

CHERB, LLC

v.

Town of Amherst

Docket No.: 22981-06PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2006 assessment of \$2,075,800 (land \$804,000; features \$1,271,800) on Map 12/Lot 12, consisting of four commercial buildings on 2.99 acres of land (the “Property”). For the reasons stated below, the appeal for abatement is granted.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the assessment was disproportionately high or unlawful, resulting in the Taxpayer paying a disproportionate share of taxes. See RSA 76:16-a; Tax 201.27(f); Tax 203.09(a); Appeal of City of Nashua, 138 N.H. 261, 265 (1994). To establish disproportionality, the Taxpayer must show the Property’s assessment was higher than the general level of assessment in the municipality. Id. The Taxpayer carried this burden.

The Taxpayer argued the assessment was excessive because:

(1) an appraisal dated April 10, 2009 performed by Arol J. Charbonneau, Jr., a certified general appraiser at Crafts Appraisal Associates, Ltd. (Taxpayer Exhibit No.2, the “Charbonneau Appraisal”) uses the income and sales comparison approaches to estimate the market value of the Property (known as the “Carriage Depot Retail Center”) to be \$1,500,000 as of the assessment date;

(2) the best evidence of the market value of the Property as of the assessment date is \$1,500,000, not the much higher estimate asserted by the Town;

(3) the Town's appraisal (by Mr. Spring) fails to make appropriate corrections and adjustments for a number of factors, including the amount of net rentable space, visibility of the space and its effects on rental rates, and a reasonable vacancy factor; and

(4) an abatement to this market value estimate adjusted by the level of assessment is warranted.

The Town argued the assessed value should be abated to \$1,890,350 based on: 1) an appraisal dated April 14, 2009 performed by Donald V. Spring, MAI, a certified general appraiser (Municipality Exhibit A, the "Spring Appraisal") which estimated a market value of \$1,925,000 and 2) the Town's 2006 median ratio of 98.2% ($\$1,925,000 \times .982$). The Town argued the revised assessment was proper because:

(1) the Spring Appraisal uses the income and sales comparison approaches to estimate the market value of the Property to be \$1,925,000 as of the assessment date;

(2) the Taxpayer's appraiser, Mr. Charbonneau, completed an earlier appraisal in the board's file (the "Prior Charbonneau Appraisal") which contains a number of differences with the revised appraisal submitted at the hearing and which impact the credibility and validity of his conclusions;

(3) the best evidence of the market value of the Property as of the assessment date is \$1,925,000, not the much lower estimate asserted by the Taxpayer; and

(4) the Taxpayer failed to meet its burden of proof that a substantial abatement is warranted.

The parties agreed the level of assessment in the Town for tax year 2006 was 98.2%, the median ratio computed by the department of revenue administration.

Board's Rulings

Based on the evidence, the board finds the proper assessment to be \$1,640,000 (rounded), based on a reconciled market value finding of \$1,670,000 and adjusted by the 98.2% level of assessment in the Town. The appeal is therefore granted.

The board arrived at this market value finding by considering carefully the appraisal evidence and testimony presented by each party, which consisted of the two appraisers and an owner of the Property, Cheryl Hardman. Ms. Hardman testified the Property was purchased in 2001 (for \$1 million) and has had ongoing vacancy problems due to the configuration of the four office and retail buildings and the lack of visibility from the roadway (Route 101A), particularly for the rear units, as well as competition from other office/retail facilities in the same vicinity with better visibility. Ms. Hardman further stated the vacancy rate has averaged 10% and she has also had to make generous allowances (such as free rent for six months) and to forego rent on occasion (because of tenant inability to pay issues), leading to further collection losses. The evidence also supported her testimony and that of the Taxpayer's appraiser, Mr. Charbonneau, that second floor areas of the buildings are not rentable space and are used only for storage. The board has reviewed the photographs in the appraisals and other evidence presented and finds these factors in all likelihood adversely impact the market value of the Property.

Assessments must be based on market value. RSA 75:1. To determine whether an abatement is warranted, the board considers and weighs the market value evidence presented, utilizing its "experience, technical competence and specialized knowledge." See 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 its findings where

there is conflicting evidence, the board must determine for itself the creditability of the witnesses and the weight to be given the testimony of each 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. City of 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 board has reviewed the Charbonneau and Spring appraisals, the methodology and assumptions used and their testimony in support of their respective estimates of the market value of the Property. As noted above, these experts are \$425,000 apart in their estimates (\$1,500,000 and \$1,925,000; compare Taxpayer Exhibit No. 2, p. 67 and Municipality Exhibit A, p. 73).

