

CIM Realty Trust

v.

Town of Merrimack

Docket Nos.: 25212-09PT/25805-10PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2009 and 2010 abated assessments of \$5,146,300 (land \$2,289,300; building \$2,857,000) on Map 2D/Lot 079, 35 Robert Milligan Parkway, a commercial building on 17.4 acres (the “Property”). For the reasons stated below, the appeals for abatement are denied.

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 Property’s assessments were higher than the general level of assessment in the municipality. Id. We find the Taxpayer failed to prove disproportionality.

The Taxpayer argued the assessments were excessive because:

(1) the building was constructed in 2003 for the purpose of operating a recreation vehicle (RV) sale and repair business known as “Campers Inn,” with special features such as “20 foot clear height ceilings,” an open retail sales area with no “build out” and offices without doors or ceilings;

(2) the Property has signage but no frontage or visibility on Daniel Webster Highway, is located on a secondary road about ½ to ¾ mile distant and is a “very poor location for retail sales”;

(3) while the Property has visibility from the FE Everett Turnpike, trees in the right-of-way partially obstruct it;

(4) the Taxpayer operates its business at other locations, but the Property was the only one that was not profitable during 2009 and made only a modest profit in 2010 (See Taxpayer Exhibit No. 4);

(5) a September 23, 2010 appraisal prepared by Stephen Bullock, MAI (the “Bullock Appraisal,” Taxpayer Exhibit No. 1 and the “Addendum” to this appraisal, Taxpayer Exhibit No. 2), indicates the Property is a “special-purpose” property that had a market value of \$3,900,000 as of April 1, 2009 and \$3,300,000 as of April 1, 2010; and

(6) the assessments should be further abated to the values estimated in the Bullock Appraisal (adjusted by the levels of assessment for each year).

The Town argued the abated assessments were proper because:

(1) while the building was built to meet the needs (specifications) of the Taxpayer’s business (Campers Inn), the Property can accommodate other potential users and does not meet the definition of a “special-purpose property” in The Appraisal of Real Estate;

(2) the Town's zoning ordinance allows for many other permitted uses of the Property (see Municipality Exhibit D);

(3) the Bullock Appraisal does not present reliable estimates of market value, relying on foreclosure sales and listings and overestimating the amount of external obsolescence in the cost approach;

(4) the proportionality of the assessments is supported by the Town's own sales analysis (see Municipality Exhibit C) and the land acquisition and improvements costs expended by the Taxpayer; and

(5) the Taxpayer did not meet its burden of proving disproportionality and the appeal should be denied.

The parties agreed the levels of assessment were 109% in tax year 2009 and 115% in tax year 2010, the median ratios calculated by the department of revenue administration.

Board's Rulings

Based on the evidence presented, the board finds the Taxpayer failed to prove the Property was disproportionately assessed in either 2009 or 2010. The appeals are therefore denied for the following reasons.

In making market value findings, the board considers and weighs all of the evidence, including any submitted appraisals, 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").

In order to prevail, the Taxpayer had the burden of proving the market value of the Property was less than the equalized market value reflected by the assessment in each tax year: \$5,146,300 divided by 109% = \$4,721,400, rounded, for tax year 2009; and \$5,146,300 divided by 115% = \$4,475,000, rounded, for tax year 2010.

The Taxpayer relied upon the Bullock Appraisal, which estimated the market value of the Property was \$3,900,000 and \$3,300,000 for April 1, 2009 and 2010, respectively. Mr. Bullock utilized the cost and sales comparison approaches to value, but placed “only minimal” weight in the final reconciliation on the sales comparison approach. (See Bullock Appraisal, p. 75.)

One crucial assumption made by Mr. Bullock is that the Property fits the definition of a “special-purpose property.”¹ This assumption led Mr. Bullock to place significant weight (approximately 75%) on the cost approach. When asked at the hearing what physical qualities led him to classify the Property as a special-purpose property, Mr. Bullock cited the lack of dock height overhead doors, the number of overhead doors at grade and the fact the Property was developed and “constructed for and to the specifications of an RV dealer.” As a further rationale, Mr. Bullock noted the Taxpayer’s former property in Nashua (used for the same business purpose) was demolished by the buyer and redeveloped for another use.

While there is no dispute the Property was developed to the specifications of the Taxpayer (for the operation of an RV dealership), the board finds merit in the Town’s position that it is not a special-purpose property. The characteristics Mr. Bullock cited are not so unique or specialized that the Property would not be valuable to other potential users. Additionally, the

¹ As explained in The Appraisal of Real Estate (11th ed. 1996 at p. 25), an authoritative source published by The Appraisal Institute: a limited-market property is a property that has relatively few potential buyers at a particular time; many limited-market properties include structures with unique designs, special construction materials, or layouts that restrict their utility to the use for which they were originally built; and these properties usually have limited conversion potential, and, consequently, are often called “special-purpose or special-design properties.”

board does not agree the demolition of the Taxpayer's former building in Nashua is evidence of a special-purpose property. Mr. Jeff Hirsch, representative of the Taxpayer, testified the Nashua property was sold to Walgreen's. Walgreen's demolished the improvements and built a retail pharmacy, a higher and better use in a neighborhood transitioning from commercial and industrial uses where other properties have been redeveloped by or for national retailers.

