

MTS Development Corp.

v.

City of Lebanon

Docket No.: 23302-06PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “City’s” abated 2006 assessment of \$1,707,200 (land \$243,300; building \$1,463,900) on Map 91/Lot 233, an office building on 0.22 acres at 2 West Park Street, (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, through its owner-manager, Richard Balagur, argued the assessment was excessive because:

(1) the City arbitrarily and without explanation increased the assessment on the Property from \$1,307,100 in April, 2006 (Taxpayer Exhibit No. 2) to \$2,048,100 in the fall of 2006, and then later abated the assessment to \$1,707,200, for tax year 2006;

(2) the analysis in Taxpayer Exhibit No. 1, using the income and sales comparison approaches to value, indicates the reconciled market value of the Property was \$1,335,630, supporting a substantial abatement;

(3) a substantial abatement is also indicated by the opinion letter of Bruce Waters using the income approach, included in the appeal document filed in 2007, which estimated the market value of the Property to be approximately \$950,000; and

(4) the City's appraisal failed to take into account the relative condition of the Property and some of the higher operating expenses associated with it, resulting in a value estimate that was too high.

The City argued the assessment was proper because:

(1) the value of the Property was a factual question resolved in litigation in the Grafton County Superior Court between Mr. Balagur and his former partner, Bukk Carleton, where conflicting appraisal evidence was presented and ruled upon;

(2) in that litigation, Presiding Justice Timothy J. Vaughn discounted the market value opinion Bruce Waters presented in his testimony (\$992,000) and accepted the higher market value conclusion in testimony and an appraisal (of the "leased fee interest") prepared by Duane H. Cowall (the "Cowall Appraisal," part of Municipality Exhibit A) of \$1,750,000 as of August 4, 2005;

(3) this estimate is reasonably close to the market value estimate in an appraisal prepared by Andrew LeMay, SRA, SRPA (the "LeMay Appraisal") which estimated the market value of the

Property was \$1,800,000 as of the assessment date, April 1, 2006, using the sales comparison and income approaches;

(4) Mr. Waters' opinion letter is also inconsistent with his October, 2004 letter in Municipality Exhibit A contending the Property had a much higher value; and

(5) the Taxpayer failed to meet its burden of proving disproportionality.

The parties agreed the level of assessment in the City was 93.4%, the median ratio computed by the department of revenue administration.

Board's Rulings

Based on the evidence, the board finds the assessment of the Property for tax year 2006 should be abated to \$1,494,400, based on a market value finding of \$1.6 million (rounded), adjusted by the agreed-upon level of assessment (93.4%). The appeal is therefore granted for the reasons discussed below.

The Property was built in 1880 and substantially renovated in 1986 and is known as the "Whipple Building" or the "Whipple Pulsifier Building." It is a three-story, mixed-use commercial (office and retail) building with a restaurant on the first floor and a partially finished basement. The Property has a good location in the historic downtown center of the City, fronting a pedestrian mall (Hanover Street) and West Park Street, with municipal (free) parking available nearby, as well as some public parking on West Park Street.

The record contains several market value analyses of the Property, including the Cowall Appraisal and an estimate by Mr. Waters, both submitted in prior litigation between the Taxpayer's partners (Balagur and Carleton), as well as the appeal-specific analyses and appraisal prepared by Mr. Balagur, Mr. Waters and Mr. LeMay, respectively. Neither Mr. Cowall nor Mr. Waters attended or testified at the hearing, limiting the value of the documentary evidence attributed to them somewhat. In addition, the board was unable to give Mr. Waters' much lower

market value estimate (\$950,000) any weight because of its inconsistency with another written opinion of value he gave.¹

In making market value findings, the board considers and weighs all of the evidence, including the respective appraisals or other analyses of each party, applying the board's "experience, technical competence and specialized knowledge" to this evidence. See RSA 71-B:1; and 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 has the ability, recognized in the statutes, to utilize its "experience, technical competence and specialized knowledge in evaluating the evidence before it").

Further, in making findings where there is conflicting evidence, the board must determine for itself the weight to be given each piece of evidence because "judgment is the touchstone." See, e.g., State of New Hampshire v. Frederick, BTLA Docket No. 23317-07ED (December 3, 2008); cf. 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. 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 finds the most reliable method of estimating the market value of the Property is the income approach and used the sales comparison approach only as a further check on the reasonableness of its findings. The parties used both approaches and agreed on many, but not all, of the elements underlying their respective market value estimates using the income approach. In the income approach, Mr. Balagur, the Taxpayer's owner-manager, and Mr. LeMay, the City's appraiser, essentially agreed in their estimates of potential gross income

¹ In his October, 2004 letter contained in Municipality Exhibit A, Mr. Waters suggested to Mr. Balagur's partner (Bukk Carleton) a listing price of \$1,975,000 and that a purchase offer for the Property in the range of \$1.6 million to \$1.8 million should be 'seriously considered' for acceptance.

