

Knight Brothers

v.

Town of Hillsborough

Docket Nos.: 23846-07PT/24594-08PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” assessments of \$2,790,100 (\$389,300 land, \$2,400,800 buildings) in tax year 2007 and \$2,460,100 (\$389,300 land, \$2,070,800 buildings) in tax year 2008 on Map 11P, Lot 341, 172 West Main Street, a 4.8 acre parcel of land and buildings operated as “Wyman Chevrolet” (the “Property”). The Taxpayer owned other properties in the Town but no dispute exists regarding the proportionality of their assessments for tax years 2007 and 2008.¹ For the reasons stated below, the appeals for abatement are granted.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the assessments were 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

¹ In fact, the appeal documents include references to these other properties, some of which were appealed, but the parties represented to the board (at the hearing of this appeal) that they had reached a settlement regarding the assessments on each of the other appealed properties and subsequently filed settlement documentation to this effect.

the Property's assessments were higher than the general level of assessment in the municipality.

Id. The Taxpayer carried this burden.

The Taxpayer argued the assessments were excessive because:

- (1) the Property was appraised by Morton J. Blumenthal in two reports (the "Blumenthal Appraisals"), using the sales and income approaches, with the July 21, 2008 appraisal (Taxpayer Exhibit No. 1) estimating the value of this Property, as of April 1, 2007, at \$2,200,000 and the August 24, 2009 appraisal estimating the value of the this Property, as of April 1, 2008 at \$1,900,000;
- (2) the Property was purchased in 1966 and an addition was constructed by the Taxpayer in 1988; the addition proved to be larger than necessary when General Motors ("GM") refused to allow the Taxpayer to display and sell two other automobile franchise brands (Saab and Volvo);
- (3) there are structural issues with the building, including defective concrete flooring, HVAC deficiencies, defective siding, and deteriorating paving (as shown in the photographs in Taxpayer Exhibit No. 3), possible environmental issues pertaining to an abandoned dry cleaning plant across the street as well as oil leaks from "old fashioned" lifts in the old building which are no longer functional;
- (4) in addition, street traffic has decreased substantially after construction of the by-pass resulting in a decline of cars and trucks sold (as shown in Taxpayer Exhibit No. 3, p. 3) which has reduced the value of the Property;
- (5) the Town's sales grid is from 2005, uses comparables from larger towns in locations with higher traffic densities and has other errors in the adjustments made, reducing its reliability; and
- (6) the Blumenthal estimates are the best evidence of market value but should be adjusted further (about 5% to 10%) for contamination and for the defective siding or approximately \$150,000.

The Town argued the assessments were generally proper because:

- (1) the Town did an update of values in tax year 2007 and used the cost approach to assess the Property;
- (2) the “stigma” and contamination issues claimed by the Taxpayer were not known in 2007 and 2008 and therefore did not affect the market value of the Property in each year; and
- (3) six sales comparisons, when adjusted, are supportive of the 2007 recommended and 2008 assessed values.

The parties agreed the levels of assessment were 98.9% in 2007 and 107% in 2008, the median ratios computed by the department of revenue administration (the “DRA”).

Following the hearing, the board requested one of its review appraisers (Theresa M. Walker) to perform an independent valuation for the purpose of estimating the retrospective market value of the Property as of the assessment dates. Ms. Walker filed her report (the “Walker Report”) with the board on April 21, 2010 and copies were provided to the parties. The Taxpayer filed comments pertaining to the Walker Report on May 10, 2010 and no comments were filed by the Town. The Walker Report and the Taxpayer’s comments are part of the record (RSA 541-A:31, VI), and as it does with other evidence, the board gives it the weight it deserves. Thus, the board may accept or reject the review appraiser’s recommendation.

Board’s Rulings

Based on the evidence presented, the board finds the proper assessments to be \$2,348,875 and \$2,541,250 for tax years 2007 and 2008 respectively, calculated by applying the levels of assessment to the board’s finding of a market value of \$2,375,000 of the Property for both years. The appeals are therefore granted for the reasons discussed below.

As noted above, the Taxpayer originally appealed the assessments on a number of properties. By the time of the hearing, however, the only remaining appeals for the board to decide are the proportionality of the tax year 2007 and 2008 assessments on the Property, operated as the Wyman Chevrolet business.

The Property consists of a 35,734± SF “auto dealership” with an asphalt paved parking lot for 200± vehicles, a 1,882 square foot wood-frame body shop and a small wood-frame structure (in poor condition) located to the rear of the site. The improvements to the auto dealership were built in two “phases,” the original construction in 1966 and the second phase in 1988. The two phases are connected by a service area with showrooms located at each end of the building. The original phase was constructed for use as a GM dealership owned and operated by the Taxpayer (the Knight Brothers). The second phase was constructed for several reasons: 1) the GM dealership had outgrown the existing building; 2) the Taxpayer made a decision to construct a new showroom and add on to the service area as the old body shop was not “particularly functionable [sic]” to handle repairs of medium duty trucks and vehicles; and 3) the Taxpayer intended to utilize the original showroom with another line of vehicles by taking on a foreign franchise. Discussions were held with Volvo and Saab and the Taxpayer’s intent was to have a dealership with offices in the original showroom, relocate the Wyman Chevrolet dealership to the new addition and have a shared service area. The Taxpayer’s plans were abandoned when, in order to sign its dealer sales and service agreement with GM, the Taxpayer had to agree it would not display any other franchises nor would GM allow them to lease to any other competing automobile brand on the Property. Attempts to lease the original portion of the building for other uses were unsuccessful.

