

Paszec Investors, Inc.

v.

Town of Durham

Docket No.: 23242-06PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2006 assessment of \$2,428,800 (land \$345,700; building \$2,083,100) on Map 5/Lot 1/3, a 3-story mixed use building, consisting of a restaurant and “pub” (on the first floor and in the basement) and ten apartments (on the second and third floors), on a 0.13 acre lot (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) the Property has mixed uses and, as demonstrated in Taxpayer Exhibit No. 1, a market analysis using the income and sales comparison approaches, but placing more weight on the income approach, indicates a market value of \$2,000,000;
- (2) the Town's market analysis also uses these two approaches, but is flawed;
- (3) the Property is only in "average" condition because of the 'wear and tear' caused by a student tenant mix; and
- (4) a substantial abatement is warranted based on the Taxpayer's analysis.

The Town argued the assessment was proper because:

- (1) the Taxpayer's market analysis is flawed and contains errors in its use of both the income and cost approaches and is less reliable than the Town's market analysis (in Municipality Exhibit A);
- (2) the Property is relatively new (four year old building, rebuilt after a fire), in good condition and in a great location, only a 'stone's throw' from UNH (the University of New Hampshire) with high traffic volumes, and the restaurant and pub are both popular and attractive;
- (3) the restaurant and pub square footage is higher (9,663 square feet) than shown in the Taxpayer's analysis;
- (4) in 2003, the restaurant owner (Mike Libby) indicated he was a business partner with the Taxpayer, which may cast doubt on whether the lease submitted is the result of an arm's-length transaction; and
- (5) the Taxpayer failed to meet its burden of proof.

The parties agreed the level of assessment was 86.8% for tax year 2006 as measured by the median ratio computed by the department of revenue administration. Following the September 19, 2008 hearing, the board directed its staff review appraiser (Theresa M. Walker) to

inspect and complete an independent valuation of the Property in the form of a written appraisal report. See RSA 71-B:14. On November 18, 2008, Ms. Walker filed her report (the “Walker Report”). The parties were sent copies of the Walker Report and requested to submit any written comments within twenty (20) days, but neither party has done so.

Board’s Rulings

Based on the evidence, the board finds the proper assessment to be \$2,204,700. The appeal is therefore granted for the reasons discussed below.

In order to prevail, the Taxpayer had the burden of proving the market value of the Property was less than approximately \$2.8 million (\$2,428,800 divided by 86.8% level of assessment = \$2,798,000, rounded). Assessments must be based on market value.

See RSA 75:1. The focus of a tax abatement appeal is proportionality, requiring a review of the assessment to determine whether the Property is assessed at a higher level than the level generally prevailing. See, e.g., Appeal of Andrews, 136 N.H. 61, 64 (1992); and Appeal of Town of Sunapee, 126 N.H. 214, 219 (1985).

Neither party submitted an independent appraisal of the market value of the Property by a duly qualified and licensed appraiser. Instead, each presented (in their respective prehearing statements) a market analysis prepared by its own representative: for the Taxpayer – Christopher Snow, who is a tax representative and licensed real estate broker; and for the Town – Robert Dix, its assessor. Both analyses employ the sales comparison and income approaches but come up with substantially different values. Mr. Snow estimates a market value of \$2 million, compared to Mr. Dix’s estimate of \$2.75 million.

Upon review of all of the evidence submitted, the board finds the Walker Report estimate of \$2,540,000 is the most credible indication of the market value of the Property as of the

assessment date, April 1, 2006. The parties and Ms. Walker agree the highest and best use of the Property “is for continued mixed use (restaurant and multi-family apartment).” See Walker Report, p. 6.

After considering the relatively few comparable sales available, Ms. Walker concluded there was a dearth of good market data for this type of property and that the income approach would provide the most reliable indication of value. Id. at p. 7; see also Town & Campus, Inc. v. Town of Durham, BTLA Docket No. 20204-03PT (February 28, 2007) (board finds income approach was “most appropriate method” of estimating value of mixed office, restaurant and student apartment buildings in same college town.) The board finds this conclusion is reasonable.

Ms. Walker agreed with the Town that the size of the restaurant on the Property was larger (9,633 square feet) than estimated by the Taxpayer, applied a market rent of \$17 per square foot, deducted estimated expenses from the income stream and then applied a 10.2% capitalization rate to arrive at her market value estimate. She also noted several deficiencies in the sales and income approaches used by the Taxpayer and the Town to arrive at their respective market value estimates. (Among other things, the board agrees with Ms. Walker that some of the contract rents used by the Taxpayer were “at below market terms” and the comparables used by the Town were not adjusted or discounted appropriately to recognize their differences with the Property. See Walker Report, pp. 12-13.)

On balance, the board finds the methodology and conclusions drawn by Ms. Walker to be well-supported and sound and that the best estimate of the market value of the Property is \$2,540,000. This estimate falls between the estimated values of the parties (\$2 million for the Taxpayer and \$2.75 million for the Town) and Ms. Walker provides ample support for her

conclusions and good explanations of why her estimate differs from the estimates presented by the parties. Applying the 86.8% level of assessment to the \$2,540,000 estimate yields an abated assessment of \$2,204,700 (rounded) and the appeal is granted to this amount.

In making a decision on value, the board looks at the Property's value as a whole (i.e., as land and buildings together) because this is how the market views value. Moreover, the supreme court has held the board must consider a taxpayer's entire estate to determine if an abatement is warranted. See Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985). However, the existing assessment process allocates the total value between land value and building value. The board has not allocated the value between land and building, and the Town shall make this allocation in accordance with its assessing practices. See RSA 76:11-a.

If the taxes have been paid, the amount paid on the value in excess of \$2,204,700 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.

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

Michele E. LeBrun, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Christopher Snow, Property Tax Advisors, Inc., 16 Pierce Street, Suite 3, Dover, NH 03820, representative for the Taxpayer; and Chairman, Town Council, Town of Durham, 15 Newmarket Road, Durham, NH 03824.

Date: December 22, 2008

Anne M. Stelmach, Clerk