

Benning Street, LLC

v.

City of Lebanon

Docket No. 24657-08PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “City’s” tax year 2008 assessment of \$8,130,700 (land \$965,000; buildings \$7,165,700) on Map 115, Lot 13, 82 Benning Street (the “Property”), five interconnected single-story buildings used as a manufacturing plant on 10.19 acres. 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 is not on Route 12A, a commercial corridor, but is on a side street and, given the Property's size, zoning and other factors, the highest and best use is its present improved use as an industrial property;
- (2) a survey of ten sales of comparable industrial properties (contained in Taxpayer Exhibit No. 1) indicates the Property is overassessed;
- (3) as indicated by the grid in Taxpayer Exhibit No. 1, these properties sold for a range of values from \$7 to \$44 per square foot;
- (4) based on this grid, the best estimate of the market value of the Property is approximately \$5.5 million, reflecting a price per square foot of \$35; and
- (5) when this estimate is adjusted by the level of assessment in the City, the assessment should be abated to \$5,137,000 (rounded).

The City argued the assessment was proper because:

- (1) while zoned for an industrial use, the Property has a very desirable location close to the Route 12A exit (Exit 20 off Interstate 89) and is within a "sea of retail development," including Shaw's Powerhouse Plaza;
- (2) the Property was purchased by an investor in 2003-04 for \$6.7 million;
- (3) the Taxpayer's comparables are not valid because most are in inferior locations far from the City, some are primarily warehouse buildings, which generally have lower values than industrial buildings used for manufacturing, and some had a changed use after being purchased;
- (4) one of the Taxpayer's comparables is located in the City (56 Etna Road) and sold for \$44 per square foot, well above the Taxpayer's \$35 per square foot estimate of value; and
- (5) the Taxpayer failed to meet its burden of proving disproportionality.

The parties agreed the level of assessment in the City for tax year 2008 was 93.7%, the median ratio calculated by the department of revenue administration. After the March 10, 2011 hearing, the board decided to engage its RSA 71-B:14 staff review appraisers to perform an inspection of the Property, review all submitted evidence and perform an independent valuation of the Property. The board is authorized to engage its review appraisers for this purpose under this statute. See Appeal of Sokolow, 137 N.H. 642 (1993).

One of its review appraisers, Ms. Theresa M. Walker, completed these steps and filed her report (the “Walker Report”) with the board on June 7, 2011. Both parties were given a twenty (20) day period to submit written comments. The Taxpayer notified the board in a June 20, 2011 letter that it had no comments or objections to the Walker Report. The City filed extensive comments on June 27, 2011 (designated as “Preliminary Comments”) and questioned whether the Walker Report, based on various criticisms, is “a true indicator of value”. Upon review of these submissions, the board issued a July 21, 2011 Order Scheduling View and Limited Hearing and held the view and a limited hearing on October 27 and 28, 2011.

Board’s Rulings

Based on the evidence presented, the board finds the Taxpayer met its burden of proving the Property was disproportionally assessed and the appeal is therefore granted. For the reasons discussed below, the board finds the market value of the Property to be \$6.8 million in tax year 2008. When adjusted by the agreed upon level of assessment (93.7%) for that tax year, the assessment is abated to \$6,400,000.

A. The City's Procedural Motions

As the first issue at the March 10, 2011 hearing, the board heard further arguments on the City's Motion in Limine ("Motion") and the Taxpayer's objection to that motion. The Motion sought exclusion of a package of documents prepared by the Taxpayer's representative (Christopher Snow of Property Tax Advisors, Incorporated) and submitted to the City on February 25, 2011, just two weeks before the hearing date, with a copy sent to the board. According to the City, this package had not been previously provided, either at the required mediation (held on March 9 and 10, 2010) or prior to that time. (See Tax 203.07 (Mediation).) The board agreed with the City's argument this package (designated a "Market Analysis") is an appraisal, since it meets the appraisal definition contained in the board's rules (see Tax 102.07). It therefore should have been submitted to the City by the Taxpayer's representative at or before the time of the mediation.

