

Wal-Mart Stores, Inc.

v.

City of Concord

Docket Nos.: 22693-06PT/23923-07PT/24268-08PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the following assessments for tax years 2006, 2007 and 2008 of Map 111-I-3-19 (the “Property”), a Sam’s Club located at Sheep Davis Road.

Tax Year	2006	2007	2008
Land	\$3,928,300	\$3,928,300	\$3,945,700
Building	\$8,323,700	\$8,323,700	\$8,246,700
Total Assessment	\$12,252,000	\$12,252,000	\$12,191,700

For the reasons stated below, the appeals for abatement are denied.

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.

The Taxpayer argued the assessments were excessive because:

- (1) an appraisal prepared by Wesley G. Reeks, MAI, (Taxpayer Exhibit No. 2) (“Reeks Appraisal”) estimated the market values of the Property for: 2006 - \$7,500,000; 2007 - \$7,730,000; and 2008 - \$7,700,000;
- (2) Mr. Reeks personally inspected and measured the Property and performed the sales comparison, income and cost approaches to value;
- (3) 75% weight was given to the indication of value arrived at in the sales comparison approach and 25% to the income approach; and
- (4) the weight given to the market value indication arrived at in the cost approach was found to be insignificant because of the Property’s age and difficulty in accurately estimating depreciation.

The City argued the assessments were proper because:

- (1) two appraisals (one for 2006 and 2007 and one for 2008) prepared by Stephen G. Traub, ASA, estimated the market values of the Property to be: 2006 - \$14,470,000; 2007 - \$14,470,000; and 2008 - \$14,500,000;
- (2) all three approaches to value were performed and Mr. Traub relied on both the income and cost approaches;
- (3) the highest and best use of the Property is as a retail warehouse club store;
- (4) the area behind the building drops off approximately 20 feet and is used for a drainage and detention area (this portion is not in current use); and
- (5) there is approximately one acre of land not in current use along the frontage of Sheep Davis Road which potentially could be developed.

Board's Rulings

The board finds the evidence submitted by the Taxpayer failed to carry its burden of proving disproportionality. Because the Taxpayer failed to carry its burden, the board need not discuss the evidence presented by the City.

In an attempt to carry its burden, the sole evidence presented by the Taxpayer was the Reeks Appraisal, which estimated the market value of the Property to be: 2006: \$7,500,000; 2007: \$7,730,000; and 2008: \$7,700,000. (The parties had stipulated the levels of assessment were: 2006: 0.971; 2007: 0.986; and 2008: 1.003.) While the Reeks Appraisal performed all three approaches to value, it placed no weight on the cost approach (testifying it was a slippery slope to "use valuation") and placed most weight ("say 75%") on the sales comparison approach and the balance of weight on the income approach. The Reeks Appraisal also did not perform the three approaches for each of the three years under appeal. Rather, it did so only for 2006 and then adjusted the 2006 correlated value by estimating changes in value by the income approach for 2007 and 2008.

The board finds the Reeks Appraisal is so flawed on a number of accounts so as to give its market value conclusions no weight. Before addressing in detail the reasons for this conclusion, a general ruling is in order. Because such "big-box" properties rarely sell and are customarily owner-occupied, there are usually few, if any, market transactions, either sales or rentals, to analyze to produce a reliable indication of value. See Appraisal Institute, The Appraisal of Real Estate 354 (12th ed. 2001); Sears Roebuck & Co. v. Manchester, BTLA Docket Nos. 19814-02PT and 20026-03PT (March 28, 2006) at page 5. This is exhibited in the Reeks Appraisal by the lack of comparable, consummated sales of improved properties (the sales history of comparable sale #2, while improved, indicates its sale price was equivalent to a land

sale) and the dissimilarity of rental comparables employed in the income approach.

Consequently, the board concludes both the sales comparison and income approaches have little reliability in arriving at a credible market value opinion for the Property.¹

While Mr. Reeks testified he had not read the board's decisions in "Conway" (BTLA Docket Nos.: 20892-04PT/21665-05PT/22694-06PT) and "Plymouth" (BTLA Docket No. 21720-05PT), the board has recently reaffirmed in Wal-Mart Real Estate Business Trust v. Town of Rindge, Docket Nos.: 22873-06PT/23932-07PT/24293-08PT/25048-09PT (January 10, 2011) at page 7, that the cost approach is the most reliable indicator of market value for a limited market property such as the one on appeal.

