

Wal-Mart Real Estate Business Trust

v.

Town of Conway

Docket Nos.: 20892-04PT/21665-05PT/22694-06PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” assessments of: \$9,593,100 (land \$3,445,200; building \$6,147,900) in tax year 2004; and \$9,736,400 (land \$3,445,200; building \$6,291,200) in tax years 2005 and 2006; on Map 246/Lot 62, a Wal-Mart (Store No. 2140) located on an 11.694 acre lot at 46 North South Road (the “Property”). For the reasons stated below, the appeals for abatement are 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 argued the assessments were excessive because:

(1) the “Berg Appraisal” (Taxpayer Exhibit No. 1), prepared by a qualified MAI appraiser, estimates the market value of the Property to be \$6,500,000, \$6,800,000 and \$7,000,000 in tax years 2004, 2005 and 2006, respectively;

(2) the Berg Appraisal utilized both the sales and cost approaches, but placed “sole weight” on the sales approach in its reconciliation and final estimates of value;

(3) regarding the cost approach: the \$3,403,000 purchase price for the land in 1998 reflects a “premium” paid by the Taxpayer (for reasons unknown to Mr. Berg); that purchase price is not indicative of the site’s value; and the building cost must be adjusted downward for functional depreciation;

(4) the Berg estimates are the best evidence of the market values of the Property and justify a substantial abatement of the assessment in each tax year; and

(5) even if the higher market value estimates in the Town’s appraisal are given weight, the Property is entitled to a substantial abatement in each tax year.

The Town argued the assessments should be abated only to the value estimates stated in its own appraisal, adjusted by the level of assessment in each tax year, because:

(1) various features of the Property, including its exceptional location, certain drainage rights over adjacent property owned by the State, and the ‘grandfathered’ status of the 100,000 square foot retail building designed and built to the Taxpayer’s specifications in 1999, make it quite valuable and not subject to functional obsolescence (depreciation);

(2) the “Rauseo Appraisal” (Municipality Exhibit A), prepared for the Town by a qualified MAI appraiser, estimates the market value of the Property to be \$9,400,000, \$10,200,000 and \$10,900,000 in tax years 2004, 2005 and 2006, respectively;

(3) the Rauseo Appraisal properly uses the cost approach as “the most reliable indicator of value” and considers the sales approach only a “secondary method of valuation” which “has not been highly weighted,” and values the effective land area as 13 acres, because of the valuable drainage rights over adjacent land now owned by the State; and

(4) the Rauseo estimates are the best evidence of the market value of the Property and, when adjusted by the agreed levels of assessment, warrant a much smaller abatement in each tax year than claimed by the Taxpayer.

The parties agreed the levels of assessment in the Town were 95.6%, 82% and 80.4% in tax years 2004, 2005 and 2006, respectively, as measured by the median ratios computed by the department of revenue administration. (See also Taxpayer Exhibit No. 3.) At the end of the hearing, the parties’ attorneys asked for and received additional time to submit requested findings of fact and conclusions of law. The board has responded to the specific requests for findings of fact and conclusions of law made by each party in the Addendum to this Decision.

Given the substantial differences in the market value estimates of the parties, the board directed one of its review appraisers, Theresa M. Walker, to complete and submit a report containing independent estimates of the market value of the Property in each tax year, based on the evidence presented, an inspection and additional investigation. Ms. Walker submitted her Summary Appraisal Report (the “Walker Report”) to the board on June 11, 2009 and the parties were given twenty (20) days to submit written comments. Both parties filed detailed written comments to the Walker Report (discussed further below) and then agreed additional time to explore settlement would be helpful. The parties then advised the board in a September 29, 2009 letter that they were unable to reach a settlement and requested the board “proceed to issue its decision in this matter.”

Board's Rulings

A. Evidentiary Ruling on the Town's Motion in Limine

The Town made a "Motion in Limine to Limit the Presentation of Evidence" ("Motion") three weeks before to the August 21, 2008 hearing and the Taxpayer responded with an "Objection" to the Motion. The board heard oral arguments from counsel at the start of the hearing, deliberated further and then denied the Motion for the reasons briefly explained on the record. In brief, the Motion contended the Taxpayer should be "limited" to use of the cost approach in the 2004 appeal and to use of the income approach in the 2005 appeal because only these approaches were referenced in the respective appeal documents filed with the board by the Taxpayer's representative at those times.

The board disagrees. The Motion relies on certain dicta in Colley/McCoy Management Co., LLC v. Town of Pelham, BTLA Docket Nos. 20363-03PT and 21399-04PT ((June 23, 2006) at pp. 6-7 (hereinafter, "Colley-McCoy"), but this reliance is misplaced, The relevant facts and procedural history of the instant appeals are markedly different than those in Colley-McCoy. Here, the Taxpayer did provide the Berg Appraisal to the Town "in early July 2007" (Objection, ¶1), more than a year before the hearing date. As stated on page 88, the Berg Appraisal utilizes the sales and cost approaches to estimate market value in each of the three years under appeal, places "sole weight" on the sales approach in its reconciliation and does not employ the income approach at all.

The Town's own appraisal prepared by Mr. Rauseo does not use the income approach either. Instead, the Rauseo Appraisal (see pp. 60-61) considers the cost approach "the most reliable indicator of value" and considers the sales approach only a "secondary method of valuation" which "has not been highly weighted."