As provided in Tax 203.07(g), the consequence for a taxpayer's failure to do so is exclusion of any such appraisal at the hearing on the merits. Consequently, the board granted the Motion and excluded the "Market Analysis" as evidence.¹ (This exclusion ruling also applied to an earlier version of the "Market Analysis" that was attached to the appeal document, based on the application of Tax 201.35, because Mr. Snow erred in not treating this document as an appraisal and not notifying the City of his intention to use it, as provided in this rule.)

Following these rulings, the hearing proceeded with Mr. Snow presenting the grid, photographs and assessment-record cards for ten comparable properties contained in Taxpayer

¹ At the hearing, Mr. Snow repeated an argument made in another appeal that Tax 203.07 should not apply in this appeal because it was adopted on September 8, 2009, shortly after the statutory deadline for filing tax year 2008 appeals (September 1, 2009). The board finds this 'retrospective application' argument is without merit for the reasons explained in Roselawn Properties, LLC v. Town of Durham, BTLA Docket No. 24671-08PT (see Order denying rehearing dated March 16, 2011).

Exhibit No. 1 and testifying regarding his knowledge and analysis of them. The City did not object to the introduction of this exhibit and instead proceeded to cross-examine the Taxpayer's representative regarding it to delve into the central issue of whether the Property was disproportionately assessed.

At the close of the Taxpayer's presentation, the City's attorney made an oral motion to dismiss the appeal, which the board denied because the board was unable to agree with the City that the Taxpayer failed to present any evidence of disproportionality. A trier of fact could reasonably conclude, based upon the evidence presented by the Taxpayer the market value of the Property, as of the assessment date, was below the approximately \$55 per square foot reflected by the City's assessment,² even if not entirely persuaded the value was as low as asserted by the Taxpayer. Following this ruling, the City proceeded to present its own witnesses (Dave McMullen and Rick Vincent) to counter the Taxpayer's arguments that the Property was disproportionately assessed.

The board has considered both parties' evidence, the Walker Report, its own view of the Property and the additional evidence presented at the October limited hearing. This evidence forms the basis of the market value findings discussed below.

B. The Board's Market Value Findings

As the parties well recognize, assessments must be based on market value. See RSA 75:1; and, e.g., Porter v. Town of Sanbornton, 150 N.H. 363, 368 (2003). In arriving at a proportional assessment, all relevant factors affecting market value must be considered. Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1975).

² The equalized value of the assessment is \$8.7 million (\$8,130,700 assessment divided by 93.7% level of assessment = \$8,677,374). \$8.7 million divided by 157,240 square feet is approximately \$55 per square foot.

Although neither party presented a formal appraisal presented by a qualified appraiser, the parties disagree sharply regarding the market value of the Property as of the assessment date. The magnitude of this difference is about \$3.2 million, since the indicated market value of the City's tax year 2009 assessment is approximately \$8.7 million (see fn. 2) and the Taxpayer contends the Property's market value is \$5.5 million ($\$35 \times 157,143 = \$5,500,005$).

In making market value findings, the board applies its "experience, technical competence and specialized knowledge" to the evidence presented. 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, "judgment is the touchstone." See 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, 115 N.H. at 68 (1975); see also Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 256 (1994).

In this appeal, the Taxpayer relied on Taxpayer Exhibit No. 1 prepared by Mr. Snow and his testimony. Taxpayer Exhibit No. 1 contains a grid and other data, photographs and the assessment-record cards for ten comparable industrial properties located throughout the State, including one in the City (56 Etna Road), another in Claremont, and eight others in more distant locations (from Concord to Dover). Mr. Snow argued the City's assessment (reflective of a \$56 value per square foot value using the 92% level of assessment assumed in Taxpayer Exhibit No. 1) was disproportional, when compared to the range of \$7 to \$44 per square foot values he calculated. Based on this evidence, Mr. Snow concluded a \$35 per square foot value for the Property was reasonable.

The Walker Report prepared at the board's request is a summary appraisal and was based on a physical inspection and measurement of the Property by Ms. Walker, consideration of many sales (before she chose the four most comparable, located in Bedford, Hooksett, Hudson and Merrimack), and development of an estimate of value using both the sales comparison approach and the income approach (using rental comparables from Bedford, Manchester, Merrimack and Rochester).

