

Town & Campus, Inc.

v.

Town of Durham

Docket No.: 20204-03PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2003 assessment of: Map 2-14-1 - \$1,074,700 (land \$368,400; buildings \$706,300), consisting of two buildings, a restaurant and combination office/apartment building on 0.44 acres (the “Property”). At the commencement of the hearing, the parties stipulated the assessment of \$1,361,000 on Map 2-14-4, a retail and apartment building on 0.35 acres, was proportionate and thus the Taxpayer withdrew its appeal of that lot. Therefore, the testimony and evidence submitted at the hearing pertained solely to the assessment of the Property at 2-4 Ballard Street. 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 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 assessment was higher than the general level of assessment in the municipality. Id. The Taxpayer carried this burden.

The Taxpayer's representative argued the assessment was excessive because:

- (1) Christopher Snow of Property Tax Advisors, Inc., the Taxpayer's representative, performed a market analysis ("Snow Analysis") which supported a market value of \$715,000 as of April 1, 2003;
- (2) the Property's owner is a knowledgeable real estate investor and manager having owned and managed real estate in the Town for more than thirty years;
- (3) an appraisal performed by Richard E. Marquis ("Marquis Appraisal") estimated a market value of \$650,000 as of September 30, 2003; however, because Mr. Marquis was not present at the hearing, the Taxpayer is relying mainly on the Snow Analysis as its basis for an abatement; and
- (4) the Property's assessment should be based on its market value and the Town's 0.99 general level of assessment for 2003 (equalization ratio).

The Town argued the assessment was proper because:

- (1) the Taxpayer's income approach does not accurately depict the Property's market value due to the inaccurately projected income and expenses;
- (2) the Taxpayer's comparable sales approach has inappropriate adjustments;
- (3) the Property's location across the street from the University of New Hampshire ("UNH") campus adds value which was not considered by Mr. Snow;
- (4) the Town's income analysis is more supportive of the Property's value; and
- (5) the Taxpayer's evidence does not warrant an abatement.

Board's Rulings

Based on the evidence, the board finds the proper assessment to be \$976,700 (rounded) which is based on a market value finding of \$986,600 equalized by the stipulated ratio of 0.99 (\$986,600 X .99). The board has not allocated the value between land and buildings and the Town shall make this allocation in accordance with its assessing practices.

The Property consists of two buildings: 1) a restaurant, known as "Murphy's Tin Palace," which consists of 4,472 square feet on the first floor and a 1,281 square foot finished basement; and 2) a combination of commercial office space consisting of 1,067 square feet on the first floor, and an apartment consisting of 1,559 square feet on the second and third floors which is rented to UNH college students.

The board's decision relies mainly on the evidence, exhibits and testimony submitted by the Taxpayer and his representative, Mr. Snow, and the Town, through its assessor, Robb Dix ("Mr. Dix"). The board gave limited weight to the Marquis Appraisal as it provided little probative evidence, based its conclusion on the office's and apartment's existing (as of September 2003) income stream rather than analyzing market rents, and based the restaurant income solely on the guaranteed annual rent of \$60,000 without consideration of other contractual requirements of the lessee.

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 and the tribunal that is reviewing valuation is authorized to select any one of the valuation approaches based on the evidence. Brickman v. City of Manchester, 119 N.H. 919, 920 (1979); Demoulas v. Town of Salem, 116 N.H. 775, 780 (1976).

The board did not find the comparable sales analysis to be the appropriate approach to value as the Property would most likely be purchased by an investor who would be looking at market income with the intent of leasing and managing the Property. The Property is in a prime location, directly across the street from the UNH campus, and is on a corner lot. These factors along with its highest and best use as developed would command premium rates which would be a prime consideration of a prospective purchaser. Therefore, given the evidence in this appeal, the board finds the income approach to be the most appropriate method of estimating the Property's market value with market supported rents estimated on a triple net basis.