In these circumstances, the board was unable to conclude the Town has been prejudiced or misled by the grounds stated in the appeal documents filed by the Taxpayer in tax years 2004 and 2005. Cf. April 29, 2008 Order in Wal-Mart Real Estate Business Trust v. Town of Plymouth, BTLA Docket No. 21720-05PT. The board further finds it would be inconsistent and impractical, at best, to disregard entirely the estimates of market value presented by the Taxpayer for tax years 2004 and 2005, but to consider an estimate using the same methodology and reliance on the sales approach for tax year 2006 at a consolidated hearing. Instead, the board has considered the Berg Appraisal, but has given it only the weight it deserves, in light of all the evidence submitted and the Walker Report, in order to decide the question of whether the Property was proportionally assessed relative to other property in the municipality. See, e.g., Porter v. Town of Sandwich, 153 N.H. 175, 177 (2006).

B. Substantive Rulings on the Taxpayer's Abatement Requests

Based on the evidence, and for the reasons explained below, the board finds the Property was disproportionally assessed and the assessments (rounded) should be abated to \$7,887,000 in tax year 2004, \$7,298,000 in tax year 2005 and \$7,598,000 in tax year 2006. These abatements are based on market value estimates of \$8.25 million, \$8.9 million and \$9.45 million for 2004, 2005 and 2006, respectively, for the Property, adjusted by the agreed level of assessment in each tax year (95.6%, 82% and 80.4%). The appeals are therefore granted for the reasons discussed below.

1. Description of the Property

The Property is a standard Wal-Mart store (identified as "Store No. 2140" on the cover page of the Berg Appraisal). It is situated in what the parties agree is a very desirable location at a lighted intersection on the reconstructed North South Road and Route 302, which is the

principal artery connecting Maine to a very popular destination retail area. The Property is in very close proximity to Settler's Green Outlet Village, an established complex of 60 stores, and a hotel on Route 16, and is just east of the Mountain Valley Mall, which, in 2004, contained both a Hannaford and a J.C. Penney, with a 145,000± SF Lowe's also planned for construction. (See Town Requests Nos. 7 - 8; and Berg Appraisal, p. 26.) Across from the Mountain Valley Mall is a new Shaw's Supermarket and another retail complex, "Settler's Crossing," is planned for the intersection of Route 16 and Route 302. (Berg Appraisal, pp. 25-26.) The Property is located within the Town's Special Highway Corridor Overlay District (SHCOD), which establishes a permanent buffer alongside the proposed highway bypass so that it will remain a scenic throughway. (Town Request No. 9.) These features are also described in the Rauseo Appraisal (pp. 51-52), which accurately concludes the Property "is located in an area of commercial development with high traffic volumes" and "the strength of the immediate neighborhood in retailing and hospitality is well respected by nationally recognized tenants." The location also benefits from visibility to the Conway Bypass and a planned intersection which improve the Property's exposure and potential for development. (Rauseo Appraisal, pp. 36 and 51.)

The Property consists of a single-story building containing approximately 100,000 square feet, together with a 5,170± square foot partial canopy garden center, a 4,900± square foot fenced garden center and a 7,050± square foot outdoor storage area, all specifically designed for Wal-Mart, and (since 2004) includes a Dunkin Donuts snack shop within the building. (See Town's Request Nos. 2 and 3.) The Property is 11.694 acres in size, but benefits from being able to drain storm water offsite onto additional land now owned by the State as a result of an eminent domain taking (to construct a highway bypass to alleviate traffic congestion in North Conway).

(Id., Nos. 4 – 5.) As a result, the board finds merit in the conclusion drawn in the Rauseo Appraisal (pp. 36 and 68) and the Walker Report (p. 6) that the effective (useable) land area is 13 acres.

The land was acquired for \$3,403,000 in April, 1998 and the building was constructed in 1999. According to the Taxpayer, this purchase followed “a lengthy process of negotiations,” an intervening eminent domain proceeding, “a lengthy permitting process and some political controversy regarding the arrival of Wal-Mart.” (See Taxpayer Request No. 2.) In addition, the actual building permitted and constructed for Wal-Mart on the Property in 1999 is now “grandfathered” (a legal, non-conforming use), as it is no longer in compliance with various zoning regulations in important respects, such as a maximum building size limit of 5,000 square feet and a minimum building separation of 40 feet, as well as a 100 foot buffer along the bypass right of way. (See Berg Appraisal, pp. 32-33; and Rauseo Appraisal, pp. 23-24.)

2. The Parties’ Differing Market Value Estimates

As the parties recognize, assessments must be based on market value and the focus is on proportionality, which requires the board to decide whether the Property was assessed higher in relation to its market value than the level generally prevailing in the municipality. See, e.g., RSA 75:1; Appeal of Andrews, 136 N.H. 61, 64 (1992); and Appeal of Town of Sunapee, 126 N.H. 214, 219 (1985). As noted above, the burden of proof rests with the Taxpayer on this central issue. See also Public Serv. Co. v. Town of Ashland, 117 N.H. 635, 637 and 640 (1977), where the supreme court affirmed the denial of an abatement and noted:

The taxpayer has the burden of proof and it is the taxpayer’s responsibility to satisfy the board as to the disproportionality of the tax burden imposed by the selectmen. “The burden is on the company to satisfy [the trier of fact] by a preponderance of the evidence that it was paying more than its proportionate share of the taxes... and thus entitled to an abatement.” New England Power Co. v. Littleton, 114 N.H. [594,] at 599 [1974].

