

**Telegraph Publishing Co.**

**v.**

**Town of Hudson**

**Docket Nos.: 22777-06PT/23416-07PT**

**DECISION**

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2006 assessment of \$3,976,000 (land \$795,800; building \$3,180,200); and 2007 assessment of \$4,106,200 (land \$1,112,300; building \$2,993,900) on Map 209/Lot 8, 17 Executive Drive, an industrial building on 7.367 acres (the “Property”). For the reasons stated below, the appeal for abatement is granted for tax year 2006 and denied for tax year 2007.

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 for tax year 2006, but not for tax year 2007.

The Taxpayer argued the assessments were excessive because:

- (1) the Property was built for its present use about 17 years ago and has some deferred maintenance issues;
- (2) an appraisal completed by Stephen Bullock, a certified MAI appraiser (the “Bullock Appraisal,” Taxpayer Exhibit No. 1), concludes the market value of the Property was \$3,000,000 in 2006 and \$3,210,000 in 2007 and is the best evidence of value;
- (3) in considering the income approach, the vacancy rate (20%) used by Mr. Bullock is more supportable than the much lower rate (7%) used by the Town’s expert;
- (4) in considering the sales comparison approach, Mr. Bullock used comparables that were more reliable and some of the sales used by the Town’s expert in his comparisons are sale/leaseback transactions, which are not reflective of market values; and
- (5) abatements should be ordered for each tax year.

The Town argued the assessments were proper because:

- (1) the Town performed a revaluation in tax year 2007 compliant with state standards (as shown in Municipality Exhibits D, E and F in the “Atrium” appeals (identified further below) of which the board has taken judicial notice);
- (2) the CB Ellis high vacancy rates relied upon by the Taxpayer are skewed because there are some “chronically vacant” properties in the Town which contribute about 400,000 square feet of vacant space to the total used to compute the high (20%) vacancy rate;
- (3) as shown in Municipality Exhibit C, the Taxpayer is offering part of the space in the building on the Property for \$10 per square foot “gross,” considerably more than the \$4.50 per square foot estimated rental rate used by its expert, Mr. Bullock;

(4) an appraisal prepared by an experienced commercial appraiser, Stephen G. Traub, ASA, of Property Valuation Advisors (the “Traub Appraisal,” Municipality Exhibit B) estimates the market values of the Property at \$4,120,000 for tax year 2006 and \$4,400,000 for tax year 2007; and

(5) the Traub Appraisal is the best evidence of market value and indicates an abatement should be granted for tax year 2006 only (\$4,120,000 times 84.3% level of assessment = \$3,473,160, lower than the assessment under appeal), but not tax year 2007 (\$4,400,000 times 97.9% level of assessment = \$4,307,600, higher than the assessment under appeal).

The Taxpayer and the Town agreed the level of assessment in the Town was 84.3% in tax year 2006 and 97.9% in tax year 2007, the median ratios computed by the department of revenue administration.

The parties further agreed the board could take official notice of all exhibits and testimony pertaining to “general” issues (not specific to the Property) in several other tax year 2006 and 2007 appeals involving industrial properties in the Town, which were also heard by the board in the same timeframe (mid-June, 2009) and in which the same tax representative and Town attorney appeared: Atrium Medical Corp. v. Town of Hudson, BTLA Docket Nos. 23138-06 and 23450-07PT (the “Atrium” appeals); and Teledyne Technologies, Inc. v. Town of Hudson, BTLA Docket Nos. 22776-06PT and 23415-07PT (the “Teledyne” appeals).

### **Board’s Rulings**

Based on the evidence, the board finds the Taxpayer met its burden of proving disproportionality for tax year 2006, but not for tax year 2007. The board finds the market value of the Property (rounded) was \$3,900,000 in tax year 2006 and \$4,100,000 in tax year 2007. When adjusted by the levels of assessment in each year (84.3% and 97.9%), an abatement to

\$3,287,700 for tax year 2006 is indicated, but none for tax year 2007 because of only a nominal 2.2% difference between the actual assessment and the indicated assessment of \$4,013,900, based on the board's \$4,100,000 market value estimate. The appeal is therefore granted for tax year 2006 and denied for tax year 2007 for the reasons discussed further below.

