the level of assessment in the City and should be utilized to ensure the Taxpayer’s assessments are proportional to other assessments throughout the City for the two tax years in question. Doing so fulfills the New Hampshire Constitution, pt. II, art. V requirement that assessments within a taxing jurisdiction be proportional.

Market Value

Because the Property consists of 384 rental apartments and would be purchased for its income producing capability, both parties agreed, and thus the board finds, the income approach is the most applicable of the three approaches to value. Both parties performed a direct capitalization calculation in the income approach with their significant differences contained in the determination of market rent, vacancy rate, and capitalization rate. After considering all the evidence, including the Berg

¹ As an exercise, the board revised its two-year income approach calculations, applying the median ratio, as argued by the Taxpayer, to both the capitalization rate and the equalization rate and the resulting values were within one to two percent of the values derived by using the weighted mean. This supports the City’s assertion that the two indicators of central tendency are statistically very close and minimally affect the value conclusions.

Appraisal and the Gagne Appraisal, the board estimates the market values and assessed values as the two following calculations summarize. The board's detailed findings relative to the significant components of the income approach follow.

<u>2003 Market Value Estimate</u>			
Potential Gross Income	Number	Monthly Rent	Annual Income
Studio Units	16	\$565.00	\$108,480
1 Bdrm 1st Floor	48	\$670.00	\$385,920
1 Bdrm Upper Floors	128	\$710.00	\$1,090,560
2 Bdrm 1st Floor	64	\$750.00	\$576,000
2 Bdrm Upper Floors	128	\$790.00	\$1,213,440
Laundry income relative to real estate			\$25,000
Total PGI			\$3,399,400
Vacancy		-3.00%	-\$101,982
Effective Gross Income			\$3,297,418
Expense Ratio of 39% EGI		-39.00%	-\$1,285,993
Net Operating Income			\$2,011,425
Market Derived Rate	7.54%		
Effective tax rate calculated by weighted mean ratio of 65.1%	1.72%		
Overall Cap rate			0.0926
Indicated Market Value			\$21,721,652
2003 Weighted Mean Ratio			0.651
2003 Assessed Value			\$14,140,795

<u>2004 Market Value Estimate</u>			
Potential Gross Income			
	Number	Monthly Rent	Annual Income
Studio Units	16	\$565.00	\$108,480
1 Bdrm 1st Floor	48	\$670.00	\$385,920
1 Bdrm Upper Floors	128	\$710.00	\$1,090,560
2 Bdrm 1st Floor	64	\$750.00	\$576,000
2 Bdrm Upper Floors	128	\$790.00	\$1,213,440
Laundry income relative to real estate			\$25,000
Total PGI			\$3,399,400
Vacancy		-5.30%	-\$180,168
Effective Gross Income			\$3,219,232
Expense Ratio of 39% EGI		-39.00%	-\$1,255,500
Net Operating Income			\$1,963,731
Market Derived Rate	7.43%		
Effective tax rate calculated by weighted mean ratio of 57.1%	1.59%		
Overall Cap rate			0.0902
Indicated Market Value			\$21,770,858
2004 Weighted Mean Ratio			0.571
2004 Assessed Value			12,431,160

Potential Gross Income Calculations

After reviewing both the Berg Appraisal and the Gagne Appraisal, the board has estimated the studio market rent to be \$565 relying largely upon the City's estimate derived from their comparables and adjustments.

The board's first floor, one bedroom unit market rent estimate is based upon the City's \$700 estimate (which reflects a negative \$10 for the lack of air-conditioning) but adjusted by \$30 to reflect the ground floor location's lack of balconies, reduced privacy and being partially below grade.

The board's upper floor, one bedroom unit market rent estimate of \$710 is arrived at by adding to the one bedroom ground floor unit rental estimate \$10 for the presence of air-conditioning and \$30 for the improved privacy and balcony amenity.

The board's upper floor, two bedroom market rent estimate of \$790 is based upon review of the subject Property's comparable rents and the parties' comparables and adjustments noting that most of the comparable two bedroom units were 250 to 300 feet larger in size.

The board's ground floor, two bedroom market rent estimate of \$750 is calculated in a similar fashion as the one bedroom units by reducing the upper floor, two bedroom estimate by \$10 for the lack of air-conditioning and \$30 for the decreased privacy, lack of balcony and being partially below grade.