There is never one exact, precise or perfect assessment; rather, there is an acceptable range of values which, when adjusted to the municipality's general level of assessment, represents a reasonable measure of one's tax burden. Wise Shoe Co. v. Town of Exeter, 119 N.H. 700, 702 (1979). The challenge is magnified, of course, when a more substantial and complicated type of property, such as a 'big box,' free standing store constructed to the special requirements of a major retailer like the Taxpayer, is involved.

While the parties agree on the measure of proportionality (the level of assessment) in each tax year, the expert appraisers hired by them disagree sharply both as to methodology/approach and as to their resulting estimates of market value. The table below summarizes these differences.¹

3. Estimated Market Values Using the Cost Approach

Turning to assessment methodology, the Berg Appraisal (at p. 88) states that Mr. Berg places "sole weight on the sales comparison approach" (using the cost approach "as a test of reasonableness only") to arrive at market value estimates. These estimates (as noted in footnote 1) are in the range of \$2.9 million to \$3.9 million below the values estimated in the Rauseo Appraisal (pp. 60 - 61) prepared for the Town. Mr. Rauseo, in contrast to Mr. Berg, relied on the cost approach and considered it "the most reliable indicator of value" (considering the sales approach "only as a secondary method of valuation"). Id.

¹

	Methodology/Approach	Market Value Estimates:		
		2004	2005	2006
Berg Appraisal	Sales Comparison	\$6,500,000	\$6,800,000	\$7,000,000
Rauseo Appraisal	Cost	\$9,400,000	\$10,200,000	\$10,900,000
	Net Differences	\$2,900,000	\$3,400,000	\$3,900,000

As the supreme court has recognized, in an abatement proceeding the valuation of property is a question of fact for the trial court to resolve, after considering all the relevant evidence before it, and the question includes deciding whether a party's "appraisal method was appropriate." See Rye Beach Country Club v. Town of Rye, 143 N.H. 122, 127 (1998), citing City of Manchester v. Town of Auburn, 125 N.H. 147, 154 (1984) and other authorities. As further recognized, "[t]here are multiple approaches to the valuation of property" and "no rigid formula which can be used to arrive at full and true value for property tax assessment"; "nor is specific weight required to be allocated to any of the several approaches"; and the trial judge can "accept or reject such portions of the evidence presented as he f[inds] proper, including that of the expert witnesses." Crown Paper Co. v. City of Berlin, 142 N.H. 563, 570 (1997) (citations, quotations and brackets omitted).²

In making market value findings, the board considers and weighs all of the evidence, including the respective appraisals of each party, applying the board's "experience, technical competence and specialized knowledge" to this evidence. See RSA 71-B:1; and former RSA 541-A:18, V(b), now RSA 541-A:33, VI, quoted in Appeal of City of Nashua, 138 N.H. 261, 265 (1994) (the board has the ability, recognized in the statutes, to utilize its "experience, technical competence and specialized knowledge in evaluating the evidence before it"). Further, where there is conflicting evidence, the board must determine for itself the weight to be given each piece of evidence because "judgment is the touchstone." See, e.g., State of New Hampshire v. Frederick, BTLA Docket No. 23317-07ED (December 3, 2008); cf. Appeal of Public Serv. Co.

² In Crown Paper, the experts disagreed on whether the "income method or cost method" should be used as the primary method for valuing a paper mill and the trial court ruled in favor of the municipality's primary use of the cost method. Id.

of N.H., 124 N.H. 479, 484 (1984), quoting from New England Power Co. v. Littleton, 114 N.H. 594, 599 (1974), and Paras v. Portsmouth, 115 N.H. 63, 68 (1975); see also Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 256 (1994).

The appraisers for each party, Mr. Berg and Mr. Rauseo, agreed the income approach should not be applied for this appraisal assignment, but disagreed on whether the cost or sales comparison approaches were more reliable as indicators of the market value of the Property. Because of the significant differences in their value conclusions, the board has reviewed each appraisal and the testimony of each expert at the hearing carefully and in considerable detail, as well as the Walker Report. The board finds the cost approach provides the most reliable indicators of the value of the Property in each tax year for a number of reasons.

First, the sales comparables used by Mr. Berg to support his analysis do not meet basic standards for reliability. Mr. Berg used three building sales to derive his market value estimates of \$6.5 million, \$6.8 million and \$7 million. See Berg Appraisal, pp. 58-62. Two of his sales are of former Ames Department Stores in Ossipee, New Hampshire and Lewiston, Maine and one is of a “neighborhood shopping center” in Conway. Even from the limited and sketchy details provided in the Berg Appraisal regarding these sales (id., pp. 94 – 102), it is clear both Ames sales were distressed sales (consummated at “auction” and while Ames was in “bankruptcy”) and the shopping center sale had certain special conditions associated with it making the purchase price questionable, including seller financing and a resale (within seven months) to what might have been a related party.

All three comparables are much smaller both in land area (ranging from 3.17 acres to 6.55 acres) and building size (43,624 to 76,500 square feet) compared to the Property (13 acres

and approximately 100,000 square feet building) and Mr. Berg therefore had to make very substantial adjustments (up to 125.3% and 130.05% for the former Ames stores, for example) in order to make a value estimate. *Id.*, p. 59. Somewhat surprisingly, Mr. Berg failed to make any adjustment for “Functional Adequacy” to these three comparables even though he stresses, elsewhere in his appraisal (see pp. 74 – 75) what he believes are sizeable “functional obsolescence” factors resulting from building size and shape considerations pertaining to the Property.

