

Varsity Durham, LLC

v.

Town of Durham

Docket Nos.: 24680-08PT/25378-09PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2008 and 2009 assessments on 11 lots with land and buildings (collectively, the “Property”) used for rental student housing.¹ The Town assessed the Property for a total of \$19,106,800 in tax year 2008 and \$19,166,800 in 2009. (The table on the next page shows the assessments on each lot.)

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 the Properties’ assessments were higher than the general level of assessment in the municipality. Id. The board finds the Taxpayer failed to prove disproportionality.

¹ The Taxpayer owns a twelfth lot (Map 2/8/13, at 33 Madbury Road) that was not appealed and neither party claimed this lot was disproportionately assessed at \$542,500 in each tax year.

MAP/LOT NUMBER & STREET ADDRESS	TOTAL ASSESSMENT 2008	TOTAL ASSESSMENT 2009
2/8/9 (37 Madbury Road)	\$ 868,600	\$ 928,600
2/8/14 (2 Strafford Avenue)	\$ 1,160,300	\$ 1,160,300
2/8/70 (14 Strafford Avenue)	\$ 3,577,200	\$ 3,577,200
2/8/71 (10 Strafford Avenue)	\$ 1,978,200	\$ 1,978,200
2/11/6 (24 Madbury Road)	\$ 3,899,600	\$ 3,899,600
2/11/8 (22 Madbury Road)	\$ 2,120,200	\$ 2,120,200
2/12/1 (22 Garrison Avenue)	\$ 2,126,100	\$ 2,126,100
5/1/6 (35 Main Street)	\$ 587,500	\$ 587,500
5/1/7 (29 Main Street)	\$ 901,400	\$ 901,400
5/1/8 (25-27 Main Street)	\$ 989,200	\$ 989,200
5/2/6 (2 Mill Pond Road)	\$ 898,500	\$ 898,500
AGGREGATE ASSESSMENT	\$19,106,800	\$19,166,800

The Taxpayer argued the assessments on the Property were excessive because:

(1) the Town performed a revaluation in tax year 2008 and increased the assessments of “multi-family” properties “by 55%” (on average), but the assessments on the Property increased by 62%;

- (2) the Taxpayer anticipated a 30% increase in the assessments (based on conversations with the Town's assessor, Robert Dix) and raised rents accordingly, but, due in part to the raised rents, occupancy rates fell, resulting in diminished revenues;
- (3) the Taxpayer purchased the Property in March 2007 as part of a larger real estate "portfolio" for "approximately \$20 million," but the operating expenses have been higher than anticipated at the time of purchase; and
- (4) based on the information contained in Taxpayer Exhibit No. 1, an abatement is warranted.

The Town argued the assessments were proper because:

- (1) Taxpayer Exhibit No. 1 should be excluded as evidence² and is not entitled to any weight because the preparer, Christopher Snow, is not a qualified appraiser or assessor;
- (2) further, Mr. Snow is not independent and unbiased (since he has a large financial interest in obtaining a tax abatement, he is an "interested advocate," not an "objective expert") and therefore this document and his opinion that the Property is disproportionately assessed "are meaningless" and "should be completely disregarded" (see also Town's "Memorandum," p. 5);
- (3) the Taxpayer, through Mr. Snow, has presented no credible or reliable evidence regarding revenue, expenses and the capitalization rate in the income approach and the sales comparison approach also does not support the claim of disproportionality;
- (4) the Town's own evidence (see Municipality Exhibit B) demonstrates the Property was proportionally assessed; and
- (5) the Taxpayer did not meet its burden of proving disproportionality.

² After hearing arguments on the Town's oral motion to exclude this exhibit, the board denied the motion, admitted this document and indicated it would give it only the weight it deserves.

The parties agreed the levels of assessment were 98.5% in tax year 2008 and 102.7% in tax year 2009. These are the median ratios calculated by the department of revenue administration.

One board member who was on the three-member panel who heard these appeals retired subsequent to the hearing. Theresa M. Walker was then appointed as a board member and has reviewed the record and participated in deliberating and deciding these appeals.

Board's Rulings

Based on the evidence, the board finds the Taxpayer failed to meet its burden of proving disproportionality. The appeals are therefore denied.