The Property is a "limited market" property.... Upon review of the accepted definition of a limited market property (as well as a 'special-purpose' property), the board finds the Property meets the definition of a limited market property. As noted in Conway (p. 12) and Plymouth (p. 9), 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.' The cost approach is recognized to be a reliable method of valuing a limited market property. (Id.)

Further, the supreme court has recognized that, given the limited marketability of a property (due to its nature as a limited market property or monopoly as the result of governmental regulation), the owner can be considered the hypothetical purchaser/user and, thus, the cost approach has merit in estimating its market value. See Public Service Co. v. New Hampton, 101 N.H. 142, 147 (1957). Consequently, the Reeks Appraisal's reliance largely on the sales comparison approach and secondarily on the income approach negates the reliability of its value conclusion.

¹ There are three approaches to value: 1) the cost approach; 2) the comparable sales approach; and 3) the income approach. Appraisal Institute, The Appraisal of Real Estate 49-50 (12th ed. 2001). While there are three approaches to value, not all three approaches are of equal import in every situation. Id. at 50. International Association of Assessing Officers, Property Appraisal and Assessment Administration, 108 (1990). In New Hampshire, the supreme court has recognized that no single method is controlling in all cases, Demoulas v. Town of Salem, 116 N.H. 775, 780 (1976), and the tribunal reviewing the 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).

Relative to the Reeks Appraisal sales comparison approach, the board finds the analysis is flawed for a number of reasons.

First, three of the four “sales” (comparables #1, #3 and #4) utilized in the sales comparison approach were not consummated sales but rather only Wal-Mart stores under agreement to be sold, pending construction of new, nearby Wal-Mart Super Centers. These properties did not sell during the years under appeal and, thus, were not part of the public sales data generally available; in fact, these agreements were available to Mr. Reeks only because his client provided them to him. His use of only the sales/agreements given him by his client infers either he did not do an independent search of the market or there were no other reliable sales.

Second, comparable sale #2 sold initially in 2003 for \$4,000,000 and resold in 2005 for \$4,600,000 with the building being razed for alternate construction. Not only did the Reeks Appraisal use the earlier sale price but the sales history indicates the ultimate consideration price was more indicative of the land value. The Property’s highest and best use, as a successful 136,000± square foot discount warehouse retail building, is so dissimilar from that of comparable sale #2 that no credible comparison can be made.

Third, Mr. Reeks testified Wal-Mart routinely places restrictions on properties it sells to limit competition from other similar users. Such restrictions limit the use of the properties and change their highest and best use; as a result, the restrictions lower the sale prices (and ostensibly, any price in the three purchase agreements relied upon in the Reeks Appraisal). Deed restrictions are akin to the removal of a stick from the comparable properties’ bundle of rights; thus, any transfer of such restricted properties would entail something less than fee simple. See Appraisal Institute, The Appraisal of Real Estate 111-112 (13th ed. 2008). Despite that, the Reeks Appraisal states “the subject is appraised in fee simple and the fee simple interest of all

four sales was transferred. No adjustments are necessary.” (Page 68). Further, the Reeks Appraisal adjustment grid at p. 72 made no note of or adjustment for these restrictions.

Fourth, all “sales” were not at the same highest and best use as the Property. The “sales” were all of “Division 1” Wal-Mart stores that were being sold due to the anticipated construction of larger “Super Center” stores nearby. None of the “sales” were of discount warehouse retail buildings.

Fifth, the location of three of the four “sales” are in Maine with two of them, comparables #1 and #2 being in the inferior locations of Bangor and Auburn, Maine. While some adjustments were made for location, it is questionable whether such adjustments are adequate given the Property’s good regional access, greater population draw and the better demographics of that population.

Sixth, the Reeks Appraisal’s comparable “sales” are so dissimilar from the Property that their use does not, in an inverse manner, comport with the principle of substitution which “affirms that a prudent buyer would pay no more for a property than the cost to acquire a similar site and construct improvements of equivalent desirability and utility without undue delay.” Appraisal Institute, The Appraisal of Real Estate 350 (12th ed. 2001). None of the comparable “sales” would be equivalent substitutes for the Property because the Property is a different type of store, larger in size, and is in a vastly superior location and, thus the comparables are not suitable proxies for determining the market value of the Property

Any one of the above reasons alone would lessen the weight to be given to the Reeks Appraisal sales comparison approach, but their cumulative affect so discredits its overall value conclusions, the board is unable to give any weight to the Reeks Appraisal.

