

Hiki Realty Trust

v.

Town of Derry

Docket Nos.: 20291-03PT and 21070-04PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2003 assessment of \$372,100 (land \$260,000; buildings \$112,100) and 2004 assessment of \$437,100 (land \$325,000; buildings \$112,100) on Parcel ID 35017, Sheet #122, a commercial property on 0.23 acres (the “Property”). 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 assessments were higher than the general level of assessment in the municipality. Id. The Taxpayer carried this burden.

The Taxpayer argued the assessments were excessive because:

(1) the Property is small in size (0.23 acres) and has only limited parking for 10 cars to accommodate a take-out food service business (“USA Subs”);

- (2) a comprehensive analysis (Taxpayer Exhibit No. 1) prepared by its tax representative (David Irwin) using the income and sales comparison approaches supports a much lower market value (approximately \$240,000); and
- (3) an abatement based upon the Town's levels of assessment of 69% in 2003 and 81.1% in 2004 is warranted.

The Town argued the assessments were proper because:

- (1) the Property is situated on one of the two major commercial roads in the Town (Crystal Avenue) with good visibility and traffic flow in an area known as the Town's "Miracle Mile" which is quite desirable and supports high commercial values;
- (2) the small size of the Property does not diminish its desirability or value significantly since similar spaces could be used for "Subway" or other businesses; and
- (3) the Taxpayer failed to meet its burden of proof.

Following the March 8, 2006 hearing, the board directed its senior review appraiser (Ms. Joan C. Gootee) to inspect the Property, review the comparable sales presented at the hearing and make an independent analysis of the market value of the Property, which the board would then treat as one additional piece of evidence. The parties were advised of this step and were later provided with copies of Ms. Gootee's "Appraisal Review Report" dated April 27, 2006 (the "Report") and given an opportunity to submit written comments regarding it. The Town did not do so and the Taxpayer's representative submitted a May 1, 2006 letter stating he believed the Report was "thorough and accurate."

Board's Rulings

Based on the evidence, including the Report, the board finds the proper assessments to be \$158,700 for 2003 (\$230,000 market value times 69% level of assessment) and \$194,600 for

2004 (\$240,000 market value times 81.1% level of assessment, rounded). Abatements are therefore granted.

At the hearing, the Town's representatives did not present any analysis or other evidence of their own of the market value of the Property to counter the substantial evidence of overassessment presented on behalf of the Taxpayer by Mr. Irwin in Taxpayer Exhibit No. 1. In that analysis, Mr. Irwin used the income and sales comparison approaches to estimate a market value of \$240,000. The Report estimates this same value for 2004 and a slightly lower value for 2003 (\$230,000). Upon review, the board finds the Report to be the best evidence of market value.

The Report analyzed eight sales and made appropriate adjustments for market conditions (time trended at 1% per month), style of building (first or second floor space), and quality/condition to give a range of indicated values per square foot. The Report also presented value estimates using the income approach. A reconciliation of these two approaches resulted in the estimated market values for 2003 and 2004 stated in the Report which the board finds to be reasonable and supportable. The Report gave "no weight" to the mass appraisal cost approach used by the Town to assess the Property in each year because of a lack of supporting information and the board agrees with this conclusion.

The board considered the Town's arguments at hearing regarding the Property's commercial location and desirability. The rental and sales comparisons made in Taxpayer Exhibit No. 1 and the Report, however, are based on similar locations, including other sites on Crystal Avenue. The board also considered the conflicting testimony relative to one of the sales (#4 in the Report, a Pizza Hut location, which may have been part of a "bulk purchase" of multiple Pizza Hut properties, making the price paid not indicative of its value, according to the

Town); the Report gave “no weight” to this sale, however, and still reached its substantially lower market value estimates for the Property.

In summary, the board finds the Property is entitled to an abatement to \$158,700 for tax year 2003 and \$194,600 for tax year 2004. The board has not allocated these annual total assessments between land and building components, but the Town is directed to do so in accordance with its standard assessment practices.

If the taxes have been paid, the amount paid on the value in excess of \$158,700 in tax year 2003 and \$194,600 in 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.

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

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: David Irwin, Tax Choice Services, PO Box 1297, Hillsboro, NH 03244, Representative for the Taxpayer; and Chairman, Town Council, Town of Derry, 14 Manning Street, Derry, NH 03038.

Date: June 29, 2006

Anne M. Stelmach, Clerk