(\$364,002), the vacancy factor (6%) and resulting effective gross income (\$342,162), but disagreed on the appropriate level of operating expenses (\$200,029 by Mr. Balagur compared to \$156,900 by Mr. LeMay). Because they also agree on the appropriate capitalization rate (11%), the key factual dispute needing resolution is the appropriate level of operating expenses for the Property using the income approach.

The board finds Mr. Balagur's estimate of stabilized operating expenses (based on some accounting and budgeting data in Taxpayer Exhibit No. 1) is too high for an established commercial property of this type in that his estimate represents approximately 58.5% of effective gross income. The board has recalibrated and adjusted these expenses in several respects to calculate an estimate of stabilized operating expenses of \$165,000, rounded, which is approximately 48% of effective gross income and is more reasonable, albeit slightly above Mr. LeMay's ratio of about 46%, which is less well supported. The adjustments made by the board to the operating expenses pertain principally to tenant fit-up reserve estimates (omitted entirely in the LeMay Appraisal, whereas the board allocated \$10,000) and whether tenant leasing expenses are material (the board combined these expenses with professional and miscellaneous expenses for a total of \$8,500, whereas Mr. LeMay appears to have omitted them entirely). The board finds these adjustments are appropriate and sufficient, especially in light of the substantial amounts budgeted for maintenance and repair (\$40,000 in the LeMay Appraisal, which the board applied, compared to \$42,775 in the Balagur analysis). In addition, the board finds these higher budgeted amounts for maintenance and repair make Mr. LeMay's lower capital reserve estimate of 3% more reasonable than Mr. Balagur's 5% estimate.

When the board's own estimate of stabilized operating expenses (\$165,000) is deducted from the agreed effective gross income (\$342,162), and the agreed capitalization rate (11%) is

applied to the resulting net operating income (\$177,000, rounded), the board's estimate of market value using the income approach is \$1.6 million, rounded.

The board found corroboration for this estimate when it reviewed the evidence presented on the sales comparison approach. Both parties agreed the metric of an estimated price per square foot (times 34,700 square feet of gross building area, "GBA") was reasonable, but disagreed on the relevant comparables and the appropriate adjustments needed to estimate a price per square foot. The board finds the comparables used by Mr. LeMay (also employed in the Cowall Appraisal) are reasonable,² but that a further (negative) adjustment of approximately 5% to each comparable is warranted, given the testimony and evidence regarding the condition of the Property (notably, the need for substantial roofing work and remedial costs for the underground oil storage tank). When this further adjustment is made, an estimated price per square foot of about \$46 can be derived (compared to the \$52 estimate of Mr. LeMay and the "\$41.12" estimate of Mr. Balagur), resulting in a market value estimate, using the sales approach, of approximately \$1.6 million ($\$46 \times 34,700 \text{ GBA} = \$1,596,200$), which correlates quite closely to the market value estimate calculated using the income approach.

In summary, the board finds the assessment on the Property in tax year 2006 should be abated to \$1,494,400, based on a market value finding of \$1.6 million adjusted by the agreed-upon level of assessment of 93.4%. The board has responded to the specific requests for findings of fact and conclusions of law made by the City in the Addendum to this Decision.

If the taxes have been paid, the amount paid on the value in excess of \$1,494,400 for tax year 2006 shall be refunded with interest at six percent per annum from date paid to refund date.

² The board also considered, but could not place much weight on, the "Commerce Building" comparable sale (24 Hanover Street) referenced by Mr. Balagur in Taxpayer Exhibit No. 1 because the board finds it to be quite inferior to the Property and underwent substantial renovations after it was sold for \$600,000 in November, 2005.

RSA 76:17-a. Until the City undergoes a general reassessment or in good faith reappraises the property pursuant to RSA 75:8, the City 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

Paul B. Franklin, Chairman

Albert F. Shamash, Esq., Member

Addendum A

The City's requests for findings of fact 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 and rulings, "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.

