

TD Banknorth D/B/A Bank of NH

v.

Town of Epsom

Docket No.: 23858-07PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2007 assessment of \$852,800 (land \$620,500; building \$232,300) on Map U05/Lot 58, a one story bank building on 0.58 acres (the “Property”). For the reasons stated below, the appeal for abatement is 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 assessment was higher than the general level of assessment in the municipality. Id. We find the Taxpayer failed to prove disproportionality.

Subsequent to the hearing, the board, on its own, took a view of the Property. This Decision is based on all of the oral and documentary evidence presented by the parties at the hearing as well as the board’s view.

The Taxpayer argued the assessment was excessive because:

- (1) the bank has only two drive-up lanes that cannot be expanded to allow for additional lanes due to the proximity of wetlands to the rear of the lot; this requires the ATM be contained in a detached kiosk;
- (2) there are safety issues with ingress and egress to the Property and cars exiting the Property must turn right only and go around the rotary (“Epsom traffic circle”);
- (3) sump pumps are located under the slab in the basement and outside the building to control the periodic flooding into the basement; there are also drainage issues in the parking lot which does not properly drain during storms;
- (4) parking is limited to 10 spaces and two handicap spaces to the west and a parking easement acquired on October 12, 2006 for an 11 additional spaces to the east which is restricted to bank hours;
- (5) the Property is located in the 100 year flood plain zone;
- (6) the water is not potable due to contamination from a prior gasoline leak from the abutting gas station;
- (7) the rest rooms are located in the basement and no elevator exists in the building; therefore, the building is not ADA (Americans with Disabilities Act) compliant;
- (8) the Town’s acreage on the assessment-record card of 0.58 is incorrect as it does not reflect the eastern boundary line created as a result of a November 11, 2000 subdivision and sale; the correct area is in the range of 0.70 and 0.75 gross acres; and
- (9) an appraisal prepared by Duane H. Cowall, MAI of Cowall Appraisal & Consulting (the “Cowall Appraisal”) estimated the market value as of April 1, 2007 to be \$470,000.

The Town argued the assessment was proper because:

- (1) the Cowall Appraisal did not properly take into consideration the high traffic count, good location and minimal banking competition;
- (2) an analysis of the Cowall Appraisal's comparable sales, when adjusted for those factors, supports a range in value of \$815,600 to \$987,900;
- (3) the bank is the only bank in Epsom with the closest bank at least 10 miles away which the Cowall Appraisal fails to recognize;
- (4) the Property has operated as a bank since 1975 and is in one of the busiest locations in the state, far superior to the Cowall Appraisal's comparable sales; although the improvements of the Cowall Appraisal's comparable sales may be of better quality, the location "trumps" all of the building's shortcomings;
- (5) the ingress and egress issues have been addressed; there is a turning lane for eastbound traffic entering the bank and the right turn only exit allows for vehicles to safely travel around the rotary;
- (6) a 2005 department of environment services ("DES") report indicated MTBE levels were significantly below standards for drinking water and typically commercial properties tend to purchase bottled water; and
- (7) should the Property be sold, nothing in the deed precludes the parking easement from being transferred with the Property.

The parties stipulated to the median ratio of 102.3% as determined by the department of revenue administration for tax year 2007.

Board's Rulings

Based on the evidence, the board finds the Taxpayer failed to prove the Property was disproportionately assessed.

To achieve proportionality, real property must be assessed at the market value of its highest and best use. RSA 75:1. The New Hampshire Supreme Court “has held that property is to be valued at its ‘best and highest use’.” State v. Town of Allenstown, 124 N.H. 487, 491 (1984) citing 590 Realty Co., Ltd. V. City of Keene, 122 N.H. 284, 285 (1982) and Blue Mountain Forest Association v. Town of Croydon, 119 N.H. 202, 203 (1979).

Further, as the Appraisal Institute notes:

In all valuation assignments, opinions of value are based on use. The highest and best use of a property to be appraised provides the foundation for a thorough investigation of the competitive position of the property in the minds of market participants. Consequently, highest and best use can be described as the foundation on which market value rests. (Emphasis added.)

See The Appraisal of Real Estate, 305 (12th ed. 2001).

The parties agreed the Property is developed so that it is maximally productive (one of the elements of a highest and best use analysis) as a bank. Thus, any valuation by the sales comparison approach (the approach to value relied upon by both parties) must recognize this highest and best use premise and any adjustments must be consistent with this premise.