The results of Ms. Walker's physical inspection of the Property are described on pages 5-6 of the Walker Report. She noted the Property has five interconnected single-story buildings, constructed from 1964 to 1979, and has $\pm 157,240$ square feet. The buildings have approximately 27,080 square feet of "average quality office space" (17% of the total) and the bulk of the space is used for "industrial/light manufacturing" purposes. Ms. Walker noted the large building size made it harder to find appropriate sale comparables and she found none in the City. Ms. Walker's reconciled market value estimate is \$5,350,000, which equates to about \$34 per square foot ($157,240 \times \$34 = \$5,346,160$).

In the City's Preliminary Comments, through its cross-examination of Ms. Walker and the testimony of its own witnesses at the limited hearing, the City attempted to establish the Walker Report is "fundamentally flawed" and should be disregarded. The board does not agree and finds these charges to be exaggerated. While reasonably informed minds can and often do disagree regarding the weight to be given location, the likelihood of a change in highest and best use and other factors in estimating market value, the board finds the Walker Report, supplemented by her testimony at the limited hearing, to be well-reasoned and well-documented, even if, in the final analysis, a further adjustment is warranted.

The City's specific arguments against the Walker Report are manifold (as reflected in the Preliminary Comments and the arguments at the October limited hearing) but center on two questions: (1) what is the highest and best use of the Property, given its proximity to the highly developed Route 12A retail corridor?; and (2) whether it is appropriate to compare the Property to industrial properties in other areas of the State which had weaker economies and real estate markets?

The City, however, offered no highest and best use conclusion of its own at the original hearing or in the Preliminary Comments responding to the Walker Report and did not present any property sales in or near the City comparable in size to the Property (over 150,000 square feet). Nor did the City submit any exhibits of its own to challenge Ms. Walker's analysis and conclusion. In other words, although the burden of proving disproportionality rests with the Taxpayer, the City made no attempt to submit a written analysis of its own to estimate a market value for the Property supportive of the \$8,130,700 assessment for tax year 2008 and the board is unable to find that assessment is proportional.

Considering the evidence as a whole, including each of the points of contention with the Walker Report raised by the City, the board finds a proportional assessment of the Property in tax year 2008 should be based on a market value estimate of \$6.8 million, rounded. The board arrived at this estimate using a price per square foot of approximately \$43 (157,204 square feet times \$43 = \$6,759,772). While this estimate is higher than one using the \$34 per square foot estimated in the Walker Report or the \$35 per square foot estimated by Mr. Snow, it is lower than the \$55 per square foot reflected in the assessment. This \$6.8 million market value estimate is slightly higher than the \$6.7 million purchase price noted above.

The board finds merit in the testimony of the City's witnesses that the economy and prospects for industrial activity were somewhat stronger in the City than in many parts of the State. The City is close to a premier academic institution (Dartmouth College) which gives it some competitive advantages in attracting technology companies. The company occupying the Property for over 20 years (Thermadyne) was founded by technological entrepreneurs with Dartmouth affiliations, which helps explain the decision to locate the company in the City. The City also pointed out the relatively low vacancy rate for industrial property in the City (about 3%) as another measure of the strength of the local market. The board finds, however, that this vacancy rate is somewhat misleading since it is based on industrial properties generally of a much smaller size, including those in the vicinity of the airport.

The board further notes one sale in the City of an industrial property, 56 Etna Road, in June, 2005 for \$3.735 million is reflective of a price of approximately \$36 per square foot (based on 103,840 square feet). The building is situated on a slightly larger lot (11.55 acres), but is one-third smaller in size and is newer and of a better quality (as evident from the photographs in Taxpayer Exhibit No. 1). The purchaser of 56 Etna Road (the Dartmouth College Trustees) is affiliated with Dartmouth.

The board also examined the location, zoning and configuration of the Property and how it impacts the determination of market value. There is no question regarding the proximity of the Property to a very heavily trafficked commercial center of activity along Route 12A. Route 12A intersects with Interstate 89 and is the last entrance and exit point leading to and from Vermont and is also quite close to Interstate 91, the major north-south highway in that state. (These locational attributes and the "generally strong industrial and office market" in the City are described in more detail on pages 3 and 4 of the Walker Report.)