Although the board did not find the Property is a special-purpose property, utilization of the cost approach can still provide a meaningful indication of market value in some instances (e.g., a newly constructed property). Upon careful review, however, the board finds it can place no weight on the cost approach in the Bullock Appraisal for several reasons.

First, Mr. Bullock's opinions of site value per acre (\$80,000 in 2009 and \$70,000 in 2010) are simply not credible. His opinions are based on five land comparables, but three of them (Nos. 1, 2 & 3) were properties being offered for sale, rather than actual sales. (See Bullock Appraisal, pp. 49-53.) Another land comparable (No. 4) was sold by a bank after a foreclosure, had an abbreviated marketing time and Mr. Bullock did no research to determine if it sold at market terms. (*Id.*, p. 55.)² The final land comparable (No. 5) is the sale of 3.456 acres located in Derry. The board finds this site is too dissimilar in size to the Property to provide a meaningful indication of value.

Second, the building on the Property was constructed in 2003, only six and seven years prior to the April 1, 2009 and 2010 assessment dates of these appeals. Mr. Bullock could have,

² For Comparable Land Sale No. 4, the Bullock Appraisal states the "Seller" is "NA", which is inconsistent with the other comparable sale properties in the Bullock Appraisal in which Mr. Bullock states the name of the seller. The board finds this is misleading at best. Mr. Bullock is an experienced appraiser who frequently researches sales of properties and obtaining the name of the seller is common practice in the profession. Listing the seller (North Middlesex Bank) would have been an indication to the user of the appraisal that the sale was likely the result of a foreclosure. Foreclosure sales involving financial institutions raise questions regarding whether the parties are "atypically motivated," an inherent part of the accepted definition of market value.

but did not, obtain actual construction cost data from the Taxpayer as a test of reasonableness for his estimates.

Third, Mr. Bullock calculated very large “external obsolescence”³ estimates: \$688,708 for 2009, and \$390,650 for 2010. (*Id.*, pp. 69-70.) They are so large and so speculative in nature as to cast substantial doubt on the reliability of his cost approach. In responding to questions by the board during the hearing regarding this adjustment, Mr. Bullock stated, “I included 5 pages in my report.” (*Id.*, pp. 64-68.) A careful reading of those pages, however, does not explain how Mr. Bullock calculated those adjustments.⁴ Mr. Bullock further states: “Additional evidence of significant external (economic) obsolescence in the subject area is the recent sales of properties at prices well below replacement cost new (less physical deterioration). On the following page is a summary table of industrial building sales. All have sold or are listed at prices well below replacement cost.” (*Id.*, p. 67) While the methodology of comparing replacement cost estimates of buildings to their subsequent sale prices might be appropriate, Mr. Bullock did not calculate the replacement costs of the properties he referenced.⁵ Without such basic information, the board is unable to determine whether any external obsolescence exists.

³ External obsolescence is “an impairment of the utility or salability of an improvement or property due to negative influences outside the property.” (The Appraisal of Real Estate, p. 365.)

⁴ When asked at the hearing for detail regarding 83 sales of industrial properties he referenced (Bullock Appraisal, pp. 64-66), Mr. Bullock could not provide anything more than what is in his appraisal, which is limited to a chart depicting sale dates and sale prices per square foot. Mr. Bullock then stated, “The fee was limited here. There is only so much I can do. If you have to give it less weight, then so be it.” Mr. Bullock, as a New Hampshire Certified General Appraiser with an MAI designation, is required to comply with the Uniform Standards of Professional Appraisal Practice (“USPAP”). USPAP allows three reporting options with varying levels of detail: self-contained, summary and restricted use reports. USPAP, however, does not permit an appraiser to limit his scope of work to any extent that may produce a less than credible estimate of market value, regardless of whether a “modest fee” or a larger fee is charged.

⁵ When asked if he calculated replacement cost new of the properties listed on p. 68 of his appraisal, Mr. Bullock stated, “There are a lot of properties. There is only so much time I can devote to an appraisal and still pay the rent.”

Along with the cost approach, the Bullock Appraisal presents a sales comparison approach which the board has also reviewed. Mr. Bullock gave this approach only minimal weight, but the board finds the value conclusions Mr. Bullock draws from this approach are entitled to no weight for several reasons.