The board is also unpersuaded by the rather confusing and cursory explanation in the Berg Appraisal (see p. 55) regarding how, if at all, location differences, were taken into account. It is hard to consider the prime location of the Property, which draws shoppers not only from the immediate geographic area, which includes Maine communities, but also from Canada, Massachusetts, and Rhode Island, to be equivalent or comparable, from a commercial retail standpoint, to much more remote areas like Ossipee, New Hampshire or Lewiston, Maine, for example.

In brief, the board finds there is a paucity of reasonably comparable sales and therefore the “sole reliance” by Mr. Berg on the sales approach to arrive at his final market value estimates is fraught with unresolved difficulties and uncertainties. As noted in the Rauseo Appraisal (p. 90), “modern, productive, limited market properties like the subject [Property] rarely sell.” Mr. Rauseo properly looked at some sales, but only as a supplement to his analysis using the cost approach, to ascertain a range of values that could serve as a check on the validity of his value conclusions using the cost approach.

Separate and apart from the relative paucity of comparable sales to allow use of the sales approach, the board finds the cost approach is the most reliable indicator of value based on the

evidence presented, regardless of whether the Property can be viewed definitively as a “limited market” property, which was a subject debated at some length at the hearing and also discussed in the Walker Report at pp. 9-15. The board has considered the accepted definition of a limited market property (as well as a “special-purpose” property) and finds the Property meets the definition of a limited market property, but not a special purpose property for the reasons stated in the Walker Report. Id. at pp. 10-11.³ The cost approach is a reliable approach to value a limited market property.

Use of the cost approach requires estimating the site value and the depreciated value of the improvements. The differences in the estimates of value using the cost approach are summarized on page 25 of the Walker Report. The board finds Ms. Walker’s independent estimates of value using the cost approach are more reliable than the lower estimates presented by Mr. Berg and the higher estimates presented by Mr. Rauseo for the following reasons.

Ms. Walker concluded the “site value” was \$2.7 million in 2004, \$3 million in 2005 and \$3.4 million in 2006. She did not rely on the purchase price of the land in 1998 (\$3.4 million) but instead looked at comparable sales of “big-box retail sites” and selected five from 18 sales for which market data was available to develop her estimate. Like Mr. Rauseo, Ms. Walker concluded the Property had 13 useable acres of land, not the lower estimate of 11.69 acres used by Mr. Berg. Unlike Mr. Rauseo, however, Ms. Walker developed her estimates on an adjusted price per square foot of building area basis, not the per acre measure used by Mr. Rauseo. She made appropriate adjustments to the comparables based on time of sale, location, site conditions

³ As explained in the Walker Report, a limited market property is defined as “a property that has relatively few potential buyers at a particular time” and a special-purpose property is defined as “a limited market property with a unique physical design, special construction materials, or a layout that restricts its utility to the use for which it was built.” Id.

and land-to-building ratios, concluding the value per square foot was \$27 in 2004, \$30 in 2005 and \$34 in 2006, because she found market evidence that values of developable sites were increasing by approximately 12% per year in these time periods, the same rate found by Mr. Berg. See Walker Report, p. 20; and Berg Appraisal, p. 68. On balance, the board finds her estimates of the site value of the Property in each year are better supported than either of the other appraisals.

Ms. Walker then developed cost estimates for the improvements, using published cost information from the Marshall Valuation Service for a Class “C,” Average Quality Discount Store, the same metric used by Mr. Berg and Mr. Rauseo. (See Walker Report, p. 22; Berg Appraisal, p. 73; and Rauseo Appraisal, p. 82.) Ms. Walker applied physical depreciation (6% in 2004, 8% in 2005 and 10% in 2006) using the Marshall Valuation Service tables, not the higher (17.1%) physical depreciation applied by Mr. Berg, (see Berg Appraisal, p. 75). The board finds his higher calculated depreciation (2.9% per year, rounded, based on a 35 year physical life) is less credible than the rates shown in the Walker Report using the Marshall tables.

An even sharper difference concerns Mr. Berg’s conclusion regarding functional depreciation. Ms. Walker found none was warranted, whereas Mr. Berg, calculated substantial “functional obsolescence”/depreciation (13.2% in 2004, 15.9% in 2005 and 18.5% in 2006) based entirely on two Wal-Mart store sales in Maine, concluding these sales indicated “2.6% per year is attributable to functional obsolescence.” Id. The board disagrees for several reasons. The two Wal-Mart store sales on which Mr. Berg relied are not indicative of functional obsolescence at the Property’s highest and best use because these sales reflect changing values when the highest and best use changes. In fact, each of the two Wal-Mart stores in the Berg

Appraisal was “relocated to a newer, larger superstore across the street,” changing the highest and best use of the old properties. Walker Report, p. 26. The board finds that Wal-Mart’s business motivation to change what it offers customers from a standard store (approximately 100,000 square feet) to a superstore/supercenter (providing additional floor area to offer groceries and other merchandise and services) does not necessarily render the improvements at the standard store to be functionally obsolete or imply that the price at which the conventional store is sold to another user reflects such obsolescence. In addition, neither Ms. Walker nor Mr. Rauseo, both respected and credible appraisers, found any market evidence to support the existence of functional depreciation.

The board has considered the comments to the Walker Report filed by the Town and the Taxpayer. The Town agrees with Ms. Walker’s decision to employ the cost approach (since its own appraiser, Mr. Rauseo, also used it), but contends her land and building values are too low because they fail to recognize the higher purchase price of the land when it was acquired in 1998 (\$3.4 million), the significant additional investment made by the Taxpayer in “offsite improvements for the road and the pond,” the extent of location adjustments made to the land comparables (in the Walker Report) and the “non-standard design and fenestration” of the building. The Taxpayer, for its part, contends the sales approach should be employed to arrive at “transmissible value” or “value in exchange” and, if the cost approach is used, functional obsolescence should be recognized, no entrepreneurial profit should be allocated and Ms. Walker’s land sales for “big box retail stores” are at the “upper end” of the market.