The board must consider and weigh all of the evidence submitted, 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"). Although the Reeks Appraisal relied very little on the income approach and none on the cost approach, the board will address briefly why neither of those two approaches, as employed in the Reeks Appraisal, carries the Taxpayer's burden.

As with the sales comparison approach, the comparable rentals utilized in the Reeks Appraisal income approach are significantly smaller buildings which have a different highest and best use; and thus, inclusion of those rental comparables in the income approach leads to an unreliable value conclusion. The dissimilarity of the rental comparables highlights the difficulty of using the income approach for large retail stores, such as the Property, because they are usually owner-occupied rather than leased; those stores that are leased are often built-to-suit for the occupants, and the lease rates are based on the actual construction costs, rather than true market rents. The gross adjustments of the rental comparables ranged from 38% to 63%; the magnitude of these adjustments is illustrative of the dissimilarity of the comparables to the Property. These facts alone reduce the weight to be given to the income approach for such property.

The Reeks Appraisal cost approach understates the Property's value in a number of ways.

First, the Property has a total of 36.60 acres but the Reeks Appraisal uses only 20.5 acres in the land value calculation portion of the cost approach. Several plans submitted (Taxpayer Exhibit No. 3 and 4 and Municipality Exhibit J) and the testimony indicate there is additional

“usable acreage” both in the northwest portion of the Property along Sheep Davis Road and in the detention basin terrace between the building and the Soucook River. This is also reflected in the fact that only 10.50 acres are assessed in current use (RSA ch.79-A) with the Taxpayer specifically retaining 26.1 acres, including those described above, out of current use. The Taxpayer has the land retained out of current use in the north west corner of the Property configured so that it could be used as a separate “pad” site with access provided by an internal road from the existing access onto Sheep Davis Road. Further, the two detention ponds shown on the plans terraced below the Sam’s Club building site but above the 100 year flood zone of the Soucook River appear necessary to accommodate the runoff from the impervious paved and building areas of the Property. Thus, they are necessary and “usable acres” for the development that has occurred on the Property. Consequently, the Reeks Appraisal understates the “usable” acreage on which to calculate the land value by five to six acres and under estimates the cost approach land value.

Second, while the Reeks Appraisal describes the building as an average “retail warehouse”, the base rate utilized from the Marshall Valuation Service is not “retail warehouse” but rather coincides with the “mega - warehouse discount store” base rate which is reflective of larger buildings (over 200,000 square feet) and less expensive discount/retail space. The photographs and the testimony indicate the building has more fit-up than the minimal demising walls of a “mega – warehouse discount store”.

Third, no adjustment was made for the building being in the “extreme” climate area designation of Marshall Valuation Service. This “extreme” climate not only accounts for the larger heating mechanicals but also for the generally greater insulation in buildings in the colder regions.

Fourth, the depreciation utilized is a straight-line calculation of the relationship between the age of the building and its estimated life. This method of depreciation is frequently used for accounting purposes in writing down an asset (such as in utility rate base calculations) but does not reflect accurately the market reaction to age especially for a well maintained building such as the Property's. See generally, Appraisal Institute, The Appraisal of Real Estate 409 - 412 (13th ed. 2008). These errors/omissions are all in the same direction and in aggregate result in a low value for the well built and maintained building component of the Property.

With all these flaws in the Reeks Appraisal, and in particular, those in the sales comparison approach that was heavily weighed in the correlation of value, the board finds the Taxpayer did not carry its burden of proving disproportionality and the appeal is denied.

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. With respect to the Requests, "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 so broad or specific 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;
- e. the Request is specifically addressed in the Decision; or
- f. the request relates to the City's evidence which the board has already found need not be discussed because the Taxpayer's evidence did not carry its burden.

Taxpayer's Requests for Findings of Fact and Rulings of Law

1. The Property under appeal is a 136,523 SF discount retail warehouse building located on some 36.6 acres of land on Sheep David Road in Concord, New Hampshire. It was built by the Taxpayer in 1993 and currently occupies by Sam's Club discount retail business.