After considering all the evidence, the board finds the market value as the 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		
Murphy's Tin Palace	\$75,000	
Office	\$17,072	
Apartment	\$19,200	
Total Potential Gross Income		111,272
Vacancy & Collection Loss	5.00%	5,564
Effective Gross Income		105,708
Expense Ratio of 16% EGI	-16.00%	-16,913
Net Operating Income		88,795
Overall CAP rate	9.00%	
Indicated Market Value		\$986,600
2003 Equalization Ratio	99.00%	
2003 Assessed Value		976,700

Potential Gross Income

Murphy's Tin Palace – Mr. Snow utilized the actual income in determining the yearly market rent of \$60,000. No consideration was applied for the provision in the lease of an additional 3% of gross sales totaling more than \$60,000 per year (“overage”) to be paid by the lessee. The Taxpayer argued the lessee had not been forthcoming with the overage and the Taxpayer was currently pursuing litigation with the lessee for specific gross sales information and the resulting past due overage. The board finds the Taxpayer's \$60,000 rental estimate was not supported by either the market or the Property's lease and the income estimate should be adjusted to account for the additional rent of 3% of gross sales beyond the guaranteed \$60,000 annual rent. Based on the evidence and the board's judgment and experience¹, the board has added an additional \$15,000 to reflect this provision in the lease. Because the lessee had not been forthcoming in compensating the Taxpayer is not cause to reduce the market rent on the Property. The Taxpayer has, and is seeking, other options to be remunerated for the unpaid overage and any potential purchaser/investor would be looking to maximize his investment. Thus, this amount should be reflected in the income analysis.

Office

Mr. Snow utilized a gross income of \$9,600 which equates to \$9.00 per square foot triple net. The board finds this income is grossly understated given the comparable leases utilized in the Snow Analysis which indicated a range of adjusted rents of \$8.63 to \$13.18 per square foot. As stated previously, the Property's prime location in the central business district zone and its immediate proximity to UNH must be reflected in the income stream. The board finds the Snow Analysis was unsupported and the gross rent of \$17,072 utilized by the Town is reasonable.

¹ The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence. See RSA 541-A:33, VI; Appeal of Nashua, 138 N.H. 261, 264-65 (1994); see also Petition of Grimm, 138 N.H. 42, 53 (1993) (administrative board may use expertise and experience to evaluate evidence).

Apartment

The apartment consists of two bedrooms and a bathroom on the second floor and two rooms (the owner testified one was a bedroom and one a study room) on the third floor. There was conflicting testimony regarding the student capacity of this apartment. Mr. Dix testified when he inspected the Property, there were six students residing there; the owner testified to a maximum of three students on a nine-month basis with summer rentals; and the Snow Analysis based the income on three students. Again, the board has used the evidence, testimony, photographs along with its judgment and experience in finding a four-student capacity and determined an income of \$400 per student per month arriving at a yearly potential gross income of \$19,200.

Vacancy and Collection Loss

The board finds a vacancy and collection loss of 5%. The evidence supported this Property suffered minimal vacancy and, given its desirable location and mixed use, finds 5% is reasonable.

Expense Ratio

The board concurs with the expenses in the Snow Analysis for management of 5%; replacement for reserves of 5%, maintenance of 3%, and miscellaneous expenses of 3%. The board does not find an additional vacancy allowance as in the Snow Analysis is warranted as it has already been accounted for above. Therefore, the board finds a total expense ratio of 16% of the effective gross income (EGI) is appropriate.

Capitalization (“CAP”) Rate

The board finds a CAP rate of 9% is reasonable. The Snow Analysis utilized a CAP rate of 9%; the Town’s income valuation used a 9.78% CAP rate; and the Marquis Appraisal utilized an 8.71% CAP rate (as of September 30, 2003).

The indicated market value, based on the above findings, is \$986,600. The parties stipulated to the equalization ratio of 99% for tax year 2003. Adjusting the market value by the equalization ratio indicates an assessed value of \$976,700 (rounded).

Last, the board considered Mr. Dix's testimony regarding a potential highest and best use of the Property as conversion to a parking lot but has given it no weight. The board finds this hypothetical highest and best use is unsupported by any evidence. Mr. Dix's calculation of parking spaces was made without any consideration of traffic flow lanes, ingress/egress points, lighting and green space requirements, or any costs of demolition. Further, the testimony regarding the inference that UNH would likely purchase the Property if it was on the market is also unsupported and has been given no weight in the board's decision. Simply because UNH was a prior tenant of the office space is not sufficient cause for a belief that UNH would purchase the Property.

If the taxes have been paid, the amount paid on the value in excess of \$976,700 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.

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

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Christopher Snow, Property Tax Advisors, Inc., 56 Middle Street, Portsmouth, NH 03801, representative for the Taxpayer; and Chairman, Board of Selectmen, Town of Durham, 15 Newmarket Road, Durham, NH 03824.

Date: 2/28/07

Anne M. Stelmach, Clerk