To determine whether a tax abatement is warranted, the board considers and weighs all of the evidence presented, utilizing its “experience, technical competence and specialized knowledge.” See 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 must employ its statutorily countenanced ability to utilize its “experience, technical competence and specialized knowledge in evaluating the evidence before it.”) Further, in making market value findings, the board must determine for itself issues of credibility and the weight to be given each piece of evidence because “judgment is the touchstone.” See, e.g., Appeal of Public Serv. Co. of New Hampshire, 124 N.H. 479, 484 (1984), quoting from New England Power Co. v. Littleton, 114 N.H. 594, 599 (1974) and Paras v. City of 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). None of the arguments and evidence for a tax abatement presented by the Taxpayer satisfies its burden of proving disproportionality on the aggregate assessment of its entire estate in each tax year for at least four reasons.

First, the mere fact the assessments increased on some multifamily properties more than on others as a result of the Town-wide revaluation in tax year 2008 is not probative of disproportionality since the very purpose of a reassessment is to remedy prior inequities and errors that may have impacted the prior assessed values. Consequently, the board could give no weight to the Taxpayer's arguments regarding differential percentage increases. Mr. Snow, the Taxpayer's representative, even acknowledged that some of the parcels may have been substantially underassessed in the prior year (2007).³

Second, simply because the Taxpayer may have "expected" assessments to increase by a lower percentage (30%) and then adjusted rents in anticipation of this magnitude of increase is not a valid reason to obtain a tax abatement. It is market value evidence, not expectations regarding assessments, that is the basis for arriving at proportional assessments in New Hampshire. See RSA 75:1; and Porter v. Town of Sanbornton, 150 N.H. 363, 368 (2003).

Third, the evidence presented regarding increases in "operating expenses" is not sufficient to warrant tax abatements in these appeals. Mr. Snow developed what could be called 'pro forma' income statements for each of the 11 lots to calculate his own "market value" estimates. However, the only rental and expense data he used is contained in the "Addendum" to Taxpayer Exhibit No. 1 and this document provides little support for Mr. Snow's estimates. In his testimony, Mr. Snow was able to provide very little additional information except to say he obtained the information in the statements from his client who had consolidated accounting information on an entire portfolio of buildings, including the 11 that are the subject of this appeal.

³ 10 Strafford Avenue, for example, had an assessment in tax year 2007 that was only about half the value estimated by the Taxpayer in 2008 (\$1,799,400). (See the assessment-record card in Taxpayer Exhibit No. 1, p. 54.) As noted above, the assessment on this lot increased in 2008 (to \$1,978,200).

Mr. Snow's pro formas were developed by using actual income numbers and allocating certain expenses for a single accounting period. He made no attempt to determine whether the actual and allocated gross income and total expense numbers he calculated were typical or reasonable for property of this type or whether the numbers contained any extraordinary items that needed to be adjusted (stabilized). In other words, he failed to provide any analysis of the actual rental income and expenses to determine whether they are reflective of the market. Therefore, his market value estimates using the income approach are likely flawed because recorded increases in expenses may be the result of capital expenditures, one-time repair or other expenses or imprudent management.

In brief, Mr. Snow placed exclusive reliance on the actual financial results for one year for the portfolio purchased by the Taxpayer, rather than estimating stabilized market rental income and expenses on the Property, which would have resulted in a credible estimate of market value using the income approach. Consequently, an argument for a tax abatement premised simply on increased actual operating expenses is not entitled to any weight. See, e.g., Campbell v. City of Dover, BTLA Docket Nos. 23541-07PT and 24405-08PT (April 30, 2010), at pp. 4-9; Henderson Holdings at Sugar Hill, LLC v. Town of Sugar Hill, BTLA Docket Nos. 21034-04PT and 22385-05PT (September 26, 2008), at pp. 6-10; and HJ Heyman Sons LLC v. City of Keene, BTLA Docket Nos. 19612-02PT/20446-03PT (August 18, 2005) at p. 4 ("Use of the income approach requires an estimate of stabilized net operating income ('NOI') and application of an appropriate CAP rate.").