First, the board finds the Cowall Appraisal does not sufficiently adjust for the Property’s excellent location in comparison to the comparables utilized. The board agrees with the Town that the high traffic count at the Epsom traffic circle is a highly desirable factor that any purchaser of the Property for a bank would consider. The Taxpayer argued the Town’s estimate of 25,000 vehicles per day is not correct for traffic passing the Route 4 frontage of the bank. However, as the board noted during its view, the Property is visible by traffic traveling either

Route 4 or Route 28 and thus the exposure to both the north/south and east/west traffic is a benefit to the Property. The village location of the Antrim and Hillsborough sales are significantly inferior to the Property's location especially considering the diminished traffic on Route 9 in Hillsborough due to the Hillsborough by-pass which was constructed approximately 10 years ago. The Property's location has twice the traffic of the 2400 Lafayette Road, Portsmouth sale when the total traffic of the Epsom traffic circle is considered. The board does acknowledge the Portsmouth sale location at a "pad" of a shopping center is a desirable locational feature and that it is likely one of the main reasons it sold for \$950,000 despite it being a relatively small bank with a remote ATM.

Second, the board agrees with the Town that there is less banking competition to the Property than the Portsmouth sale and certainly the Nashua listing utilized as comparable #4 in the Cowall Appraisal. Because it has been determined the highest and best use of the Property is for a bank, any purchaser of the Property would consider this competitive advantage coupled with the excellent exposure and traffic flow.

Third, the board does not find that the Property's location is hampered by any ingress and egress deficiencies. When, approaching the Property eastbound on Route 4, there is a center turning lane to facilitate left hand turns into the bank. While the exit from the bank is limited to a right turn only (west on Route 4), the bank's proximity to the Epsom traffic circle (one property removed from the circle) allows exiting traffic to have the ability to go east or west on Route 4 or north or south on Route 28 within a minute by traversing the circle. Based on the board's view and experience, any disruption to exiting the Property due to queuing up of cars during peak traffic times is a relatively minor and insignificant factor relative to the Property's excellent location.

The board acknowledges the Taxpayer's presented some evidence of negative features of the Property. The site is limited by its small size and the wetlands associated with the Suncook River to the rear as to any significant expansion potential for the bank. This is evidenced by the standalone ATM facility as opposed to having it as a third drive-through bay. The small size of the lot also limits available parking, although the board notes this limitation is mitigated to a large extent because the Property enjoys a parking easement to its benefit on the adjoining property of 11 spaces. On its view, the board observed the spaces appeared to be part of the bank paving area and were proximate to the ATM kiosk. The parking easement quitclaim deed contained in the Cowall Appraisal has no restriction as far as the transmissibility of the easement but that the parking can only be utilized during the bank's business hours. Again, because the highest and best use of the Property is as a bank, the board does not see the bank easement restriction affects market value.

The Taxpayer argued the MTBE contamination of the Property's well water affected the Property's market value and required bottled water to be purchased for drinking water. The board notes several 2005 through 2008 reports of the level of MTBE by DES (Cowall Appraisal, p. A-8 - A-10) indicate the MTBE levels were below state standards and the concentrations appeared to be diminishing with time. While the board appreciates there may be some stigma related to drinking the well water, the water supply appears to be adequate for all other purposes a bank would need and the cost of bottled water is nominal and often incidental to many commercial businesses that are open to the public. Thus, we do not find the MTBE presence to be a significant factor affecting market value.

Last, the Taxpayer also noted the bathroom facilities are located in the basement and are not ADA accessible to the public. While having ADA public accessibility to restrooms may be

ideal, most banks do not provide public restroom facilities. Consequently, the board again concludes this factor is not a significant one affecting market value. In brief, the several limiting/negative factors raised by the Taxpayer are, as the Town noted, “trumped” by the Property’s excellent location, high traffic exposure and limited banking competition. The Town’s assessed value of \$852,800 compared to the three sales presented by the Taxpayer and analyzed by both parties does not appear out of line with the unadjusted sale prices of the Portsmouth, Hillsborough and Antrim properties, especially when, again, the Property’s premier factors noted above are considered.

The Taxpayer presented in Taxpayer Exhibit No. 2 the assessment-record cards, plans and sale prices of commercial retail condominiums on the southwest quadrant of the Epsom traffic circle. The Taxpayer argued the Town’s site values for the condominiums provide a basis for abating the Taxpayer’s land assessment value. The board viewed the condominiums and their location and concludes they do not provide good comparable market data from which to value the Property’s site. The common area of the three retail condominiums share a singular access point, are chopped up and disjointed in their orientation to Route 4 and Route 28 and comprise an entirely different legal configuration of the sticks of the bundle of rights than the fee simple ownership of the Property. Consequently, the board was unable to give any weight to those properties as a basis for the land valuation of the Property.

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

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

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 Epsom, PO Box 10, Epsom, NH 03234; and Loren J. Martin, Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258, Contracted Assessing Firm.

Date: 2/24/10

Anne M. Stelmach, Clerk