

5 Dennison Road, LLC

v.

Town of Durham

Docket No.: 25335-09PT

DECISION

The “Taxpayer” appeals the “Town’s” 2009 assessment of \$3,985,800 (land \$1,800,000; building \$2,185,800) on Map 2/Lot 11-5, an apartment building on 0.93 acres located at 5 Dennison Road (the “Property”). The Taxpayer has the burden of showing, by a preponderance of the evidence, that 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); and, e.g. 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. We find the Taxpayer failed to prove disproportionality and therefore the appeal is denied.

The Taxpayer argued the assessment was excessive because:

(1) the Property is a two-story apartment building in average condition historically and currently utilized as an 81-bed student housing complex;

- (2) Taxpayer Exhibit No. 2 contains an analysis of “the best” five comparable sales that provide a market value indication of \$31,000 per bed (reflected by the median and mean calculations), resulting in a market value indication of \$2.5 million, rounded ($\$31,000/\text{bed} \times 81 \text{ beds} = \$2,511,000$);
- (3) Taxpayer Exhibit No. 2 also contains an income approach to value (based on a “pro forma” operating statement corroborated by Taxpayer Exhibit No. 1), which indicates an estimated net operating income (“NOI”) of \$233,758, which as Christopher Snow (the Taxpayer’s representative) testified to, equates to a market value indication of \$2.46 million when a capitalization rate of 9.5% is utilized;
- (4) student housing properties “trade” (sell) based on potential NOI;
- (5) although the Property was purchased by the Taxpayer in June 2008, the Taxpayer overpaid for it as the previous owner misrepresented the actual income and expenses, which resulted in the net operating income being \$100,000 or more lower than the Taxpayer anticipated; and
- (6) after placing primary weight on the income approach to value, as well as the sale price of \$4.2 million (which the Taxpayer believes was inflated), the market value indication was “hedged up” to \$3 million and therefore the assessment should be abated to this value adjusted by the agreed-upon level of assessment in the Town.

The Town argued the assessment was proper because:

- (1) the assessment-record card reflects a maximum of 93 beds (not 81 beds), utilizing a standardized methodology and formula based on square footage as determined by the Town’s Fire Department;
- (2) the Town performed a town-wide revaluation in tax year 2008;

- (3) Municipality Exhibit A confirms the Taxpayer purchased the Property in June, 2008 for \$4.2 million;
- (4) the Town considered the purchase price to reflect the market value of the Property based upon standard professional definitions of “market value” and an “arm’s-length transaction” and confirmation by the selling agent (see Municipality Exhibit A, pp. 3-5);
- (5) the comparable sales approach utilized by the Taxpayer (see Taxpayer Exhibit No. 2, p. 10) contains inaccurate information regarding the comparable sales, including sale prices, bed counts and other information, and utilizes at least one non-arm’s-length transaction;
- (6) when appropriate corrections and adjustments are made in the Taxpayer’s analysis, the calculations reflect a market value of \$44,000 per bed which supports the assessment; and
- (7) the Taxpayer did not meet its burden of proving disproportionality.

The parties agreed the level of assessment was 102.7% in tax year 2009, the median ratio calculated by the department of revenue administration.

Board’s Rulings

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

In order to prevail, the Taxpayer had the burden of proving the market value of the Property was less \$3.89 million, rounded, (\$3,985,800 divided by 102.7% level of assessment) because assessments must be based on market value. See RSA 75:1. The focus of a tax abatement appeal is proportionality, requiring a review of the assessment to determine whether the Property is assessed at a higher level than the level generally prevailing. See, e.g., Appeal of Andrews, 136 N.H. 61, 64 (1992); and Appeal of Town of Sunapee, 126 N.H. 214, 219 (1985).

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).

The board reviewed Taxpayer Exhibit No. 2 and the supporting documentation in Taxpayer Exhibit No. 1 and found it deficient in meeting the Taxpayer’s burden of proof for several reasons. First, the sales comparison approach contained no qualitative or quantitative adjustments, but rather simply a recitation of selected information regarding the physical characteristics of the Property and the comparable sales. Second, when questioned by the board regarding this approach, Mr. Snow stated that his “adjustment” grid (see Taxpayer Exhibit No. 2, p. 10) was “not final in a way” and was only a “guideline” for the board. Finally, the board found the Town’s testimony regarding errors in Mr. Snow’s description of the comparable sales and his inclusion of a non-arm’s-length transaction was persuasive in casting further doubts on the credibility of his conclusions.

Next, the board reviewed the income capitalization approach prepared by Mr. Snow and the supporting documentation. (See Taxpayer Exhibit No. 2, pp. 41-46.) While there was a

significant amount of information provided and the income and expense figures utilized in the pro forma were reasonably supported, Mr. Snow made no attempt to correlate the rents received were actually at market terms, or if the expenses reported were typical or reasonable for this property type, or whether the numbers contained any extraordinary or one-time expenses. In other words, he provided a significant amount of historical income and expense figures, but did not do any analyses to verify whether they are reflective of the market. This step is critical in the development of the income approach, because utilization of market rents is the basis for the valuation of the fee simple interest in the Property, the value that must be determined for tax assessment purposes. (See Arliss J. Hill, et al. v. Town of Conway, BTLA Docket No.: 15289-94PT (October 9, 1997).)

