Colonial Plaza Realty Trust

v.

City of Lebanon

Docket Nos.: 22815-06PT/23886-07PT

And

Walgreen Company

v.

City of Lebanon

Docket Nos. 22988-06PT/23504-07PT

ORDER

For the extraordinary reasons detailed below, the board is referencing the above two Colonial Plaza Realty Trust ("Colonial Plaza") appeals and above two Walgreen Company ("Walgreen") appeals for the same tax years (2006 and 2007) in this Order. The two sets of appeals pertain to separate parcels of land located adjacent to each other in the "City." Each parcel has the same fee owner, Colonial Plaza. Colonial Plaza developed and operates a shopping center on land identified by the parties as "Lot 8" and Walgreen (under a long-term ground lease with Colonial Plaza) developed and operates a drug store on land identified as "Lot 6."

The board finds unnecessary complications have arisen with respect to the processing and resolution of these appeals. Until the January 7, 2009 limited hearing described below, the board members hearing the Colonial Plaza appeals were not aware of the fact that the Walgreen appeals had been filed by another tax representative (listed as Robert O. McNamara with Wulsin Murphy McNamara Consulting in the 2006 appeal and as Robert O. McNamara, Paradigm Tax Group, LLC, with the same Boston address, in the 2007 appeal). There can be no doubt these facts were known to the City Assessor, David McMullen, but he chose not to disclose them - - not to the board and not to Colonial Plaza's tax representatives either (William Boatwright and Robert Lisk of Commercial Property Tax Management, LLC ("CPTM")).[1]

I. Issue Decided at January 7, 2009 Limited Hearing

Because of one specific issue that arose at the start of the scheduled December 16, 2008 hearing in the Colonial Plaza appeals, the board scheduled and held a limited hearing on January 7, 2009. This specific issue was framed as whether or not an agreement existed between the "Taxpayer" and the City that Lot 6 would not be part of the Colonial Plaza appeals (scheduled for hearing on December 16, 2008 – the first time this issue surfaced). See the board's December 18, 2008 Order, which describes how and when the issue arose.

At the January 7, 2009 limited hearing, Colonial Plaza's attorney and representatives took the position an agreement existed and should be applied to exclude consideration of the Walgreen property. The City's attorney and assessor disagreed with Colonial Plaza's position. This dispute resulted in an extended hearing where the parties called three witnesses to testify (Mr. Boatwright, Mr. Lisk and Mr. McMullen), and presented various documents.

[1] The operative facts discussed below occurred prior to December 2, 2008, when CPTM withdrew its appearance for Colonial Plaza and Margaret H. Nelson, Esq., Sulloway & Hollis, PLLC, entered her appearance on its behalf.

After hearing the testimony and considering the documents, the board deliberated and then ruled as follows: no agreement existed between Mr. Boatwright (representing Colonial Plaza) and Mr. McMullen (representing the City) to the effect that Lot 6 would not be a part of the Colonial Plaza appeals. At most, there were miscommunications between Colonial Plaza's representatives and the City's assessing department, which neither side clarified or resolved to the point where a "meeting of the minds" can be said to have occurred. This state of affairs is reflected in the testimony, emails and other documents presented at the limited hearing. See, e.g., Municipality Exhibits D – H and J.

In making this ruling, the board has also reviewed the "Memorandum of Law" submitted by the City's attorney at the close of the hearing and notes, without further elaboration, the extensive case law supporting it. This case law, as well as Tax 201.23 pertaining to stipulations, is discussed at pages 5 - 6 of the Memorandum of Law. In brief, the board finds Colonial Plaza has not met its burden of proving a binding agreement existed.

II. The Larger Issues

Moving forward from this limited issue, there is a larger substantive issue and several procedural issues that are of concern. These issues were discussed extensively at the January 7, 2009 hearing. Because no Walgreen representative attended the hearing, and because of the special circumstances described above, the board notes a tape of the hearing is available and will be made available to Mr. McNamara, the named representative listed in the Walgreen appeals, at no cost upon request.