While the present zoning is “Light Industrial” and the Property, because of its irregular shape and building configuration, is a non-conforming lot (due to the setback and maximum lot coverage requirements detailed on page 5 of the Walker Report), it is not unreasonable to consider whether a different highest and best use could evolve at some point in time, assuming the required changes in zoning and variances are applied for and approved and growth in demand for retail commercial development continues requiring expansion more distant from the Route 12A corridor. At that still indeterminate point in the future, the highest and best use could change to commercial from industrial, but this would no doubt require substantial conversion costs to the existing buildings (which, among other things, have no central heating or air-conditioning system) or outright demolition and rebuilding.

There was no evidence presented that anyone, including the Taxpayer or a third party, has developed any concrete plan or proposal to change the current manufacturing use of the Property to one involving some type of commercial development. Nonetheless, would a knowledgeable potential buyer be willing to pay a very substantial premium based on the possibility of a change in use at some indefinite point in the future? Is such a potential change in use “highly speculative or remote,” on the one hand, or “reasonably probable,” on the other?

These are relevant questions which the board has noted and addressed in prior decisions.³ The board finds no definitive answers to these questions exist, notwithstanding the City’s attempt to cast doubts on the highest and best use conclusion made by the Taxpayer and in the Walker Report. The board has nevertheless considered the questions and finds some premium is warranted because, based on the evidence presented, future commercial development is

³ See, e.g., Coroc Lakes Region, LLC v. Town of Tilton, BTLA Docket Nos. 23508-07PT/24302-08PT (June 10, 2010); Kerouac v. City of Nashua, BTLA Docket No. 17896-98PT (May 3, 2001); and the appraisal and other authorities cited therein.

somewhat more than “highly speculative” and somewhat less than “reasonably probable.” In other words, the board finds it is more likely than not a buyer would pay something more for the Property due to its location in the City and proximity to a major commercial corridor than if the Property were not so situated.

Applying its judgment and experience, taking all the relevant factors into consideration and discounting for time (for future transitioning to a possible commercial use), the board finds a premium in the range of approximately 25% is reasonable.⁴ This premium was applied as an adjustment in the estimated value from \$34 to \$43 per square foot, resulting in the \$6.8 million market value estimate noted above for tax year 2008. Applying the 93.7% level of assessment to this estimate yields an abated assessment of \$6,400,000, rounded.

If the taxes have been paid, the amount paid on the value in excess of \$6,400,000 for tax year 2008 shall be refunded with interest at six percent per annum from date paid to refund date. 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.

Any party seeking a rehearing, reconsideration or clarification of this Decision must file a motion (collectively “rehearing motion”) 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

⁴ The board’s thinking on this issue is influenced, in part, by the concept of “interim use” explained in the appraisal literature, where the market could recognize the current highest and best use of a given property “is likely to change in a relatively short time—say, five to seven years.” See The Appraisal Institute, The Appraisal of Real Estate (12th ed. 2001), pp. 323-24. (See also the 11th edition of this text, published in 1996 (at pp. 312-14), where an example of this effect is given.) Cf. Curran v. Town of Hollis, BTLA Docket Nos. 19808-2002 and 20445-2003PT (May 3, 2005); and Post Office Square Nominee Trust v. Town of Newport, BTLA Docket No. 11398-91PT (May 3, 1995). Although the board does not find a formal interim use analysis is required to determine the market value of the Property, the approach is suggestive of how a value premium can arise if there is a supportable perception the highest and best use may change in a reasonably foreseeable manner in the future.

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

CERTIFICATION

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Christopher Snow, Property Tax Advisors, Inc., 125 Brewer Lane, Suite 6, Portsmouth, NH 03801, Taxpayer Representative; Shawn M. Tanguay, Gardner Fulton & Waugh P.L.L.C., 78 Bank Street, Lebanon, NH 03766, Counsel for the City; and Chairman, Board of Assessors, 51 North Park Street, Lebanon, NH 03766.

Date: 12/9/11

Anne M. Stelmach, Clerk