Salzburg Square, LLC

v.

Town of Amherst

Docket No.: 20292-03PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 2003 assessment of $1,371.000 (land $302,100; buildings $1,068,900) on Map 8, Lot 44-3, retail office buildings on a 4.70 acre lot (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 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 argued the assessment was excessive because:

(1) the Property sold on April 16, 2004 for $1,225,000 after being professionally marketed for 15 months;

(2) there were no offers other than the one that led to the Property's transfer during the 15 month period the Property was marketed;

(3) the Michael A. Driscoll appraisal (the "Appraisal") relied upon by the Town is flawed; and

(4) the Property's selling price is the best indication of its market value.

The Town argued the assessment was proper because:

(1) the sale of the Property for $1,225,000 in April, 2004 is not a good indication of its market value for several reasons; and

(2) the Appraisal is the best evidence of the Property's market value and was the basis for the assessment reduction after the Taxpayer filed its abatement request.

Board's Rulings

Based on the evidence, the board finds the proper assessment to be $1,046,200.

The Taxpayer's representative, Mr. David Irwin of Tax Choice Services, testified the April 16, 2004 sale of the Property was an arm's-length transaction as it was between a willing and informed buyer and a willing and informed seller. Further, Mr. Irwin testified that although the sale occurred approximately one year after the effective tax date (4/1/03 v. 4/16/04), the Property's location and unique design, negated the need to apply any adjustment for any appreciating market conditions during the time elapsed.

The Property has a unique design (European half-timber stucco) with the ten buildings oriented around a central courtyard. Several of the buildings are situated at the back of the Property with very limited or no exposure to the highway (Route 101). Additionally, the majority of the parking spaces are located at the rear of the Property. Mr. Irwin testified this

feature, coupled with the Town's sign ordinance limiting the possibility of extensive signage, hinders the Property's exposure to the highway and its marketability.

Mr. Irwin further described the Property's location as "betwixt and between" the town centers of either Amherst/Nashua or Bedford/Manchester. He stated the Property's location made it more of a "destination" shopping place rather than a general shopping area similar to the ones seen closer to either Manchester or Nashua. These two factors, design and location, are the primary reasons the Property has such a historically high vacancy rate not associated with other commercial properties in the Town.

The Taxpayer, through its representative, testified the Property's sale price was $1,225,000 on April 16, 2004 (Taxpayer Exhibit 2). The board has the discretion to evaluate and determine the credibility of the sales price being indicative of market value. See Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 256 (1994); Appeal of Town of Peterborough, 120 N.H. 325, 329 (1980). However, where it is demonstrated that the sale was an arm's-length transaction, the sale price is one of the "best indicators of that property's value." Appeal of Lakeshore Estates, 130 N.H. 504, 508 (1988). In this case, the board finds the Property's sale price in April, 2004 to be the best evidence of its market value. The board determined the assessment using the sale price of the Property and the weighted mean equalization ratio, stipulated to by the parties at the hearing, of 85.4% ($1,225,000 x 0.854 = $1,046,200 (rounded)).

The Town abated the assessment after the Taxpayer filed its abatement request and testified the abatement was based on the Appraisal. The board finds, after a thorough review of the Appraisal and the testimony given at the hearing, the appraiser's assumptions were optimistic in several areas, resulting in an overstatement of the Property's market value. For example, the

board finds the Appraisal's low vacancy rate in the third, fourth and fifth years of the discounted cash flow income approach to be overly optimistic. Historically, the Property had vacancy rates near or exceeding 40% for several years prior to the Appraisal. Mr. Irwin testified the high vacancy rates continued after the Property's sale. To project such a significant drop in vacancy given the history of the Property coupled with its design and location is too optimistic. Additionally, the board finds the appraiser's use of the middle to high end of the estimated range of market rents to be unsupportable given the Property's design, location and high vacancy rates. A review of the leases itemized in the Appraisal on page 55 of Taxpayer's Exhibit No. 1, reveals that few of the leases are of spaces near the Property or in similar locations.

In addition, several of the leases appear to be for space "available" rather than of currently leased properties. The only two leases listed as being from the Town have the "available" notation and are at a much lower lease rate than the rate used by the appraiser. Further, while the appraiser did state he used a higher capitalization rate due to the Property's historically high vacancy rate, the board finds the Appraisal's estimated appreciation rate of 3% per year for the income and expenses estimated in the discounted cash flow is not supported by the Property's rental history. Given these facts, the board has little confidence in the Appraisal's estimate of the Property's market value by the income approach, the approach relied upon by the appraiser as most appropriate for the Property.

In addition to the Appraisal, the Town stated there were four reasons why the Property's selling price in 2004 was not a good indication of its market value in 2003: 1) vacancies were increasing therefore values were falling between 2003 and 2004; 2) the Property had been extensively marketed, initially at $1,970,000 and then for $1,600,000 and that after the price was lowered it sold within approximately three months of the effective date of the Appraisal; 3) there

is a stigma attached to the Property because it was on the market for an extensive period of time; and 4) the previous owners "bailed out of the Property" after trying to market it unsuccessfully.

Given the limited testimony and evidence in support of the reasons the board gives them little weight. The reasons are based on opinions and assumptions without supporting facts. The Town did not do any independent research or provide factual data to conclusively support its assertions. The board finds the Town needed to overcome the evidence of the selling price and needed to have conclusive, fact-based rebuttal as to why the selling price was not the best indicator of the Property's market value. The Town essentially relied on the Appraisal and all the appraiser's assumptions, some of which the board finds to be overly optimistic given the unique features of the Property.

If the taxes have been paid, the amount paid on the value in excess of $1,046,200 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, <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

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 Town of Amherst, Chairman, Board of Selectmen, PO Box 960, Amherst, NH 03031.

Date: September 21, 2006

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Anne M. Stelmach, Clerk