CHERB, LLC

v.

Town of Amherst

Docket No.: 22981-06PT

AMENDED AND RESTATED 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 x .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 $1,600,000 (rounded), based on a reconciled market value finding of $1,625,000, 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).

Like these appraisers, the board finds the most reliable approach for estimating the market value of the Property is the income approach. (The board's calculations and certain comparisons to the Charbonneau and Spring Appraisals are shown in Attachment A.)

The board computed potential gross income by starting with the net leaseable area estimate (19,565 square feet) in the Charbonneau Appraisal for the four buildings on the Property, but making an upward modification of the overall average rent per square foot to $8.75 (from the $8.36 inherent in his analysis). This rent modification is based on a finding that the evidence, considered as a whole, supports market rental rates for the rear buildings that are higher than estimated in the Charbonneau Appraisal.

The board then applied Mr. Charbonneau's 12% vacancy and credit loss estimate to calculate an effective gross income of $150,651, which is slightly higher than the estimate in his appraisal ($144,004) but much lower than Mr. Spring's estimate ($186,921). With respect to operating expenses, the two appraisers agreed on a management expense percentage (5%) but differed, in various respects, in their methodology for estimating other operating expenses. The

board need not discuss or resolve these differences entirely in order to make its own findings regarding a reasonable level of operating expenses for the Property by applying its own judgment and experience to the evidence presented. As shown in Attachment A, the board estimated operating expenses by applying the following items as percentages of effective gross income: management expense (5%); replacement reserves (2%); and miscellaneous expenses (1%); in addition, the board estimated the property owner's share of common area maintenance ("CAM") expenses (for vacant space, exclusive of property taxes adjusted in the capitalization rate discussed below) by applying $2 per square foot to the net leaseable area (19,565) and the 12% vacancy factor. In this regard, the board finds Mr. Charbonneau's estimate ($4 per square foot) to be too high for a property of this type, especially in light of all of the other adjustments made. Like Mr. Charbonneau, the board included an expense deduction for replacement reserves and its estimate, calculated as 2% of effective gross income, results in a relatively small difference from the Charbonneau estimate made on a square foot basis ($3,013 versus $5,131).

Turning to capitalization rates, the board has noted the different computations made by the two appraisers to arrive at their estimates of value using the income approach. Mr. Spring added the effect of the property tax expense absorbed by the owner during vacancy to compute a higher capitalization rate. Mr. Charbonneau, on the other hand, used adjustments to his estimated unrecoverable operating expenses, including property taxes during vacancy, to account for this factor. The board's own estimate of unrecoverable expenses does not, however, account for the property tax component of CAM charges not recoverable during vacancy. Therefore, following the methodology in the Spring Appraisal (p. 68), the board has increased the Charbonneau capitalization rate estimate of 8.25% (which was not loaded for the property taxes during vacancy) by 0.2% to 8.45%. (This 0.2% increase results from multiplying the 2006

effective tax rate of 1.849% ($18.83 per $1,000 of value times the 98.2% level of assessment) by the vacancy factor of 12%.)

In comparison to the Charbonneau Appraisal, the Spring Appraisal 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 of the buildings. Mr. Spring also used a much higher rent ($9.49), which the board finds is less supported by the evidence presented.

The board checked the reasonableness of a **$1,600,000** indication of value **using the income approach** 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 **reasonably** close and consistent to the indication of market value using the income approach and the findings presented above.

The board's final estimate of market value is $1,625,000, which results from placing more weight on the indication of value from the income approach than the sales comparison approach. To arrive at a proportional assessment, the **$1,625,000** market value finding must be adjusted by the agreed-upon level of assessment in the municipality for tax year 2006 (98.2%).

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[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.

For all of these reasons, the board finds the assessment should be abated to **$1,600,000 (rounded)**. The appeal is therefore granted.

If the taxes have been paid, the amount paid on the value in excess of **$1,600,000** 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 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. **See also Appeal of White Mts. Educ. Ass'n., 125 N.H. 771, 774-75 (1984) (discussing RSA 541:4).** 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. **RSA 541:6.**

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Member

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Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Amended and Restated 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: July 1, 2009

Melanie J. Ekstrom, Deputy Clerk

ATTACHMENT A (Revised for the Amended and Restated Decision)

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	**$171,194**	$163,641	$196,759
Average Rent Per Square Foot	**$8.75**	$8.36	$9.49
Vacancy Rate & Credit Loss	12%	12%	5%
Effective Gross Income (EGI)	**$150,651**	$144,004	$186,921
Expenses:			
Management @ 5% EGI	**$7,533**		
Replacement reserves @ 2% EGI	**$3,013**		
Miscellaneous expenses @ 1% EGI	**$1,507**		
Unrecoverable expenses ($2/sq. ft. x 12%)	**$4,696**		
Total Operating Expenses	**$16,748**	$23,162	$13,357
Net Operating Income	**$133,903**	$120,842	$173,565
Cap Rate	**8.45%**	8.25%	9.10%
Indicated Value w/ Income Approach	**$1,584,649**	$1,464,752	$1,907,308
Rounded to	**$1,600,000**	$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
Final estimate of market value	**$1,625,000**	$1,500,000	$1,925,000
Level of Assessment -TY 2006	98.2%		
Indicated assessment	**$1,595,750**		
Ordered assessment (rounded)	**$1,600,000**		