As in the Teledyne appeals, the board finds the best indication of value can be obtained using the income approach, not the sales comparison approach or a combination of the two approaches. This is largely due to the lack of good comparable sales and questions regarding the sales data presented and whether they reflect arm's-length transactions furnishing reliable indications of the market value of the Property. See Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 256 (1994); and Appeal of Town of Peterborough, 120 N.H. 325, 329 (1980) (the board has the discretion to evaluate and determine the credibility of whether sale prices are indicative of market value). See, e.g., the Bullock Appraisal, p. 68 (“Unfortunately, there have been no year 2004 sales that are considered sufficiently comparable to the subject property”).

Turning to the income approach, several key disputed issues strongly influence the outcome of these appeals. It is incumbent for the board to consider and resolve these issues and make market value findings by applying the board's “experience, technical competence and specialized knowledge” to the evidence presented.<sup>1</sup> The board's resolution of these issues is discussed below and is reflected in the calculations shown in Attachment 1.

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<sup>1</sup> 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 must employ its statutorily countenanced ability to utilize its “experience, technical competence and specialized knowledge in evaluating the evidence before it”). Further, in making findings 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., Appeal of Public Serv. Co. 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).

One key disputed issue is the estimated market rental rate. The board considered the quality and size of the building (compared to the building in the Teledyne appeals, in particular) and finds its lesser quality and larger size warrants a slight reduction in Mr. Traub's estimate of \$5.50 per square foot to \$5.25 per square foot. The building on the Property (79,233 square feet) is approximately 32% larger than the Teledyne building and, all other things being equal, a larger building is likely to yield a lower rental rate per square foot. On the other hand, the Taxpayer's argument for a much lower rate of \$4.50 is somewhat undercut by its own evidence: the CB Richard Ellis survey (Taxpayer Exhibit No. 2) of industrial space discussed further below indicates the "average asking lease rate" in the Town increased from \$5.25 in January, 2005 to \$6.00 in January, 2006 and January, 200; and the Town further noted evidence the Taxpayer was trying to rent a small part of the office space in the building (4,500 square feet) for a gross rental rate of \$10.00 per square foot, as shown in Municipality Exhibit C. Applying the \$5.25 per square foot estimate to 79,233 square feet yields a potential gross income of \$415,973.

A second disputed issue concerns the appropriate vacancy and collection loss/bad debt (collectively, "vacancy") factor to be applied. The Town emphasized the long period of occupancy of the Property (approximately 17 years) by its owner, the Taxpayer, and a state-wide survey of industrial space by Grubb & Ellis, showing vacancy rates in the 10% range; while referencing this survey, Mr. Traub noted "much of the market-wide vacancy is made up of space that is less desirable than the (Property)" to apply a 7% vacancy factor in his analysis. See Traub Appraisal, p. 39; and Municipality Exhibit G (marked in the Atrium appeals), p. 5.

Mr. Bullock, on the other hand, used a very aggressive 20% vacancy factor, relying on a CB Richard Ellis survey "track(ing) vacancy rates in Hudson." See Bullock Appraisal, p. 92 and

Taxpayer Exhibit No. 2 in the Teledyne appeals. The CB Richard Ellis survey estimates total industrial space and available square feet by municipality and, by this measure, the vacancy rate in the Town dropped from 22.8% in January, 2005 to 17.9% in January, 2006 and 16.9% in January, 2007. Id. at pp. 3 – 5. Even more to the point, however, was the extended testimony by Mr. Traub and Jim Michaud, the Town’s Assistant Assessor, that a town-wide survey of vacant industrial space is misleading because it includes substantial space that is markedly inferior and has been vacant for a number of years, in contrast to the Property, which is of much higher quality. Mr. Michaud further testified the Town had about 400,000 square feet of industrial space that was “chronically vacant” from year to year, pushing the overall vacancy rate higher than it actually was for higher quality industrial space.