While no satisfactory consensus may be attainable on these disputed issues, the board finds the comments presented do not detract from or lessen the reliability of the market value

estimates in the Walker Report. Among other things, cost does not always equate to market value. The Berg Appraisal does use the sales approach, but its shortcomings, along with the Taxpayer's burden of proof, led the board to conclude this approach employed by Mr. Berg is not as reliable an indicator of the transmissible value of the Property as the cost approach employed both by the Town's appraiser, Mr. Rauseo, and by Ms. Walker, neither of whom found any functional obsolescence was warranted.

In summary, and upon consideration of the evidence as a whole, the board finds Ms. Walker's estimates using the cost approach are the most reliable indications of the market value of the Property in each tax year. Adjusting these estimates of \$8.25 million, \$8.9 million and \$9.45 million by the agreed levels of assessment in each tax year results in abated assessments of \$7,887,000 in tax year 2004, \$7,298,000 in tax year 2005 and \$7,598,000 in tax year 2006. See Walker Report, p. 24.

If the taxes have been paid, the amount paid on the value in excess of \$ 7,887,000, \$7,298,000 and \$7,598,000 for tax years 2004, 2005 and 2006, respectively, shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. The board notes appeals have been filed and are still pending for tax years 2007 and 2008. See BTLA Docket Nos. 23930-07PT and 24629-08PT. The subsequent year statute, RSA 76:17-c, is therefore not applicable to these tax years.

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(g). 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

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Addendum A

The parties' requests for findings of fact and rulings of law are replicated below, in the form submitted and without any typographical corrections or other changes. The board's responses are in bold face. With respect to the proposed findings and rulings, "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

1. The property under appeal is a 99,941 SF discount retail building on 11.69 acres with associated improvements, including access to an off-site detention pond, presently used as a Wal-Mart store. The building is of the type frequently referred to as a "big box" retail building.

Neither granted nor denied.

2. Wal-Mart purchased the site in April 1998 for \$3,403,000, following a lengthy process of negotiation dating back to the early 1990s, which originally contemplated acquisition of a much larger parcel, eminent domain proceedings by the State to acquire a portion of that parcel, a lengthy state and local permitting process and some political controversy regarding the arrival of Wal-Mart in the community.

Granted.

3. There is evidence in the record that Wal-Mart overpaid for this site, with Steven H. Berg, MAI, SRA, the Taxpayer's appraiser, finding the sale price to not reflect prevailing values in the 1998 and having been told by the seller's broker that Wal-Mart had, in fact, overpaid for the site.

Denied.

4. The BTLA has recognized that “big box operators frequently pay at the upper end or above the general market because of undue business motivations.” *See State of New Hampshire v. New Hampshire Heritage, L.P. et al*, 2004 N.H. Tax LEXIS 50 (N.H. Tax 2004).

Neither granted nor denied.

5. While the property’s location on the North South Road on the North South Road which was built as a bypass around commercial development and traffic on Route 16 is good for retail purposes, it is set back from the prime retail shopping district of Route 16, which draws significant tourist traffic.

Neither granted nor denied.

6. All but a small southwestern segment of the property is located within the Special Highway Corridor Overlay (“SHCO”) District, established after the construction of the property, which, among other things, requires an additional protective buffer and restricts the size of future buildings to 5000 SF, in an area adjacent to a long-planned but as of yet never built Bypass Highway around Conway. For the purposes of this valuation analysis, both the Taxpayer’s appraiser, Mr. Berg, and the Town’s appraiser, David Rauseo, MAI, have assumed that a building of the same or similar dimensions could be rebuilt within the footprint of the current building, so long as it complied with other pertinent aspects of Conway’s land use regulations.

Granted.

7. As of the tax years under appeal in this case, 2004-2006, the New Hampshire Department of Transportation was estimating that the Northern section of the Bypass which would be in the vicinity of the property would not be advertised until 2011 and would not be completed until 2013. Even during the tax years, there was uncertainty as to whether the planned construction would go forward.

Neither granted nor denied.

8. Given the property’s physical characteristics, its location and other factors, the highest and best use of this property is as a destination oriented retail use intended to serve the residents of the community as opposed to the region’s tourism and recreation.

Neither granted nor denied.

9. There is a market for this type of “big box” building, as demonstrated by the following:

- Wal-Mart sells approximately 160-200 of its stores nationally per year.
- There were 10 sales of Wal-Mart stores between January 1, 2003 and January 1, 2007 in the Northeast (New England, New York, New Jersey and Pennsylvania).

- Both Mr. Berg and Mr. Rauseo located additional sales of “big box” buildings in New Hampshire, Maine and Massachusetts.
- While sales of these “big box” buildings require some special marketing, and appeal to a relatively small pool of market participants, there is a recognized market for these buildings, ranging from use by major discount retailers to secondary discounters, other retailers and various other commercial and recreational purposes.

Neither granted nor denied.

10. Under accepted appraisal principles, even if a property could be considered a “limited market property”, “an appraiser must search diligently for whatever market evidence is available” and comply with legal requirements for the appraisal assignment, using whatever direct market evidence is available. The Appraisal of Real Estate, 12th Ed., p. 26.

Granted.

