

Atrium Medical Corp.

v.

Town of Hudson

Docket Nos.: 23138-06PT and 23450-07PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” tax year 2006 assessment of \$7,935,000 (land \$1,422,700; building \$6,512,300) and tax year 2007 assessment of \$9,344,900 (land \$1,487,600; building \$7,857,300) on Map 215/Lot 1, 5 Wentworth Drive, an industrial building on 14.23 acres of land (the “Property”). 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 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 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) the Taxpayer is the sole tenant under a long term lease with the owner and is responsible for the real estate taxes on the Property, an “R&D” warehouse building constructed in 1987;

(2) the market values of the Property in each tax year were no more than the “high end” of the value ranges contained in the analysis prepared by its tax representative, Mark Lutter, using the sales comparison approach, as presented in Taxpayer Exhibit No. 1: \$6.96 million in tax year 2006; and \$7.34 million in tax year 2007;

(3) if an income approach is considered, the Town erred in using a lower (10%) vacancy rate because industrial properties in the Town had high vacancy rates from 2003 - 2008, running from 17 – 27% (as shown on pages 12 – 17 of Taxpayer Exhibit No. 1) and there are also underutilized industrial properties in the Town, making a 20% vacancy rate more reasonable and supportable, and, in addition, the appropriate capitalization rate should be 10%, rather than the lower rates used by the Town’s expert; and

(4) the Property is entitled to substantial abatements based upon the estimated market values of the Property noted above, adjusted by the level of assessment in each 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;

(2) the Property is owned by a real estate investment trust (“REIT”), is a high quality R&D building and has been leased to the Taxpayer since 1994;

(3) the REIT purchased the Property as part of a multi-property transaction in November, 2005 for \$15,100,000, as shown in Municipality Exhibits B (Quitclaim Deed) and C (DRA Form PA-34);

(4) an appraisal prepared by an experienced commercial appraiser, Stephen G. Traub, ASA of Property Valuation Advisors (the “Traub Appraisal,” Municipality Exhibit A) estimates the market values of the Property at \$9,465,000 in tax year 2006 and \$9,770,000 in tax year 2007;

(5) these estimates by Mr. Traub are the best evidence of market values and support the proportionality of the assessments made by the Town;

(6) the Taxpayer's representative, Mr. Lutter, acknowledged at the hearing the four sales he used in his analysis were "not great" sales and the analysis was based on "subjective guesses," one was sold following foreclosure and bankruptcy, one in a bank sale, and were not arm's-length transactions, and his sales comparison grid contains other errors that further diminish its reliability;

(7) vacancy rates are higher for lower quality industrial buildings in the Town than for the Property, which is much higher in quality and has been rented by the same tenant since 1994 and, when larger properties are vacant, the surveyed average vacancy rate for industrial properties is misleadingly skewed to the high side;

(8) unlike the Taxpayer's representative, the Town expert, Mr. Traub, inspected the Property and every other industrial property in the Town because he was used by the Town to establish values for the commercial and industrial properties during the tax year 2007 revaluation; and

(9) the Taxpayer did not meet its burden of proving disproportionality.

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: Teledyne Technologies, Inc. v. Town of Hudson, BTLA Docket Nos. 22776-06PT and 23415-07PT (the “Teledyne” appeals); and Telegraph Publishing Co. v. Town of Hudson, BTLA Docket Nos. 22777-06PT and 23416-07PT (the “Telegraph” appeals).

Board’s Rulings

Based on the evidence, the board finds the Taxpayer failed to meet its burden of proving disproportionality in tax year 2006 and, at the hearing, the board granted the Town’s motion to dismiss the tax year 2007 appeal. The appeals for abatement are therefore denied for each tax year for the reasons discussed further below.

The board granted the Town’s oral motion to dismiss the 2007 appeal based on Tax 202.02(d)¹ and 203.03(g).² In support of the motion, the Town noted the Taxpayer’s grounds for appeal stated in the tax year 2007 appeal document filed by Mr. Lutter on behalf of the Taxpayer did not mention the sales comparison approach at all. Nevertheless, this was the sole approach presented in his pre-hearing submission where Mr. Lutter analyzed four sale comparables. See Taxpayer Exhibit No. 1. The 2007 appeal document presents an estimated value using the income approach and some land sale information reflecting the possible use of a cost approach. Mr. Lutter, the Taxpayer’s sole representative, gave no satisfactory explanation as to why the sales comparison approach was not mentioned in the tax year 2007 appeal document, but was discussed in the appeal document he filed for tax year 2006. Basic fairness to the municipality and to the process requires that each taxpayer provide reasonable notice and detail regarding each ground for appeal it intends to pursue for each tax year.