The board agrees that not differentiating industrial space along the parameters of quality and usability is a shortcoming in the Taxpayer’s approach and is not reflective of how a knowledgeable buyer is likely to evaluate the market value of the Property. The board, however, does not find the vacancy factor should be as low as the 7% advocated by the Town. In the Atrium appeals, Mr. Traub used a 10% vacancy factor. In closing argument here, the Town’s attorney indicated the evidence supported a vacancy factor for an industrial building in the “5% to 11%” range in the relevant periods. The long term occupancy of the Property owned by the Taxpayer does not necessarily mean it will be rented any faster if the Taxpayer, for business or other reasons, decided to sell the Property and move to another location. A buyer of the Property in these circumstances is likely to focus on whether a prospective tenant will find it suitable when compared to other available properties on the market and will not be influenced by the historical length of occupancy of the seller or its use of the Property. For these reasons, the

board finds the evidence, considered as a whole, supports a vacancy estimate of 10% for the Property as of the assessment dates.

Applying a 10% vacancy to the potential gross income estimate of \$415,973 yields an effective gross income (“EGI”) estimate of \$374,376 to which estimated operating expenses must be applied. The board found lesser differences in the latter estimates between the two experts. In fact, the Town’s expert, Mr. Traub, used higher total operating expense estimates (\$54,348 in each year, compared to \$35,338 for Mr. Bullock), chiefly because Mr. Traub added leasing commission and tenant improvement allowances (each at 2% of EGI), while Mr. Bullock did not. On balance, the board finds the operating expense assumptions of Mr. Traub to be more supportable and has estimated total operating expenses to be \$51,414 in each year (compared to \$54,348 for Mr. Traub and \$35,338 for Mr. Bullock).<sup>2</sup> All other things being equal, the higher operating expense estimates used by the Town lead to a more conservative indication of value and give the Taxpayer the benefit of the doubt (by leading to a lower overall market value estimate using the income approach). Deducting \$51,414 in operating expenses from effective gross income of \$374,376 yields net operating income (“NOI”) estimates of \$322,962 for tax years 2006 and 2007.

Finally, the board noted relatively nominal differences in the capitalization rate estimates of the two experts: Mr. Traub used 8.35% for tax year 2006 and 7.9% for tax year 2007, while Mr. Bullock used 8.5% and 8.0% for these years. The board finds no reason not to use the same capitalization rates as in the Teledyne appeals: 8.35% and 7.9%.<sup>3</sup> Applying them to the NOI

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<sup>2</sup> The relatively small difference between the board’s calculation of total operating expenses and Mr. Traub’s calculation (13.73% compared to 13.41% of EGI) is attributable primarily to the lower effective gross income estimates used by the board and the effect of fixed reserves (unrelated to EGI), applied at \$0.20 per square foot).

<sup>3</sup> The Taxpayer offered no explanation as to why Mr. Bullock used slightly higher capitalization rates in these appeals than in the Teledyne appeals, where his estimates were actually below those of Mr. Traub.

estimates yields indicated market values (rounded) of \$3,900,000 in tax year 2006 and \$4,100,000 in tax year 2007. When the agreed-upon levels of assessment (84.3% and 97.9%) are applied to these estimates, the board finds the assessment for tax year 2006 should be abated to \$3,287,700 in tax year 2006. (See Attachment 1.)

On the other hand, there is a relatively nominal difference between the actual assessment (\$4,106,200) and the indicated assessment (\$4,013,900) for tax year 2007. This difference is only about 2.2%, which is well within an acceptable range for testing the proportionality of an assessment, given all the assumptions and judgments needed to estimate value.<sup>4</sup>

If the taxes have been paid, the amount paid on the value in excess of \$3,287,700 in tax year 2006 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. For the reason noted above, the board finds no abatement or refund is warranted for tax year 2007.