11. Mr. Berg’s conclusion that there is ample evidence in the marketplace to develop an estimate of value under the Sales Comparison Approach is supported by marketplace data in the record.

Denied.

12. It was reasonable for Mr. Berg to exclude from his sales analysis sales of “big box” stores in the Rockingham, Hillsborough, and Merrimack Counties in New Hampshire and Cumberland County, Maine as their proximity to much higher priced areas, denser population and more abundant regional highway networks made sales in these areas not reasonably comparable.

Neither granted nor denied.

13. The three building sales selected by Mr. Berg in Ossipee and Conway, New Hampshire and Lewiston, Maine were close in time to the pertinent assessment dates; two of the sales (1 and 3) were for discount retail buildings while sale 2, located in Conway itself, was a multi-tenant shopping plaza. The sales selected by Mr. Berg were reasonably comparable to the subject property and the adjustments he made to those sales were appropriate and supported by marketplace data.

Denied.

14. Mr. Rauseo performed a supplementary sales comparison approach in which he identified 4 sales, 1 of which was a “big box” retail building with the others being shopping centers, all of which took place after the assessment dates in these appeals and which were located in Haverhill, Massachusetts, and Plaistow, Hooksett, and Concord, New Hampshire.

Granted.

15. Mr. Rauseo made no adjustment to these sales to account for differences in location, size, development potential or other factors to arrive at an indicated market value, as would customarily be done under the Sales Comparison Approach.

Neither granted nor denied.

16. Mr. Rauseo’s supplementary sales analysis is not entitled to any weight because it purports to reflect a market estimate for 2007 only which is not one of the years under appeal in this case, makes no adjustment to the sales data to account for location and other factors, fails to develop an reconciled indication of value and fails to adjust the purported 2007 value to the years under appeal.

Denied.

17. In developing an estimate of value under the cost approach, Mr. Berg utilized a market derived depreciation factor which accounted for both physical and functional depreciation and was consistent with Wal-Mart’s own estimate of the average economic life of its buildings of about 15-20 years.

Neither granted nor denied.

18. Mr. Rauseo’s failure to account for any functional depreciation in the subject property was not reasonable, in light of all the evidence regarding the functional super adequacy of this type of “big box” building, including evidence that many Wal-Mart buildings were torn down or substantially modified upon sale and that Wal-Mart was interested in building a new, much larger SuperCenter in the Conway area which could not be done on the current site.

Denied.

19. Mr. Berg’s land analysis under the cost approach was based on relevant land sales close to the assessment dates and was properly adjusted to develop an appropriate indication of value for the subject land, as if vacant, as of the years under appeal.

Denied.

20. Mr. Rauseo's land sales analysis was flawed for the following reasons:

- He relied on two 1998 sales which took place 6 years before the earliest date of assessment in this case.
- He gave too much weight to the sale of the subject (Sale 1) which, under accepted appraisal principles, should normally be considered, if at all, as a test of reasonableness and he also failed to account in any way for the fact that the sale price may have been above market.
- His Sale 3 was located in Keene and involved a sale of retail condominium land in a very different market and with much greater density potential, for which he failed to make appropriate adjustments.
- His Sale 4 in Tilton for \$20,000,000 was not a land sale at all but reflected a sale of both land and buildings under a leased fee arrangement which does not reflect a fee simple transfer. This sale also took place in March 2007, almost a year after the last date of assessment under appeal in these cases.
- His listing of 14 additional commercial land sales, to which he made no adjustments and provided no reconciled value estimate, cannot support his flawed reliance on the 4 sales discussed above.

Neither granted nor denied.

21. Mr. Rauseo's entire valuation analysis is premised on the assumption of a continuation of the current use by the current occupant.

Denied.

22. Mr. Rauseo's valuation constitutes a value in use which is not the standard for *ad valorem* taxation in New Hampshire which must be based on the sale value rather than the value to its owner. RSA 75:1, 590 *Realty Co., Ltd v. City of Keene*, 122 N.H. 284 (1982); *Trustees of Phillips Exeter Academy v. Exeter*, 92 N.H. 473 (1943); *See also, Vaillancourt v. Town of Greenville*, 2007 N.H. Tax LEXIS 34 * 10 (2007); *MacDonald v. Town of Sunapee*, 2000 N.H. Tax LEXIS 55 (2000); *Windhurst v. Town of Hopkinton*, 1997 N.H. Tax. LEXIS 200 (1997).

Denied.

23. The evidence in this case does not support a finding that the current owner of the property could be deemed to be the sole hypothetical purchaser. *See, e.g., PSNH v. Town of New Hampton*, 101 N.H. 142 (1957). [regulated public utility could be deemed probable hypothetical purchaser, given the difficulty, if not impossibility, of finding an alternate purchaser.]

Denied.

24. Even if Wal-Mart could be considered one of the market participants who might be interested in acquiring the subject property, its purchase price would reflect the anticipated economic life of this building and reliable marketplace data about sales.

Neither granted nor denied.

25. The Taxpayer has met its burden of demonstrating that Conway's assessments for 2004-2006 are excessive and disproportional and is entitled to abatements, along with statutory interest computed in accordance with RSA 76:13, as follows:

	2004	2005	2005
Assessed Value	\$9,593,100	\$9,736,400	\$9,736,400
Equalization Ratio	95.6%	82.0%	80.4%
Implied Market Value	\$10,034,623	\$11,873,659	\$12,109,950
Actual Market Value	\$6,500,000	\$6,800,000	\$7,000,000
Equitable Assessment	\$6,214,000	\$5,576,000	\$5,628,000
Over-Assessment	\$3,349,100	\$4,160,400	\$4,108,400

Denied.