Neither granted nor denied.

2. The Property is located in the Gateway Performance District, a major center of commercial development in the City.

Granted.

3. Only 20.5 acres are useable for commercial development, with some 10 acres being in current use and the balance of approximately five acres being either wetlands, steep topography or not clearly able to be developed. The City treated these approximately 5 acres as having only nominal value on its assessment record card. *See Exs. 3-5, 8.*

Denied.

4. In determining the value of real estate for *ad valorem* assessment the statutory standard is fair market value, the amount a willing buyer would pay a willing seller for the real estate after reasonable efforts have been made to obtain the highest price for it. RSA 75:1. *Trustees of Phillips Exeter Academy v. Town of Exeter*, 92 N.H. 473, 481 (1943).

Granted.

5. The property's value to the current owner is not the test of *ad valorem* valuation as the issue is the transmissible value of the real estate. *Trustees of Phillips Exeter Academy v. Town of Exeter*, 92 N.H. 473, 481 (1943); *590 Realty Co., Ltd. v. City of Keene*, 122 N.H. 284, 285 (1982); *Vaillancourt .v Town of Greenville*, 2007 N.H. Tax. LEXIS 34 *10 (2007); *MacDonald v. Town of Sunapee*, 2000 N.H. Tax LEXIS 55 *9 (2000); *Windhurst v. Town of Hopkinton*, 1997 N.H. Tax LEXIS 200 *4 (1997).

Granted.

6. The Taxpayer's appraiser, Wesley Reeks, MAI, relied on 1 completed sale and 3 purchase and sales agreements involving discount retail buildings formerly occupied by Walmart stores to determine value under the sales comparison approach.

Granted.

7. Purchase and sales agreements, negotiated between knowledgeable market participants, which in this case included Walmart, KGI Properties, LLC, and Lowe's Home Improvement, provide probative evidence of market value.

Denied.

8. It was proper for Mr. Reeks to rely on the 2003 Auburn sale, rather than the 2005 sale, which was, in effect, a land sale, as the 2003 purchaser planned to use both land and buildings.

Denied.

9. Walmart, while precluding sales to Target and grocery stores, permits sales to a broad range of national, regional and local retailers.

Denied.

10. As an illustration, the deed for the Auburn property allowed sales to the following types of purchasers:

These restrictions shall not be construed to prohibit Grantee from using the Property for the following uses which include, but not be limited to, the following single purpose discount retailers as they exist today:

Marshall's Tory R' Us, Bed, Bath and Beyond, Linens and Things, Michaels Party City, Hobby Lobby, Office Depot, Office Max, Goody's TJ Maxx, Ross Dress for Less, Circuit City, Books-a-million, Kohl's, Christmas Tree Shoppe, Burlington Coat Factory, Old Navy, GAP, Marden's, JoAnns Fabrics, Dicks Sporting Goods, Sports Authority, Rony's, Tweeter, Decathlon or as a Dollar General, or as a Family Dollar or as a Dollar Tree or as a Best Buy or as a Lowe's or as a warehouse facility or as a distribution facility or as an office supply store, apparel or clothing store, appliance store, craft and hobby store, furniture store, hardware store, farm supply store and other stores similar to the aforementioned.

Ex. I, p. 18.

Neither granted nor denied. The request omits the first sentence of the deed restrictions which states: “[g]rantee covenants that the Property will not be used for or in support of the following: a general merchandise discount retail store, a wholesale membership club or warehouse club, a grocery store or supermarket, or a pharmacy/drug store.”

11. Given the substantial pool of potential purchasers, Walmart's deed restrictions did not so affect the “bundle of rights” transferred to a potential purchaser as to make the transfers or proposed transfers not fee simple transfers.

Denied.

12. Walmart acted in a commercially responsible manner to sell its real estate in Maine and New Hampshire, listing the properties with commercial real estate brokers whose compensation depended on the price paid, and exposing the properties to the market for a reasonable time.

Neither granted nor denied.

13. Mr. Reeks' decision to give primary weight to the sales comparison approach was reasonable as purchasers in the marketplace for this type of property would give maximum weight to this approach.

Denied.

14. Mr. Reeks' final value conclusion was also supported by his income analysis which was based on market rentals of large retail buildings and/or spaces, appropriate expenses and a capitalization rate that properly reflected the market risks and expectations if Walmart sold this Property.