In addition, the Taxpayer argued the Property suffers from other limiting conditions and constraints which affect its value, emphasizing two in particular: 1) the “Dryvit” siding on the building has failed, resulting in extensive mold and mildew which will require remediation and ultimate removal and replacement of the siding; and 2) a former laundry facility located across the street suffers from environmental contamination resulting from the use of various solvents discharged into the ground; three monitoring wells were placed on that site during a 2001-2002 investigation and in April 2009 monitoring wells were installed on the Property (Wyman Chevrolet), which resulted in a determination, in June 2009, the contamination had migrated to the Property. (See Taxpayer Exhibit No. 5.) The Taxpayer also argued additional factors affect the Property’s value: 3) the Fall, 2004 construction of the Hillsboro by-pass adversely affected traffic flow past the Property and there is no longer highway visibility to the Property, which impacts the automobile business; 4) the size of the building far exceeds the dealer facilities’ planning guides for the number of vehicles sold; 5) the HVAC heating/ventilation/air-conditioning system is too small and poorly designed, the furnace is located in the old section of the building and electric heaters must be used in the new section; 6) the floor of the body shop area was designed to have six inches of concrete or greater but was found to have only two to three and one-half inches which is not adequate for its use; and 7) four in-floor lifts in the original portion of the building are inoperable and oil from these lifts has leaked into the ground causing a concern as to how much contamination they have created.

The board has considered all of these specific items insofar as they have an impact on market value because the test of proportionality is market value. See RSA 75:1; Appeal of Andrews, 136 N.H. 61, 64 (1992) (the New Hampshire Constitution requires all taxpayers be assessed at the same proportion of market value.) In weighing evidence to arrive at a

proportional assessment, “judgment is the touchstone.” See Appeal of Public Service Co. of New Hampshire, 124 N.H. 479, 484 (1984).

Given the evidence in these appeals, the board finds the sales comparison approach is the most appropriate approach to value the Property. The board further finds the highest and best use of the Property, as improved, is a multi-lined automobile dealership.

In determining whether the Property was proportionately assessed, the board considered all of the evidence presented in making its market value findings, including the Blumenthal Appraisals and the Walker Report. The board finds the Walker Report to be the best evidence of value with some adjustment. The board concurs with Ms. Walker’s highest and best use analysis of the Property, as improved, as a multi-lined automobile dealership. The board finds the Blumenthal Appraisals are flawed as they are based on the premise the “marketing of this space would have to be for a use acceptable to GM...” and thus concludes the highest and best use of the Property is for an automobile dealership for the 1988 section (with a substantial mezzanine area for “storage or other purposes”) and, in the 1966 section, “complimentary automotive-related business or other business acceptable to General Motors, relieving the automobile dealership of the current burden of financial maintenance.” (See Taxpayer Exhibit No. 1 at pp. A-15, A-17 and A-18, see also Taxpayer Exhibit No. 2 at p. B-21.) The board disagrees with this analysis. Undue consideration of the dealership agreement would result in a market value estimate of the Property as a GM dealership, not the market value of the fee simple interest. The market value of the Property must be determined devoid of all business related components; thus the dealership agreement and non-dualing clause must be ignored. (See Walker Report, p. 10.) To consider the dealership agreement in a market analysis would result in a market value estimate as a GM dealership, not market value of the fee simple interest as is required to

determine whether the Property was disproportionately assessed. (Id.) Thus, the board finds the fundamental valuation premise in the Blumenthal Reports to be flawed.

The board finds the Walker Report to be thorough and well analyzed and concurs with the \$2,500,000 market value determination prior to the application of a “10% Adjustment for Condition/Contamination Issues.” (Id., pp. 17-18.) However, given the lack of credible evidence regarding the cost to cure and the Taxpayer’s burden of proof, the board finds a more conservative adjustment of 5% for condition/contamination issues is appropriate.

Although the market may recognize some diminution in value for the potential contamination from the laundry facility across the street, there was no evidence of contamination on the Property until 2009. The Taxpayer failed to establish a prudent buyer would have given this potential issue, undocumented as of the 2007 and 2008 assessment dates, more weight in arriving at a negotiated purchase price for the Property. On the other hand, there was substantial evidence regarding the deterioration of the siding which would be plainly visible to a potential buyer and, in all likelihood, would have been taken into account as a cost to cure expense, even without specific cost information available in these appeals.

Applying a 5% adjustment results in a market value finding of \$2,375,000 for each tax year², which the board further adjusted by the levels of assessment of 98.9% and 107% for tax years 2007 and 2008.

If the taxes have been paid, the amount paid on the value in excess of \$2,349,875 and \$2,541,250 for tax years 2007 and 2008 respectively 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

² Based on the evidence presented, the board finds the market value of the Property did not change materially between these two tax years.

reassessment or in good faith reappraises the property pursuant to RSA 75:8, the Town shall use the ordered tax year 2008 abated 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 with a copy provided to the board in accordance with Supreme Court Rule 10(7).

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Michele E. LeBrun, Member

Albert F. Shamash, Esq., Member

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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; Chairman, Board of Selectmen, Town of Hillsborough, PO Box 7, Hillsborough, NH 03244; and Cross Country Appraisal Group, LLC, 210 North State Street, Concord, NH 03301, Contracted Assessing Firm.

Date: 6/30/10

Anne M. Stelmach, Clerk