Esther's Marina LLC

v.

City of Portsmouth

Docket No.: 25595-10PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "City's" 2010 assessment of $758,000 (land $565,000; improvements $193,000) on Map 0102/Lot 0025, 41 Pickering Avenue, a commercial marina and a single family residence on 0.24 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. The board finds the Taxpayer failed to prove disproportionality.

The Taxpayer, represented by its owner, Esther Kennedy, argued the assessment was excessive because:

(1) excerpts (four pages) from a 2011 Evaluation (the "Burke Evaluation" prepared by George Burke, President of ARC Consulting, included in Taxpayer Exhibit No. 1) indicates the Property had an estimated market value of $642,000 (as of "4/22/11");

(2) the docks should not be assessed by the City because they are in the water, not on the land;

(3) at certain times (during storms and high tides), water comes up to the grass on the Property as shown in the photographs in Taxpayer Exhibit No. 1;

(4) during the City's 2010 update, the assessment on the Property increased substantially in relation to other properties; and

(5) the Taxpayer is not being treated "fairly" in the assessment process and the assessment for 2010 should be abated to the value stated in the Burke Evaluation ($642,000) adjusted by the level of assessment in the City.

The City, represented by Gary Roberge of Avitar Associates of New England, Inc., argued the assessment was proper because:

(1) the City hired Mr. Roberge to do an independent valuation which was admitted into evidence (the Assessment Report for the City of Portsmouth, Municipality Exhibit A) and he estimated the market value of the Property as of the assessment date (April 1, 2010) was $760,000 using the sales comparison approach and $766,212 using the income approach and these estimates are the best evidence of value and support the reasonableness and proportionality of the assessment under appeal;

(2) the Taxpayer is approved to have 36 docks on the Property for use as a commercial marina, but the City notes the Property "most likely" has a maximum of 28 docks;

(3) the Burke Evaluation underestimates the value of the Property in part because values are not correlated in a "linear" fashion with size, as Mr. Burke apparently assumed, and his estimate of the commercial value (using the income approach) is not "credible"; and

(4) the Taxpayer failed to meet its burden of proving disproportionality.

The parties agreed the level of assessment in the City in tax year 2010 was 98.1%, 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.

As prescribed in RSA 75:1, ad valorem assessments must be based on market value. Proportionality is determined by arriving at a reasonable estimate of market value adjusted by the level of assessment in the Town. See, e.g., Porter v. Town of Sanbornton, 150 N.H. 363, 367 (2003).); see also Appeal of NET Realty Holding Trust, 128 N.H. 795, 796 (1986); Appeal of Great Lakes Container Corporation, 126 N.H. 167, 169 (1985); and Appeal of Town of Sunapee, 126 N.H. 214, 217-18 (1985).

To determine whether the Taxpayer met its burden of proof, the board considered and weighed all of the market value 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, "judgment is the touchstone" in evaluating the credibility and probative value of any appraisal and other evidence presented. 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 Taxpayer placed heavy reliance on the Burke Evaluation. As noted above, what the Taxpayer submitted as evidence is not a complete copy of the Burke Evaluation but only four pages from it. This document, however, "is not an appraisal" (as noted on the third page) and Mr. Burke, whose qualifications to appraise or assess property are unknown to the board, did not attend the hearing to explain his methodology or assumptions. On the second page, Mr. Burke states he performed only an exterior inspection and prepared the document for his "client" (Optima Bank), not the Taxpayer.

The Burke Evaluation confirms the "excellent" location of the Property, noting its "close proximity to the Strawberry Banke Museum and Prescott Park" in downtown Portsmouth and the fact it is "surrounded by water on two sides" and has "views" and "water access." (Id.) All other things being equal, location is a key influence on the value of property.

The Burke Evaluation contains no discernible analysis in arriving at its estimate of value, except for making building size comparisons to three other properties. In this comparison, the Burke Evaluation calculates a price per square foot ("$/SF") for the Property (based on the assessment) that is higher than two of the properties and lower than the third. Since Mr. Burke lists each property's "Asking Price," it appears this comparison is based on listing information rather than actual market-based sale transactions. In addition, and as noted above, Mr. Burke estimates a value as of "4/22/11," more than one year after the assessment date. These factors all diminish the weight that can be placed on the Burke Evaluation as evidence of the market value of the Property as of the April 1, 2010 assessment date.

In contrast, the board finds Mr. Roberge's Assessment Report (Municipality Exhibit A), together with his testimony at the hearing, to be much better supported and probative of the likely market value of the Property as of the assessment date. Mr. Roberge is a qualified assessor with many years of experience and the Taxpayer did not question or challenge his qualifications to give an opinion of value. Mr. Roberge testified he did not review the City's assessment of the Property but rather arrived at his own value conclusions independently. Mr. Roberge estimated values using the sales comparison approach (with three actual sales) and the income approach and these estimates correlate closely with each other. ($760,000 and $766,212, respectively.) His estimates of value are supportive of the assessment under appeal. ($758,000 assessed value divided by 98.1% level of assessment = indicated value of $772,700, rounded.)

The board considered all of the Taxpayer's other arguments and find they do not indicate the assessment on the Property was disproportional. For example, the Taxpayer argued the docks should not be assessed because they are on the water, not the land, but the board has ruled otherwise, based on the New Hampshire statutes defining what is taxable real estate. See, e.g., RSA 21:21, RSA 72:6 and RSA 72:7; and Town of Stoddard, BTLA Docket No. 18362-00RA (August 19, 2002 Order) (docks, like wharves, are real estate improvements that are taxable). Further, while the City did not dispute the occasional flooding issues on the Property (occasioned by tides and weather; see the photographs in Taxpayer Exhibit No. 1), such conditions are not uncommon to a waterfront neighborhood and also appear to impact other properties. The Taxpayer failed to show how the conditions impacted market value to the point where the assessment under appeal was disproportional.

The Taxpayer also referred to other properties which were allegedly not assessed in the same manner as the Property or that did not have the same percent increases in their assessments. Such evidence is not probative of disproportionality for several reasons. One purpose of a reassessment is to remedy possible inequities in prior assessments and, thus, new assessments are likely to vary between properties, both in absolute terms and in terms of percentage changes from prior assessments. In other words, not all properties appreciate or depreciate at the same rate. Moreover, the possibility that one or more other properties may have been underassessed by the City does not mean the Property was disproportionally assessed in tax year 2010. See Appeal of Cannata, 129 N.H. 399, 401 (1987).

For all of these reasons, the board finds the Taxpayer failed to prove the Property was disproportionally assessed in tax year 2010. The appeal is 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 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

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Michele E. LeBrun, Chair

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Albert F. Shamash, Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Esther Kennedy, Esther's Marina, LLC, 41 Pickering Avenue, Portsmouth, NH 03801, Taxpayer's Represenative; Chairman, Board of Assessors, City of Portsmouth, 1 Junkins Avenue, Portsmouth, NH 03801; and Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258, Contracted Assessing Firm.

Date: 8/2/13

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Anne M. Stelmach, Clerk