Laundry income was estimated at \$25,000 attributable to the real estate. While this is less than the actual income shown in the Property's income and expense statement of \$40,000 to \$44,000, it acknowledges the fact that the income stream for laundry is partially attributable to the machines, which are non-realty, and partially to the realty location of the machines in the buildings.

Vacancy

There was no dispute amongst the parties as to a vacancy rate for tax year 2003 as both appraisals utilized a 3% vacancy and collection rate. After considering the actual vacancy and collection loss, considering the board's estimated market rents and the increase in vacancy rate citywide, as shown in the NHHFA residential Rental Cost Survey (Taxpayer Exhibit 3, at 24), the board estimates a reasonable vacancy and collection rate for tax year 2004 to be 5.3%. While the City may argue this is excessive compared to the actual vacancy history, the board is setting the vacancy rate at this level as part of the overall consideration of the slightly higher risk the Property

has due to its smaller sized units in comparison to most other apartment complexes in the market. As such, this rate, to some extent, is an offset to employing a higher capitalization rate as addressed below.

Expenses

The parties agreed their total expense estimates are quite similar despite there being some variation between how some expenses were allocated between general maintenance and replacement reserves accounts. The total expense ratios (expenses/effective gross income) of the Berg Appraisal and Gagne Appraisal are in a tight range for both years from 37.62% to 40.9%. After reviewing both parties' assumptions and the Property's expenses², the board concludes an expense ratio of 39% for both years is a reasonable assumption.

Capitalization Rate

The board finds the Taxpayer's capitalization rates of 7.54% and 7.43% for 2003 and 2004 respectively were derived from market sales of apartment complexes and their estimated net operating incomes. These rates, while slightly higher than the City's calculation through the band-of-investment technique, are generally supported by the City's rates of 7.1% and 7.22% (before the addition of the effective tax rate). The board was not convinced by the Taxpayer's evidence that an additional "risk premium", as contained in the Berg Appraisal, is warranted. While the board acknowledges the Property may have slightly higher risk than competing complexes due to its smaller unit size and mix of unit types, we do not find the Property's vacancy history or any inordinate deferred maintenance exists to support such an adjustment to the capitalization rate. Any nominal higher risk the Property may have has been addressed in the board's choice of market rents,

² The board is cautious in giving too much weight to the Property's expenses as many of them were allocated to the Property from the Taxpayer's overall costs in managing many other units in southern New Hampshire and northern Massachusetts.

the higher vacancy rate in 2004, adoption of expense ratios that are slightly higher than estimated by the City and adoption of the Berg capitalization rates which are 20 to 40 basis points higher than the City's rates.

In conclusion, the board finds the Property is not overassessed for tax year 2003 but is for tax year 2004. If the taxes have been paid, the amount paid on the value in excess of \$12,431,200 for tax year 2004 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.

Responses to Requests of Findings of Fact and Rulings of Law

The "Requests" received from the Taxpayer are replicated below, in the form submitted and without any typographical corrections or other changes. The board's responses are in bold face.

In these responses, "neither granted nor denied" generally means one of the following:

- a. the Request contained multiple requests for which a consistent response could not be given;
- b. the Request contained words, especially adjectives or adverbs, that made the request overly broad or narrow so that the request could not be granted or denied;
- c. the Request contained matters not in evidence or not sufficiently supported to grant or deny;
- d. the Request was irrelevant; or
- e. the Request is specifically addressed in the decision.

**TAXPAYER’S REQUESTS FOR FINDINGS OF FACT
AND RULINGS OF LAW**

Pursuant to TAX 201.36, Gilbert G. Campbell, the Taxpayer, hereby requests that the Board of Tax and Land Appeals (the “BTLA”) grant the following requests for findings of fact and rulings of law:

1. Manchester Gardens, the property under appeal, is a garden-style apartment complex with 384 units in 16 buildings located on Dunbarton Road, Manchester, New Hampshire.

Granted.

2. Manchester Gardens, constructed in the early 1970’s, is one of the oldest complexes in the City and while properly maintained, has a heightened risk for sudden major capital expenditures.