First, Mr. Bullock's choice of a price per square foot unit of comparison leads to a flawed outcome. The building constructed by the Taxpayer clearly adds utility to the site but so does the additional acreage available for the parking and display of RV inventory. For this type of property, a 'whole to whole' comparison (with suitable adjustments) to properties having similar acreage and building features would have led to a more credible value indication. Selection of the appropriate unit of comparison is of key importance in arriving at an acceptable estimate of market value.⁶

Second, five of his eight comparable sales are of substantially larger buildings, ranging from 137,674 square feet to 227,029 square feet, while the subject is 41,415 square feet in size. (Id., p. 72.) The likely purchasers of these larger buildings would probably not consider the Property under the principle of substitution, a concept inherent in the sales comparison approach. While some variation in the size of comparable sale properties is expected and can reasonably be adjusted for, these properties are too disparate from the Property and do not provide a meaningful indication of value.

Third, Mr. Bullock determined, based on his selection of comparable sales, the Property has more than 13 acres of "excess land". (Id., p. 73.) The board does not agree, as the large site

⁶ See, generally, The Appraisal of Real Estate, p. 402 ("The units of comparison depend on the appraisal problem and nature of the property."); and, e.g., State of New Hampshire v. The Anup S. Sandhu Revocable Trust of 1997, BTLA Docket No. 23364-08ED (October 23, 2009) at p. 5 ("board's analysis and comparison is on a 'lot to lot' (or 'whole to whole') basis"); and Russell v. Town of Nottingham, BTLA Docket No. 23566-07PT (January 5, 2010) at p. 3 (comparing four comparables and the subject and noting "the market tends to view the property on a 'site value' basis," rather than the alternate unit of comparison proposed by the taxpayer).

is essential to the Property's highest and best use as an RV dealership. The board's finding is supported by the testimony of Mr. Hirsch, who stated the primary reason he relocated the business from Nashua to the Town was a need for additional land for inventory display and adequate parking.

Chiefly for these reasons, the board finds it can place no weight on either approach utilized in the Bullock Appraisal and therefore did not find his market value estimates to be credible. Aside from the Bullock Appraisal and Mr. Bullock's testimony, the Taxpayer's representative also relied on Mr. Hirsch's testimony and various financial documents regarding the business results of his company, Campers Inn, on the Property.

The board was unable to place weight on this evidence because it related primarily, if not entirely, to the question of business value, not real estate value.⁷ For example, Mr. Hirsch testified Campers Inn experienced a loss in 2009 and a small profit in 2010, but noted his company engaged in extensive cost cutting and added another important RV franchise ("Tiffin") in this period (which "added \$2.5 million in sales") and these factors resulted in an improvement in business income. While there is no question a good location can enhance business or going concern value, it does not necessarily follow that periodic business declines (or upswings, for that matter) caused by general economic, management or product line factors result in corresponding increases (or decreases) in the market value of real estate.

As a case in point, there was no evidence to suggest any change in the market value of the Nashua property, sold when the Taxpayer relocated its business, was influenced by the financial performance of the business at that location. Rather, the increase in market value

⁷ Cf. Coroc Lakes Region, LLC v. Tilton, BTLA Docket Nos. 23508-07PT/24302-08PT (June 10, 2010) ("there is no doubt a difference between business value or going concern value, not taxable under RSA 75:1, and real estate value, which is subject to taxation" and location can impact real estate value, "separate and apart from any business value enhancements").

probably occurred because of the desirability of the land, due to its location and other features, to a buyer who redeveloped the Nashua property for an alternate use (as a retail pharmacy). For these reasons, the board finds the financial information submitted by the Taxpayer is not relevant to the determination of market value of the real estate, but is simply reflective of business value and performance.

The board also examined the evidence presented by the Town to support the proportionality of the abated assessments on the Property. The sales data in Municipality Exhibit C reflect the substantial value of relatively large parcels of land (such as the 17.4 acres on the Property) for commercial or industrial development or redevelopment. For example, the board finds the sale of 20.56 acres of land in Bedford (539 Donald Street) for \$2.6 million in December, 2010 to be supportive of the assessed value of the land (\$2.289 million assessed value, including substantial improvements, equalized to \$2.1 million, rounded, in tax year 2009 and \$2 million, rounded, in tax year 2010).⁸ It is not unreasonable to conclude the assessed building value (\$2,857,000) is also proportional, since the equalized values in both tax years are roughly the same as the depreciated cost estimates in the Bullock Appraisal (excluding his external obsolescence estimates, discussed above).

For all these reasons, the board finds the Taxpayer did not meet its burden of proving further abatements are warranted. The appeals are therefore 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

⁸ The board need not dwell on the April, 2009 sale of the land for the “Merrimack Premium Outlet Center” for \$17 million. That sale was of a much larger parcel (166.75 acres) but does reflect, to some degree, the value of the location of the Property which is nearby and has visibility and easy access to the FE Everett Turnpike between Nashua and Manchester.

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

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: Mark Lutter, Northeast Property Tax Consultants, 14 Roy Drive, Hudson, NH 03051, representative for the Taxpayer; Chairman, Board of Selectmen, Town of Merrimack, 6 Baboosic Lake Road, Merrimack, NH 03054; and Loren J. Martin, Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258, Contracted Assessing Firm.

Date: September 11, 2012

Anne M. Stelmach, Clerk