¹ “Throughout the appeal, the taxpayer shall be limited to the grounds stated in the appeal document. The board, on its own or by municipality’s motion, shall limit the taxpayer’s presentation to the issues raised in the appeal.”

² “Throughout the appeal, the issues raised by the taxpayer in the abatement application and appeal document may differ, but the grounds stated in the appeal document shall control the issues before the board.”

Because each taxpayer bears the burden of proving disproportionality and the grounds for appeal must be stated in the appeal document for each tax year, the board granted the Town's motion to dismiss the 2007 appeal. See also Flatley v. City of Manchester, BTLA Docket Nos. 22838-06PT and 23796-07PT (February 27, 2009) ("the board ruled it would not consider the sales comparison contained in the (Taxpayer's) Appraisal because the Taxpayer made no mention of the sales comparison approach in the appeal documents filed for each tax year"), citing the board's rules and Booth v. Town of Gilford, BTLA Docket No. 21101-04PT (September 14, 2007) (taxpayer barred from presenting at the hearing a new ground for appeal not stated in the appeal document).

Turning to the tax year 2006 appeal, the board considered the Taxpayer's evidence based on the sales comparison approach, but finds it was far from sufficient to meet the Taxpayer's burden of proving disproportionality. Mr. Lutter did not present an appraisal or other expert evidence, but relied entirely on his own analysis and his observations on the Traub Appraisal submitted by the Town. Mr. Lutter has many years of experience appearing before the board as a tax representative and has employed licensed appraisers in the past, but is not an appraiser. He stated he considered hiring an appraiser for these appeals, but did not do so because of "timing issues."

As the Town further noted through further cross-examination of Mr. Lutter, he used four comparable sales, but one was only a listing, not an actual sale ("Comparable Sale #4" in Pelham) and one went through a foreclosure and bankruptcy in the very recent past ("Comparable Sale #3" in Nashua). See also the Town's Request for Finding No. 5.

In brief, the board finds Mr. Lutter's analysis using the sales comparison approach for tax year 2006 and his belief the market value of the Property is at the "high end" of the range he

computed is simply not persuasive in light of the Taxpayer's burden of proof. If the board was inclined to consider the 2006 assessment further, however, the board would find the evidence establishing a much higher market value for tax year 2006 presented by the Town to be supported. When the tax year 2006 market value estimate of \$9.465 million estimated in the Traub Appraisal is adjusted by the level of assessment of 84.3%, the resulting indicated assessment (\$7.98 million, rounded) is over \$400,000 above the actual assessment on the Property (\$7.935 million), negating a finding of disproportionality.

For all of these reasons, the appeals are denied.

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. 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

Paul B. Franklin, Chairman

Albert F. Shamash, Esq., Member

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 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.

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

Granted.

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

Denied.

4. The taxpayer, in presenting a comparable sales report states that “There are no great comparables for the subject property. There are many subjective guesses used in trying to equate the comparables with the subject property...”.

Granted.

5. Of the four (4) sales used in the comparable sales study by the taxpayer, one was a listing and one was a sale of a property that had gone through a bankruptcy filing and a foreclosure sale in the very recent past.

Granted.

6. The taxpayer has, in its own report (page 1), discredited its comparable sales study by basing its conclusions on subjective guesses and by using less than accurate comparable sales.

Granted.

7. The taxpayer’s income analysis is deficient in that it lacked any analysis of how it arrived at its capitalization rate.

Neither granted nor denied.

8. The capitalization rate used by the taxpayer was based on an average of non-institutional quality buildings.

Neither granted nor denied.

9. The subject property is an institutional quality or an investment quality type property.

Granted.

10. 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.

Neither granted nor denied.

11. The subject property has had a zero vacancy rate for the last fifteen (15) years.

Neither granted nor denied.

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

Granted.

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

Neither granted nor denied.

14. 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 ten percent (10%).

Granted.

15. The conclusions reached by the taxpayer's representative in either the income approach or the comparable sales approach were not supported by credible evidence and/or by independent testimony.

Neither granted nor denied.

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

Neither granted nor denied.

17. 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:

18. 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.

19. 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.

20. 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.

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

Granted.

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

Melanie J. Ekstrom, Deputy Clerk