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

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<sup>4</sup> All assessments are based on “estimates” of a property’s market value and an “estimate” is not an absolute determination, but rather one that involves opinion and a substantial amount of judgment. There is never one exact or precise assessment, but rather 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. See Wise Shoe Co. v. Town of Exeter, 119 N.H. 700, 702 (1979). Further, “[t]he demand of constitutional equality in taxation anticipates some practical inequalities.” City of Berlin v. County of Coos, 146 N.H. 90, 94, 767 A.2d 441, 444 (2001). “Absolute mathematical equality is not obtainable in all respects if taxation is to be administered in a practical way.” Id. (quotation omitted); see also Sirrell v. State, 146 N.H. 364, 370 (2001).

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.

Attached as Addendum A hereto are the board's responses to the Town's "Requests for Findings of Facts and Rulings of Law."

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Albert F. Shamash, Esq., Member

**Attachment 1**

TELEGRAPH PUBLISHING CO.

**BOARD FINDINGS:**

	<b>2006</b>	<b>2007</b>
Income Approach:		
Net Leasable Square Feet	79,233	79,233
Average Rent Per Square Foot (NNN)	\$5.25	\$5.25
Potential Gross Income	\$415,973	\$415,973
Vacancy and Collection Loss/Bad Debt	10%	10%
Effective Gross Income	\$374,376	\$374,376
Less: Operating Expenses to Owner		
Management (3.5% of EGI)	13,103	13,103
Leasing commissions (2% of EGI)	7,488	7,488
Tenant improvements (2% of EGI)	7,488	7,488
CAM for vacant space (2% of EGI)	7,488	7,488
Reserves (\$0.20 per square foot)	15,847	15,847
Total Operating Expenses	51,414	51,414
as percent of EGI	13.73%	13.73%
Net Operating Income	\$322,962	\$322,962
Cap Rate	8.35%	7.9%
Indicated Value w/ Income Approach	\$3,867,808	\$4,088,127
Rounded to	\$3,900,000	\$4,100,000
Level of Assessment	84.3%	97.9%
<b>Indicated assessment (rounded)</b>	<b>\$3,287,700</b>	<b>\$4,013,900</b>

**Addendum A**

The Town's "Requests for Findings of Facts 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 of Fact, "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.

**TOWN'S REQUESTS FOR FINDINGS OF FACTS AND RULINGS OF LAW**

**FINDINGS OF FACT:**

1. The 2007 assessment of the taxpayer's property was based on a reassessment which included a field inspection, measurements and a data collection process.

**Granted.**

2. The NH Department of Revenue Administration has found that in general, the 2007 assessments in Hudson, NH were accurate and proportional.

**Granted.**

3. The subject property has been occupied by the taxpayer for approximately twenty-seven (27) consecutive years.

**Neither granted nor denied.**

4. The vacancy rate reduction (per the income approach) relied upon by the taxpayer's expert, Mr. Bullock, was based upon an average of all industrially zoned property located in the Town of Hudson.

**Granted.**

5. Statistical studies of vacancies are affected by the least desirable industrial properties within the community.

**Granted.**

6. That a certain percentage of industrial properties located within Hudson are consistently vacant because of undesirable locations, poor design, poor quality or lack of maintenance, accordingly, those chronically vacant properties will cause the average figure to be artificially high.

**Neither granted nor denied.**

7. The properties under consideration by the Board enjoyed long uninterrupted periods of full or nearly full occupancy: to wit; Teledyne Technologies, Inc. 29 years; Telegraph Publishing Co. 27 years; and, Atrium Medical Corp. 14 years.

**Neither granted nor denied.**

8. In order to accurately determine a property's fair market value while using the income approach, vacancy rates need to be stratified by quality, condition, size and location of the subject property.

**Granted.**

9. The use of an incorrect vacancy factor permeates the income approach in that it affects the CAM (landlord) charges to be deducted from the gross revenues of the property owner, as well as in the construction of the ultimate capitalization rate.

**Granted.**

10. The Town of Hudson presented evidence in support of the assessed value of the taxpayer's property through a qualified expert witness, to wit: Stephen Traub of Property Valuation Advisors.