CITY'S REQUEST FOR FINDINGS OF FACT AND RULINGS OF LAW

1. In 1995, Richard Balagur and Bukk Carleton formed the MTS Development Corporation ("MTS") in an effort to purchase property in the City of Lebanon and conduct a real estate holding company.

Granted.

2. In 2004, Bukk Carleton filed suit against MTS and Richard Balagur in order to dissolve the corporation and establish a division of assets of the company for the stockholders.

Granted.

3. In 2004, Bukk Carleton owned 50% of all MTS stock.

Granted.

4. As of 2004, the primary corporate asset owned by MTS constituted the Whipple-Pulsifer Building located at 2 West Park Street, Lebanon, New Hampshire.

Granted.

5. On or about October 5, 2004, Bruce Waters of McLaughry Commercial, a commercial real estate broker, submits a letter to MTS, via Bukk Carleton, seeking to list the Whipple-Pulsifer Building for sale at \$1,975,000.00. In that same letter, Mr. Waters advises the principals of MTS to seriously consider offers in the range of \$1,600,000.00 to 1,800,000.00.

Granted.

6. On or about January 24, 2007, Richard Balagur and Adrienne Balagur issue correspondence to Bukk Carleton offering to sell their shares in MTS for \$1,000,000.00.

Granted.

7. On or about July 2, 2007, Richard Balagur submits documentation to the City in support of the MTS tax abatement request. Within that packet of documents, an Opinion Letter of Value, by Bruce Waters of McLaughry Commercial, sets a market value range for the Whipple-Pulsifer Building, as of February 10, 2006, between \$940,000.00 to \$960,000.00.

Granted.

8. The Waters' Opinion Letter of Value establishes a capitalization rate of 8.5%.

Granted.

9. As a result of the litigation between Bukk Carleton and Richard Balagur/MTS, an appraisal is produced by Duane H. Cowall, of Cowall Appraisal & Consulting, concerning the market value of the Whipple-Pulsifer Building as of August 4, 2005. The appraisal report shows that the market value for this building, as of August 4, 2005, to be \$1,725,000.00.

Granted.

10. On October 22, 2007, the Grafton County Superior Court issues an Order concerning the dissolution of the business association as between Bukk Carleton and Richard Balagur which primarily concerned the assets of MTS. Within that Order, the Court ruled, "the Court adopts the opinion of Cowall and establishes the value of the Whipple Building at \$1,750,000.00."

Granted.

11. MTS did not produce to the Board an appraisal, by a certified appraiser, to establish the market value for the subject property (the Whipple-Pulsifer Building) for the purposes of establishing proportionate tax assessment of this property.

Granted.

12. MTS did not produce any credible evidence which supports its claims of market value for the subject property.

Neither granted nor denied.

13. The City provided to the Board an appraisal of the subject property by Andrew LeMay of Real Estate Consultants of New England, Inc. (a certified appraiser). The appraisal report sets out an “as is” market value for the subject property, as of April 1, 2006, at \$1,800,000.00.

Granted.

14. The City’s appraisal relies upon two methods of value: 1) Sales Comparison Approach; and 2) Income Approach in accordance with the Uniform Standards of Professional Appraisal Practice.

Granted.

15. The Sales Comparison Approach, within the City’s appraisal, utilizes four (4) comparable and recent sales within the City of Lebanon in establishing a value under such an approach.

Granted.

16. The Sales Comparison Approach, within the City’s appraisal, reveals a market value for this property, as of April, 1, 2006, as \$1,800,000.00.

Neither granted nor denied.

17. The Income Approach, within the City’s Appraisal, utilized income and expenses provided by MTS in arriving at the Net Operating Income for purposes of Income Capitalization Analysis.

Neither granted nor denied.

18. The City’s appraisal establishes a fair and reasonable capitalization rate given the general market conditions for such a property within the City of Lebanon.

Granted.

19. The Income Approach, within the City’s Appraisal, establishes the market value for this property, as of April 1, 200, at \$1,700,000.00.

Neither granted nor denied.

20. The City's appraisal report accurately reflects the market value of the subject property, as of April 1, 2006, at \$1,800,000.00.

Denied.

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: MTS Development Corp., c/o Richard Balagur, President, 20 West Park Street, Lebanon, NH 03766, Taxpayer; Adele M. Fulton, Esq., Gardner, Fulton & Waugh, PLLC, 78 Bank Street, Lebanon, NH 03766, counsel for the City; and Chairman, Board of Assessors, City of Lebanon, 51 North Park Street, Lebanon, NH 03766.

Date: January 21, 2010

Anne M. Stelmach, Clerk