Town's Requests

FINDINGS OF FACT

1. The subject property was purchased by Wal-Mart for \$3,403,000 from Evelyn and Thomas Burke by Warranty Deed dated April 27, 1998 (Book 1744, Page 226, Carroll County Registry of Deeds).

Granted.

2. The subject property is improved with an approximately 100,000 square foot (SF) single story, single occupant retail building (Wal-Mart) situated on an 11.69 acre site which abuts Route 302 and the North-South Road in Conway, New Hampshire.

Granted.

3. The building was specifically designed and constructed in 1999 for Wal-Mart Stores, together with a 5,170 +/- SF partial canopy garden center. A 4,900 +/- SF fenced garden center and a 7,050 +/- SF outdoor storage area were added in 2003, and the snack shop was renovated to a Dunkin Donuts in early 2004.

Granted.

4. Prior to Wal-Mart's purchase of the subject property, the New Hampshire Department of Transportation, exercising its powers of eminent domain, took a 20.4 +/- acre portion of the Burke's land for the future construction of a highway bypass to alleviate traffic congestion in North Conway.

Granted.

5. A function of this taking included the right to take storm water from the remaining 11.69 acres and drain it off site onto NHDOT land to the east, on the opposite side of the proposed bypass. Wal-Mart benefits from this right to drain storm water off site onto NHDOT land.

Granted.

6. The North-South Road runs east of Route 16 behind Settlers' Green and many other retail uses. The NHDOT reports traffic volumes on the North-South Road of 8,900 vehicles per day (2003:AADT).

Granted.

7. The subject property is located in close proximity of Settlers' Green, which is a village setting of roughly 60 stores and a hotel, and east of the Mountain Valley Mall (the largest plaza in North Conway).

Granted.

8. In 2004, the Mountain Valley Mall included a Hannaford and a J.C. Penney, and a 145,000 +/- SF Lowe's Home Improvement Store was planned.

Granted.

9. The subject is located within the Town of Conway's Special Highway Corridor Overlay District (SHCOD). The SHCOD establishes a buffer alongside the proposed bypass so that it will remain a scenic throughway.

Granted.

10. The building constructed on the subject property (at approximately 100,000 +/- SF) is a legal but non-conforming use due to the SHCOD maximum building size of 5,000 SF.

Granted.

11. The real estate agent involved in the purchase of the subject site in the 1990's (Richard Badger) told Mr. Berg (Wal-Mart's appraisal expert) that Wal-Mart chose this site over others in higher traffic, higher visibility settings, because of its ease of access for shoppers coming from Maine.

Granted.

12. Wal-Mart's \$3,403,000 purchase price reflected fair market value of the subject property as of April 27, 1998, because:

(A) The buyer was informed and willing and under no undue influence.

(B) The absolute likelihood of the proposed bypass and the North-South Road enhanced the value of the site.

(C) The site held, as part of its bundle of rights, the right to utilize an off site detention pond, thus saving the buyer a significant amount of money in underground water detention costs or, in the alternative, losing a large area of the site to a detention pond which would most likely have prohibited the construction of a 100,000 SF building on site.

(D) The site was approved for a big box store prior to the adoption of the Town's SHCOD, and

(E) The buyer had optioned the property for five years at \$40,000/yr.

Neither granted nor denied.

13. The Town's assessment of the subject property in 2004 was \$9,593,100; in 2005 and 2006 the Town's assessment was \$9,736,400.

Granted.

14. There is no property available in the subject property's neighborhood to accommodate a Super Wal-Mart, which typically range from 150,000 SF to 225,000 SF in size, and require 20-35 acres to satisfy site constraints.

Granted.

15. While regional Wal-Mart sales utilized by Wal-Mart's expert appraiser to determine physical and functional obsolescence indicate a faster diminution in value than that expressed by Marshal and Swift, such an accelerated diminution is only applicable in cases where there is a site available for the construction of a Super Wal-Mart, which is not the case here.

Neither granted nor denied.

16. The subject property does not suffer from economic obsolescence because the property is maximally productive, the proposed bypass was a certainty as of the dates of the assessments under appeal, and there are no external influences which would result in a diminution in value (in other words, traffic counts and sales continue to increase).

Neither granted nor denied.

17. The Town's expert appraiser's opinion of fair market value for the years under appeal contains an accurate estimate of land valuation because:

(A) it is common knowledge that the real estate market, generally speaking, appreciated locally, regionally and statewide between the subject's purchase date of April 27, 1998 and the years under appeal: 2004, 2005, 2006, and

(B) The purchaser enhanced the property's value by undertaking significant on site and off site improvements at its own expense, including, but not limited to the off site detention pool, and contributing \$400,000 towards the construction of the North-South Road.

Denied.

18. The highest and best use of the subject is a limited market retail facility, because the building was specifically designed (and appears to be successful in accommodating) Wal-Mart's retail sales use, and the unique exterior façade, high clear height, depth, lack of ceilings, limited plumbing, and specific single tenant electrical and mechanical systems all cause the property to have a special purpose or limited market.

Neither granted nor denied.

19. The market value of the subject property as of April 1, 2004 was \$9,400,000; as of April 1, 2005, \$10,200,000; as of April 1, 2006, \$10,900,000.

Denied.

RULINGS OF LAW

20. 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 the City of Nashua*, 138 NH 261, 265 (1994).

Granted.