Fourth, while Taxpayer Exhibit No. 1 presents vestiges of both an income approach and a sales comparison approach, neither was properly developed or completed using acceptable

appraisal methodology and neither resulted in credible indications of market value. For example, there is no explanation as to why Mr. Snow applied varying percentages (31% to 47%) to the estimated income for each building to calculate “Total Expenses.” Further, he applied a 12.1% tax-loaded capitalization rate (based on a 9.5% base rate), but this rate is higher than the rate that would result from applying the information presented by the Town (see Municipality Exhibit B) and the board is not persuaded Mr. Snow’s higher rate is justified.⁴ In the sales comparison approach, Mr. Snow presented a grid of sales to calculate “mean” and “median” sale prices per square foot and per bed without any attempt to make quantitative or qualitative adjustments. Instead, what he calls an “adjustment grid” is simply a recitation of some physical characteristics of each property and contains no analysis or adjustments that would lead to a meaningful market value conclusion. In brief, the board is unable to place any weight on either the income or sales comparison approaches as evidence the Property is disproportionately assessed.

Turning to the Town’s arguments and evidence, the Town began (as noted above) by arguing the Taxpayer did not present any appraisal by a qualified expert to meet its burden of proof but instead relied solely on the analysis prepared by Mr. Snow, who is not an appraiser. The Town also emphasized the purchase price for the Property as corroboration that it was proportionally assessed. The Taxpayer purchased the Property (plus two other lots, one at 33 Madbury Road, which was not appealed, and another in the Town of Madbury) in March 2007 in a portfolio acquisition for an aggregate price of \$19,205,546 and did so after obtaining “extensive expert appraisals” which “suggested that the market value of the properties was higher than what the (Taxpayer) paid for them.” (Town’s Memorandum, p. 4.)

⁴ Among other things, the sophistication of the likely investors in an investment portfolio of this size (approximately \$20 million), the relative stability of demand for student housing, the close proximity of the lots to the University of New Hampshire campus and the historical performance of these lots as income producing properties are all factors that would lower the capitalization rate in the relevant market.

In arriving at a proportionate assessment, all relevant factors affecting market value must be considered. Paras v. City of Portsmouth, 115 N.H. at 67-68. While price does not equate to market value in all instances, the board has the discretion to determine whether the sale price reflects market value. See Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 256 (1994); Appeal of Town of Peterborough, 120 N.H. 325, 329 (1980). The sale price can be one of the “best indicators of the property’s value.” Appeal of Lakeshore Estates, 130 N.H. 504, 508 (1988); see also Poorvu v. City of Nashua, 118 N.H. 632 (1978), cited in the Town’s Memorandum (p. 2).

On the facts presented, the board finds the sale price is a good indicator of the Property’s value. The Taxpayer is a sophisticated investor and there is no evidence the investor paid any premium over market value. In fact, there is nothing to suggest the Property was not adequately exposed to the market or that either the buyer or the seller was atypically motivated. Additionally it is evident the Taxpayer performed extensive due diligence prior to the purchase and obtained financing based on appraisals prepared by qualified and independent appraisers that supported the purchase price.

The board also considered the additional evidence presented by the Town regarding the 2008 revaluation. This evidence included an “Appraisal Review” performed by Stephen G. Traub, ASA, CNHA, of Property Valuation Advisors. Mr. Traub conducted an independent review of the revaluation performed by the Town’s assessor (Robert Dix, CNHA). Mr. Traub concluded “the new assessments of student housing overall are at approximately 100% of market value, right on target, and overall the quality is considered good.” The Taxpayer presented no reliable evidence to rebut this conclusion.

For all of these reasons, the appeals are denied.

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 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, Chair

Albert F. Shamash, Esq., Member

Theresa M. Walker, 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 Brewery Lane, Suite 6, Portsmouth, NH 03801, representative for the Taxpayer; Town of Durham, Assessing Office, 15 Newmarket Road, Durham, NH 03824; Laura A. Spector, Esq., Mitchell Municipal Group, P.A., 25 Beacon St., East Laconia, NH 03246, counsel for the Town; and Cross Country Appraisal Group, LLC, 210 North State Street, Concord, NH 03301, Contracted Assessing Firm.

Date: 3/9/12

Anne M. Stelmach, Clerk