The larger issue is whether the City, in the Colonial Plaza appeals, can offset any overassessment on the Colonial Plaza shopping center (Lot 8) against any underassessment of the Walgreen drug store (Lot 6). The board notes the parties take conflicting positions on this

issue based on several lines of authority, including Appeal of Sunapee, 126 N.H. 214, 217 (1985), cited by the City, and the board's August 26, 2008 "Wal-Mart" Order, submitted as Taxpayer Exhibit No. 2.

The board will defer ruling further on these issues because the attorneys for both Colonial Plaza and the City have agreed to submit "briefs" stating their respective positions and why the board should rule in their favor. The board encourages Mr. McNamara, the Walgreen tax representative, to review the relevant pleadings, avail himself of the tape of the January 7, 2009 limited hearing and file a brief or other statement on behalf of Walgreen explaining its position regarding the relevant questions that have arisen which may delay the hearing of these appeals.

The briefs will be due not more than ninety (90) days after the issuance of this Order. This will allow the parties reasonable time to initiate and complete whatever limited discovery each believes may be reasonably necessary to resolve this issue. The City's attorney, for example, expressed a desire to serve interrogatories on Walgreen to examine further the relevant facts pertaining to the October 6, 2004 ground lease with Colonial Plaza (Taxpayer Exhibit No. 1), insofar as this leasing relationship impacts what has been described as the "one estate or two" issue in these appeals. The board granted this specific request for additional time for discovery and briefing because an interim ruling on this issue should allow the parties to plan for and prepare any appraisal and other evidence they may wish to present on the two properties at the substantive hearing(s).

After receiving these briefs, the board intends to decide this issue and also to examine various case management questions that have arisen (also discussed at the limited hearing) such as whether it would be desirable or prudent to hold consolidated hearings on all the appeals or

make other scheduling and procedural orders. Cf. Appeal of Land Acquisition, 145 N.H. 492, 494 (2000) (board has inherent authority to manage its docket effectively).

Finally, there was some discussion at the hearing regarding the respective roles and responsibilities of the City Assessor and CPTM in the Colonial Plaza appeals. The concurring opinion to this Order expresses the amplified views of one board member, Chairman Paul B. Franklin, regarding them.

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

CONCURRING OPINION OF PAUL B. FRANKLIN, CHAIRMAN

While I fully concur with the rulings in this Order, I believe there are additional concerns that I would emphasize more. This Order has concluded Mr. Boatwright and Mr. McMullen did not have a meeting of the minds as to whether an agreement existed as to how to handle the Walgreen property (Lot 6) and outlines how the board intends to proceed in these appeals. However, I must also express some concerns as to the manner the issue of one or two estates has been dealt with by both Mr. Boatwright of CPTM and Mr. McMullen, the City Assessor.

First, as the board has found in the past, the taxpayer's representative, when filing an abatement request and appeal, has the initial responsibility to become knowledgeable of the taxpayer's entire estate so as to determine whether the taxpayer is indeed, aggrieved by the

aggregate assessments within a taxing jurisdiction of the tax. See Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985); and Mount Washington Hotel Preservation Limited Partnership v. Town of Carroll, BTLA Docket Nos. 19177-01PT and 19856-02PT (December 14, 2005) (taxpayer bears the burden to show, by the preponderance of the evidence, that the taxpayer's entire estate is overassessed). Here, this issue of what comprises the Taxpayer's entire estate is unresolved as it was not clearly determined by Mr. Boatwright in the first instance and not discussed intelligently by the parties (Colonial Plaza, Walgreen and the City) because only the City was aware of the concurrent appeals of Colonial Plaza and Walgreen and made no effort to inform and engage them responsibly to resolve the entire estate issue. Certainly, on the one hand, the board concludes Mr. Boatwright should have investigated this matter more fully than he did to become more knowledgeable as to the ownership interest that Colonial Plaza has in Lot 6, rather than simply relying upon the representation of his client that Colonial Plaza's interest was comprised of fee ownership of the land subject to a long-term lease to Walgreen. In addition to Mr. Boatwright's tax representative experience, his prior assessing experience in Portsmouth, New Hampshire should have made him aware of the importance of addressing this threshold issue of determining the taxable estate of the "person aggrieved". RSA 76:16 and 76:16-a.