21. The principle of substitution states that when several similar or commensurate commodities, goods or services are available, the one with the lowest price attracts greatest demand and widest distribution. Property values tend to be set by the cost of acquiring an equally desirable substitute property. Appraisal Institute, *The Appraisal of Real Estate*, 10th ed., p. 39.

Granted.

22. When a property has unique features that add value to achieve its highest and best use (such as an off site drainage easement), such features must be considered and valued. *See 590 Realty Co., Ltd. v. City of Keene*, 122 NH 284, 286-287 (1982); *Public Service Company of New Hampshire v. Town of Ashland*, 117 NH 635 (1977).

Granted.

23. When the cost approach is employed, an initial and important component of the cost estimate is estimating the value of the land and then estimating all direct and indirect costs including entrepreneur profit relative to the improvements. *Appraisal Institute, The Appraisal of Real Estate*, 12th ed. at 356.

Granted.

24. The cost approach is considered the best approach for valuing special purpose and/or limited market properties, like the subject, which are infrequently exchanged in the marketplace. *See Person v. Town of Campton*, NH TAX Lexis 99 (BTLA May 3, 1996); *509 Realty Co., Ltd., v. City of Keene*, 122 NH 284 (1982); *Manchester Housing Authority v. Rheingold*, 130 NH 598, 602 (1988) (“Cost approach is proper in situations where the subject property is “unique or has special characteristics not found in other comparable properties, and is adapted or well suited to the land”).

Neither granted nor denied.

25. “Many limited market properties include structures with unique designs, special construction materials, or layouts that restrict their utility for the use for which they were originally built. These properties usually have limited conversion potential and, consequently, are often called special purpose or special design properties.” Appraisal Institute, *The Appraisal of Real Estate*, 10th ed., p 23.

Granted.

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; Chairman, Office of the Selectmen, Town of Conway, 1634 East Main Street, Center Conway, NH 03813; and Peter J. Malia, Jr., Esq., Hastings Law Office PA, PO Box 290, Fryeburg, ME 04037, counsel for the Town.

Date: 12/17/09

Anne M. Stelmach, Clerk

Wal-Mart Real Estate Business Trust

v.

Town of Conway

Docket Nos.: 20892-04PT/21665-05PT/22694-06PT

ORDER

On January 14, 2009, the “Town” filed separate, but identical rehearing motions (the “Motions”) in each of the above three appeals with respect to the board’s December 17, 2009 Decision granting the “Taxpayer” abatements for tax years 2004, 2005 and 2006. The Motions raise only two issues, summarized and discussed briefly below, and are denied for the following reasons.

First, the Motions, citing no case law or other authority, question whether the board could place any weight in the Decision on the report prepared by its review appraiser (the “Walker Report”), given that the Taxpayer has the burden of proof in a tax abatement appeal and, according to the Town, “[i]t is improper, and unfair to the Town, for the [b]oard to essentially do the Taxpayer’s work for the Taxpayer.” (See Motions, p. 2.) The board disagrees because both the statutes and the case law authorize, if not require, the board to utilize its review appraisers for the purpose of helping to decide contested property valuation issues, such as the proportionality

of assessments. See RSA 71-B:5, I (board is authorized to “institute its own investigation, . . . or take such other action as it deem necessary” to determine taxation issues); RSA 71-B:14 (board’s staff includes review appraisers “competent to review the value of property for tax and eminent domain purposes”); and Appeal of Sokolow, 137 N.H. 642, 643-44 (1993) (citing these statutes and deciding it was “unreasonable” for the board not to use the board’s review appraisers to perform “a second appraisal” in a tax abatement appeal). See also the board’s November 24, 2008 Order citing and discussing these authorities and others, including RSA 71-B:7 (“The board . . . may take into consideration in determining any question any information obtained through its own investigation, including information obtained by persons employed under RSA 71-B:14.”) Further, the Administrative Procedure Act (RSA ch. 541-A), applicable to adjudicative proceedings before state agencies, provides that the record in contested cases shall include a number of items including any submitted “[s]taff memoranda or data. . . .” RSA 541-A:31, VI(h).

While a taxpayer has the burden of proof in a tax abatement appeal, the board is not required to limit itself solely to the Taxpayer’s evidence of disproportionality or to accept or reject the Taxpayer’s appraisal entirely and without consideration of other evidence, including the report of its review appraiser. The board further notes it advised the parties of the involvement of its review appraiser and gave them an opportunity to comment on the Walker Report, an opportunity the Town accepted without objection; the board then considered the parties’ written comments when deliberating on all of the evidence presented and issuing the Decision (see p. 3).

Second, the Town in the Motions “restates” an argument it already has made (at the hearing and in its comments to the Walker Report) that the site value should not be lower than the purchase price paid by the Taxpayer for the Property (\$3.4 million in 1998). As the Town

concedes, however, the board has already addressed this argument in the Decision (see pp. 12-15) and the Town's restatement of the argument appears to be for the purpose of preserving the issue for a possible appeal. (See Motions, p. 3.) In brief, the board does not find reconsideration or a rehearing is warranted under the standards set forth in RSA 541:3 and Tax 201.37.

Any appeal must be by petition to the supreme court filed within thirty (30) days of the Clerk's date shown below. RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Order 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; Chairman, Office of the Selectmen, Town of Conway, 1634 East Main Street, Center Conway, NH 03813; and Peter J. Malia, Jr., Esq., Hastings Law Office PA, PO Box 290, Fryeburg, ME 04037, counsel for the Town.

Date: January 27, 2010

Anne M. Stelmach, Clerk