Denied.

15. Mr. Reeks was correct to give minimal, if any, weight to the cost approach as this approach is not typically relied on by buyers and sellers of commercial real estate.

Denied.

16. Furthermore, the cost approach is rarely used as the basis of value for older properties, given the difficulties of estimating depreciation and other factors. *David Flouton v. City of Portsmouth*, 2000 N.H. Tax LEXIS 72 *6n.1 (2000).

Neither granted nor denied.

17. The appraisal offered by the City, prepared by Steven Traub, ASA, describes itself as an "Appraisal of Sam's Club" and assumes the continued use of the Property by Walmart for its Sam's Club discount Club business.

Neither granted nor denied.

18. Mr. Traub's income approach relies largely on "build to suit" rental rates which reflect individually tailored arrangements between national retailers and developers and do not represent market rental rates. *See, e.g., In the Matter of Eckerd Corp. v. Semon*, 44 AD3d 1232, 1233 (2008); *In the Matter of Eckerd Corp. v. Semon*, 35 AD3d 931, 932 (2006); *Target Corporation v. Green County Board of Revision*, 122 Ohio St.3d 142, 909 N.E.2d 605 (2009).

Neither granted nor denied.

19. Mr. Traub's appraisal overstated the value of the land by assigning over \$1 million in value to some 5 acres that were largely wetlands and/or steep and to which the City itself had assigned a minimal value in its assessments.

Neither granted nor denied.

20. Mr. Traub's analysis of the depreciated cost of the improvements also failed to reflect the marketplace reality that many retail buildings are demolished before the end of their physical and/or anticipated economic lives due to changing business conditions, technology, and other market forces.

Neither granted nor denied.

21. Mr. Traub's estimate of value under the sales comparison approach was based on various "leased fee" sales in which purchasers buy a property subject to a long term lease with a national retailer and are essentially buying the cash flow.

Neither granted nor denied.

22. "Leased fee" sales cannot be used as evidence of market value under New Hampshire law. *Merrimack River Mills, L.L.C. v. City of Manchester*, 2004 N.H. Tax LEXIS 32 (2004); *see also, 241 Pine Street Ass's, L.P. v. City of Manchester*, 2004 N.H. Tax LEXIS 29 (2004); *Mountain Valley Ass's v. Town of Conway*, 1997 N.H. Tax LEXIS 227 (1997).

Neither granted nor denied.

23. Mr. Traub's appraisal constitutes a "value in use" analysis which cannot be the basis of *ad valorem* taxation in New Hampshire. *590 Realty Co. Ltd. v. City of Keene*, 122 N.H. 284, 286 (1982); *Trustees of Phillips Exeter Academy v Town of Exeter*, *supra* at 486; *Vaillancourt .v Town of Greenville*, 2007 N.H. Tax. LEXIS 34 *10 (2007); *MacDonald v. Town of Sunapee*, 2000 N.H. Tax LEXIS 55 *9 (2000); *Windhurst v. Town of Hopkinton*, 1997 N.H. Tax LEXIS 200 *4 (1997).

Neither granted nor denied.

24. The Taxpayer has met its burden of demonstrating that its Property has been disproportionately assessed and is entitled to reduced assessments based on Wesley Reeks' Real Estate Appraisal in a Summary Report, as shown below, and corresponding abatements of taxes paid for tax years 2006-2008.

Tax Year	Fair Market Value	Ratio	Assessed Value
2006	\$7,500,000	97.1%	\$7,282,500
2007	\$7,730,000	98.6%	\$7,621,780
2008	\$7,700,000	100.3%	\$7,723,100

Denied.

Any party seeking a rehearing, reconsideration or clarification of this Decision must file a motion (collectively “rehearing motion”) 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 with a copy provided to the board in accordance with Supreme Court Rule 10(7).

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

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: Margaret H. Nelson, Esq., Sulloway & Hollis, P.L.L.C., PO Box 1256, Concord, NH 03302, counsel for the Taxpayer; and James W. Kennedy, Esq., Deputy Chief Solicitor, City's Solicitor's Office, 41 Green Street, Concord, NH 03301, counsel for the City.

Date: 2/8/11

Anne M. Stelmach, Clerk