On the other hand, however, I am troubled by Mr. McMullen's withholding of information that Walgreen had exercised its right to file an abatement and appeal on Lot 6 for the same tax years that Colonial Plaza had filed for Lot 8. The record of the January 7, 2009 hearing is replete with evidence that Mr. McMullen was fully aware of the concurrent abatements and appeals on Lots 6 and 8 and, yet, withheld that information from: 1) Mr. Boatwright in e-mail, letter and verbal communications with him during the pendency of the appeals; 2) Ms. Nelson

when she assumed the Taxpayer's representation on December 2, 2008; 3) this board in the Colonial Plaza and Walgreen appeals; and 4) indeed, the City's own attorney, Mr. Shawn Tanguay. (Mr. Tanguay indicated he became aware of the Walgreen appeals a day or two before the January 7, 2009 limited hearing, presumably based on discussions with opposing counsel, Ms. Nelson.)

While there may be no explicit stated obligation in either the statutes or the board's rules for Mr. McMullen to have notified Mr. Boatwright and others of the concurrent Walgreen appeals, implicit in his responsibility under the New Hampshire Constitution and statutes to assess property reasonably and proportionally to achieve equity is the responsibility to consider all factors that may impact on that determination (Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1975)) and when the assessment is challenged, to proceed in good faith when dealing with the opposing party. By not revealing to Mr. Boatwright, Ms. Nelson, the board and his attorney of the pendency of the Walgreen appeals has resulted in an inconclusive resolution of this issue as to whether one or two estates exist at the abatement level and has prolonged, rather than expedited, the resolution of the appeals. At the very least, had the board been made aware of the Walgreen appeals at the December 16, 2008 hearing, the board would have likely proceeded differently in resolving the appeals of these properties for the two years in question. When the board was apprised of the Walgreen appeals by Ms. Nelson at the January 7, 2009 hearing (having become aware of it herself just prior to that hearing), the board obviously needed to craft an order to engage Walgreen and its representative, Mr. Robert McNamara, to provide Walgreen with due process in addressing this pivotal issue of whether Lots 6 and 8 are separate or one estate. The resolution of the appeals has been delayed and additional resources will have to be expended by all parties, including the City, for no perceived reason other than that stated by

Mr. McMullen that it was not his obligation to inform others of the concurrent appeals. This act of omission is illogical and results in the protraction of the appeals. In addition, this withholding of critical information raises serious questions as to Mr. McMullen's respect for the integrity of the process of achieving equitable assessments in the City.

While the board has no specific authority in regulating assessors (other than adjudicating appeals of decertification of individuals involved in making appraisals for tax assessment purposes pursuant to RSA 21-J:14-g), the board certainly has broad authority in assuring assessments are done properly and equitably (see Appeal of Wood Flour, Inc., 121 N.H. 991 (1981)) and the authority to manage its docket effectively to prevent delays and inefficient use of resources, see Appeal of Land Acquisition, 145 N.H. 492, 494 (2002). Mr. McMullen's actions raise the question as to the premise and factors considered in initially assessing both Lot 6 and 8 and did frustrate potential resolution of these appeals to date causing delay and inefficient use of the parties' and board's resources in ultimately resolving this issue.

Paul B. Franklin, Chairman

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, Board of Assessors, City of Lebanon, 51 North Park Street, Lebanon, NH 03766; Shawn M. Tanguay, Esq., Gardner, Fulton & Waugh, PLLC, 78 Bank Street, Lebanon, NH 03766, counsel for the City; and Robert O. McNamara, Paradigm Tax Group LLC, 20 Park Plaza - Suite 400, Boston, MA 02116, representative for Walgreen Company.

Date: January 26, 2009

Anne M. Stelmach, Clerk