**Granted.**

11. The Town of Hudson presented evidence in the form of an appraisal utilizing the income approach and comparable sales approach.

**Granted.**

12. The taxpayer failed to significantly rebut or challenge the findings of the appraisal expert utilized by the Town of Hudson.

**Denied.**

13. The taxpayer's vacancy rate of twenty percent (20%) is not realistic in evaluating a property with the tenant and physical quality characteristics of the subject.

**Granted.**

14. A twenty percent (20%) vacancy factor anticipates one (1) year of vacancy during every five (5) year period.

**Granted.**

15. Using a twenty percent (20%) vacancy factor distorted the ultimate findings of the taxpayer's representative in its income approach.

**Neither granted nor denied.**

16. The Town of Hudson presented credible evidence that a realistic vacancy rate for properties of the nature of the subject located in the Town of Hudson is in the area of seven percent (7%).

**Denied.**

17. Mark Lutter, the representative testifying on behalf of the taxpayer had a pecuniary bias in the outcome of the case.

**Neither granted nor denied.**

18. The party testifying on behalf of the taxpayer was a paid consultant and his compensation was based upon a contingent fee or a partial contingent fee basis. Paras v. City of Portsmouth, 115 NH 63 (1975).

**Neither granted nor denied.**

**RULINGS OF LAW:**

19. The Board of Tax and Land Appeals must assess conflicting evidence, its credibility and the weight to be given the various portions thereof. Paras v. City of Portsmouth, 115 NH 63 (1975).

**Granted.**

20. To succeed in a tax abatement claim, the taxpayer has the burden of proving, by a preponderance of the evidence, that they are paying more than their proportional share of taxes. Porter v. Town of Sanbornton, 115 NH 363 (1004) and Society Hill at Merrimack Condo Assoc. v. Town of Merrimack, 139 NH 253 (1994).

**Granted.**

21. In order to prevail in a Petition for Abatement, the petitioner must prove that its tax was greater than it should have been with respect to the taxes of other property owners in the taxing district. Gail C. Nadeau 1994 Trust v. City of Portsmouth, 155 NH 810 (2007).

**Granted.**

22. That as a matter of law, the taxpayer failed to establish that its property is disproportionately assessed as located within the Town of Hudson.

**Denied.**

**Certification**

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Mark Lutter, Northeast Property Tax Consultants, 14 Roy Drive, Hudson, NH 03051, representative for the Taxpayer; Jay L. Hodes, Esq., HageHodes, PA, 440 Hanover Street, Manchester, NH 03104, counsel for the Town; and Chairman, Board of Selectmen, Town of Hudson, 12 School Street, Hudson, NH 03051.

Date: July 29, 2009

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Melanie J. Ekstrom, Deputy Clerk

**Telegraph Publishing Co.**

**v.**

**Town of Hudson**

**Docket Nos.: 22777-06PT/23416-07PT**

**ORDER**

The board has reviewed the “Taxpayer’s” August 28, 2009 Motion for Rehearing (“Motion”) of the board’s July 29, 2009 Decision and the “Town’s” August 31, 2009 Objection.

The Motion is denied because it does not demonstrate the board erred in its Decision and, thus, the Motion failed to show any “good reason” to grant a rehearing. See RSA 541:3.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

\_\_\_\_\_  
Paul B. Franklin, Chairman

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Albert F. Shamash, Esq., Member

**CERTIFICATION**

I hereby certify a copy of the foregoing Order has this date been mailed, postage prepaid, to: Mark Lutter, Northeast Property Tax Consultants, 14 Roy Drive, Hudson, NH 03051, representative for the Taxpayer; Jay L. Hodes, Esq., HageHodes, PA, 440 Hanover Street, Manchester, NH 03104, counsel for the Town; and Chairman, Board of Selectmen, Town of Hudson, 12 School Street, Hudson, NH 03051.

Date: September 4, 2009

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Anne M. Stelmach, Clerk