Mr. Snow testified a capitalization rate of 9.5% was appropriate for the Property due to its labor intensive nature, its 100% annual turnover and its layout and condition deficiencies. He presented a chart of capitalization rates, ranging from 7.1% to 12.3% extracted from the sale of apartment properties in New Hampshire. (See Taxpayer Exhibit No. 2, p. 55.) There was no testimony or evidence to indicate how, if at all, these capitalization rates apply to the Property. Further, the rate chart he relies on is a single page out of context from an appraisal prepared by Bergeron Commercial Appraisal (“Bergeron Appraisal”) for an unidentified property as of an uncertain date. Little weight, if any, can be placed on the information on this chart as there was no testimony regarding what the subject of that appraisal was, what its purpose was, and, most importantly, how those capitalization rates were calculated. Without knowledge of the purpose of the Bergeron Appraisal, the board cannot determine how, if at all, those capitalization rates can be applied to this appeal for the purpose of estimating the market value of the Property as of the assessment date.

In addition, Mr. Snow's 9.5% capitalization rate estimate is in conflict with the chart on the prior page of his analysis (Taxpayer Exhibit No. 2, p. 54), which shows that, as of the assessment date, the capitalization rate for student housing (as determined by "Real Capital Analytics") was below 8%. No information was provided regarding the specifics of the Real Capital data; nonetheless, it does not correlate with Mr. Snow's claim that a 9.5% capitalization rate is appropriate. In reality, a capitalization rate in the range depicted on this chart in the applicable time frame (say, 7.75%) actually supports the equalized value of the assessment when the actual NOI data for the Property is considered and adjusted for taxes.

Based on his own analysis, Mr. Snow estimated the Property's market value at \$2.5 million and \$2.46 million by utilization of the sales and income approaches to value, respectively. Mr. Snow testified, however, that he himself thought that those estimates were not credible when the sales price of \$4.2 million paid by the Taxpayer approximately ten months prior to the April 1, 2008 date of assessment was considered. Therefore, he (in his own words) "hedged up" his opinion of market value to \$3 million, but provided no further evidence or testimony as to how he arrived at that figure.

After reviewing Taxpayer Exhibit No. 2 and these admissions by Mr. Snow, the board finds it can place no weight on either his sales comparison or income capitalization approaches to value. As stated in a recently decided appeal involving similar (student housing) property, simply "presenting vestiges of both an income approach and a sales comparison approach" when "neither was properly developed or completed using acceptable appraisal methodology" will not result in "credible indications of market value," making the board "unable to place any weight on either (of these approaches)." (See Varsity Durham, LLC v. Town of Durham, BTLA Docket Nos.: 24680-08PT/25378-09PT (March 9, 2012) at pp. 6-7.)

The board also considered the Taxpayer's testimony that the purchase price of the Property, which the Town emphasized in its arguments, was not reflective of market value. The Taxpayer indicated he purchased the Property in June 2008 for \$4.2 million based on income and expense information provided to him by the previous owner. He testified the income figures were overstated and the expense figures were understated, resulting in a net operating income ("NOI") of "at least \$100,000" less than was reported to him by the seller. However, after a review of the evidence, the board finds this testimony inconsistent with the evidence.

The chart below is a restatement of the Property's historical income and expense figures (excluding mortgage interest, amortization and real estate tax expenses) for the Property for 2005, 2006, 2007 and 2009.¹ (Taxpayer Exhibit No. 2, pp. 42 & 45-46). This includes three years prior and one year subsequent to the June 2008 purchase.

	2005	2006	2007	2009
Total Income	\$ 540,135	\$ 508,456	\$ 568,979	\$ 531,282
Total Expenses	\$ 182,537	\$ 175,108	\$ 199,195	\$ 147,954
NOI	\$ 357,598	\$ 333,348	\$ 369,784	\$ 383,328

In summary, it is evident from the chart that the income, expenses and NOIs generated by the Property before the June 2008 purchase are relatively consistent with those generated by the Property since the purchase. In fact, the NOI reported for 2009 was actually higher than any of the three years prior to the 2008 purchase. Therefore, the board has no credible evidence that would allow it to conclude that the Taxpayer substantially 'overpaid' for the Property.

For all of these reasons, the appeal is denied.

¹ 2008 is not included in this table because the Taxpayer failed to provide complete historical income and expense figures for that year.

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

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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; and Cross Country Appraisal Group, LLC, 210 North State Street, Concord, NH 03301, Contracted Assessing Firm.

Date: 3/23/12

Anne M. Stelmach, Clerk