Denied.

3. Manchester Gardens’ units are significantly smaller than similar units in other apartment complexes.

Neither Granted nor Denied.

4. Manchester Gardens has a larger number of studio and one bedroom apartments than other apartment complexes.

Granted.

5. Manchester Gardens’ units do not have dishwashers and lower floor units floors lack air conditioners and balconies and are partially below grade.

Granted.

6. The tenant base of Manchester Gardens is very sensitive to rental rate increases.

Denied.

7. As agreed by the Taxpayer’s appraiser and the City’s assessor, the income approach is the appropriate method to determine the fair market value of Manchester Gardens as of April 1, 2003 and April 1, 2004.

Granted.

8. The Taxpayer's appraiser, Steven A. Berg's, MAI, SRA, selection and analysis of rental comparables were appropriate and well supported.

Neither Granted nor Denied.

9. Mr. Berg's rental analysis resulted in a reasonable estimate of rental income in both 2003 and 2004.

Denied.

10. The City's comparable rental analysis included two of the same properties Mr. Berg utilized (City Comparable Rentals 2 and 5) but failed to make appropriate adjustments to those comparables to reflect known differences.

Neither Granted nor Denied.

11. The City's other comparable rentals (1, 3 and 4) were inappropriate for comparison to Manchester Gardens. For example, the City's comparable rental #3, used for its analysis of studios only, is largely a Townhouse complex with only 65 units over-all, far smaller than the subject. Comparable rental #4 is even smaller, only 36 units, and in a much better neighborhood.

Neither Granted nor Denied.

12. The City failed to properly adjust its comparable rentals 1, 3 and 4 to reflect known differences.

Neither Granted nor Denied.

13. The City failed to explain and have good support for its reconciliation of its comparable rentals.

Neither Granted nor Denied.

14. Mr. Berg's calculation of a capitalization rate for 2003 and 2004 was derived from market data and well supported.

Neither Granted nor Denied.

15. The Mr. Berg's capitalization rates of 8.6% and 8.24% (before tax adjustment) for 2003 and 2004 properly reflected the risk associated with investment in Manchester Gardens, given its age, physical characteristics and market appeal.

Denied.

16. The City's capitalization rate was based on a "band of investment" method and relied on data on investor expectations set forth in a national survey which reflected investor expectations for institutional grade investments.

Granted.

17. Because of its age and physical characteristics, Manchester Gardens would not be considered an institutional grade investment.

Granted.

18. The City's capitalization rate failed to reflect the risk associated with investment in Manchester Gardens.

Granted.

19. The City's capitalization rates of 7.1% and 7.2% for 2003 and 2004 (before tax adjustment) do not reflect reasonable investor expectations for an investment in Manchester Gardens.

Granted.

20. Mr. Berg properly used the median equalization ratios of 63.6% and 56.4% determined by the New Hampshire Department of Revenue Administration (the "DRA") in making his tax adjustment to his capitalization rates and determining an equitable assessment.

Denied.

21. The City, both in making a tax adjustment to its capitalization rates, and examining the equity of the Manchester Gardens' assessment, used aggregate mean ratios of 65.1% and 57.1%, not the median ratios, as determined by the DRA.

Granted.

22. The median ratio is the proper ratio to be applied to determine the proportionality of a taxpayer's assessments. *PSNH v. Seabrook*, 133 N.H. 368, 378, 580 A.2d 702 (1990).

Neither Granted nor Denied.

23. The Taxpayer has carried his burden of demonstrating that his assessments are excessive and disproportionate. *Appeal of Town of Sunapee*, 126 N.H. 214, 217 (1988).

Granted.

24. The Taxpayer's assessments are reduced to \$12,074,262 for 2003 and \$10,689,712 for 2004 and the City shall issue abatements, based upon the reduced assessments, along with statutory interest calculated in accordance with RSA 76:13

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 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

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

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CERTIFICATION

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Margaret H. Nelson, Esq., Sulloway & Hollis, P.L.L.C., PO Box 1256, Concord, NH 03302, counsel for the Taxpayer; and Chairman, Board of Assessors One City Hall Plaza-West Wing, Manchester, NH 03101.

Date: 2/16/07

Anne M. Stelmach, Clerk