On balance, the board finds the best estimate of the market value of the Property can be obtained by using the data assumptions in the Charbonneau income approach, with a slight upward modification of the overall average rent per square foot (to \$8 from \$7.36) and a net rentable area of 19,565 square feet to arrive at a slightly higher potential gross income (\$156,520), and then applying his 12% vacancy and credit loss factor to calculate net operating income (\$137,738), capitalized at 8.25%, to obtain an indicated value of \$1,670,000 (rounded). See the comparative grid showing these calculations in Attachment A.

In comparison, Mr. Spring used a slightly higher net rentable area (20,727), which is the same number that appears in the Prior Charbonneau Appraisal; as the testimony at the hearing indicated, however, this figure incorrectly includes some non-leasable second story areas. Mr. Spring also used a much higher rent (\$9.49), which the board finds is less supported by the evidence presented. The effects of these assumptions by Mr. Spring were somewhat offset by his use of a higher capitalization rate (9.10%) than Mr. Charbonneau.

The board checked the reasonableness of a \$1,670,000 indication of value with the estimates obtained by each appraiser using the sales comparison approach. The sole differences appear to be Mr. Spring's use of a higher "Finished SF" number (25,655 square feet), which is apparently drawn from the assessment-record cards, applied to a lower \$80 estimated price per square foot, rather than the 19,656 square feet and \$85 per square foot estimates used by Mr. Charbonneau. Based on the testimony and evidence presented, the board finds Mr. Charbonneau's assumptions are more reasonable and supportable.¹ A calculation of value using the sales approach and his estimates (19,565 square feet times \$85 per square foot = 1,663,025; see Attachment A) is quite close and consistent to the indication of market value using the income approach and the findings presented above. To arrive at a proportional assessment, the \$1,670,000 market value finding must be adjusted by the agreed-upon level of assessment in the municipality for tax year 2006 (98.2%).

For all of these reasons, the board finds the assessment should be abated to \$1,640,000. The appeal is therefore granted.

If the taxes have been paid, the amount paid on the value in excess of \$1,640,000 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Until the Town undergoes a general reassessment or in good faith reappraises the property pursuant to RSA 75:8, the Town shall use the ordered assessment for subsequent years. RSA 76:17-c, I and II.

A motion for rehearing, reconsideration or clarification (collectively "rehearing motion") of this decision must be filed within thirty (30) days of the clerk's date below, 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

¹ While the Taxpayer conceded there has been no conclusive measurement of leasable area, the board finds the best estimate in the record is the 19,565 square feet used in the Charbonneau Appraisal, which does not include unrentable second story storage space.

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, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Mark D. Fernald, Esq., Fernald, Taft, Falby & Little P.A., PO Box 270 Peterborough, NH 03458, counsel for the Taxpayer; Chairman, Board of Selectmen, Town of Amherst, PO Box 960, Amherst, NH 03031; and Municipal Resources, Inc., 295 No. Main Street, Salem, NH 03079, Contracted Assessing Firm.

Date: May 21, 2009

Anne M. Stelmach, Clerk

ATTACHMENT A

CHERB	BOARD	Taxpayer's Charbonneau Appraisal	Town's Spring Appraisal
Income Approach			
Net Leasable Square Feet	19,565	19,565	20,727
Potential Gross Income	\$156,520	\$144,004	\$196,759
Overall Average Rent Per Square Foot	\$8.00	\$7.36	\$9.49
Vacancy Rate & Credit Loss	12%	12%	5%
 Net Operating Income	 \$137,738	 \$120,842	 \$173,564
 Cap Rate	 8.25%	 8.25%	 9.10%
 Indicated Value w/ Income Approach	 \$1,669,547	 \$1,464,752	 \$1,907,297
Rounded to	\$1,670,000	\$1,465,000	\$1,905,000
 Sales Comparison Approach			
Square Feet	19,565	19,565	25,655
Price per square foot	\$85	\$85	\$80
Indication of Value w/ Sales Approach	\$1,663,025	\$1,663,025	\$2,052,400
 Reconciled to	 \$1,670,000	 \$1,500,000	 \$1,925,000
 Level of Assessment -TY 2006	 98.2%		
 Indicated assessment (rounded)	 \$1,640,000		