

**NH Beta Housing, LLC**

**v.**

**Town of Durham**

**Docket No.: 25672-10PT**

**DECISION**

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2010 assessment of \$1,237,200 (land \$640,000; building \$597,200) on Map 2/Lot 11/2, 28 Madbury Road, a “fraternity house” used for student housing on 0.94 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. We find the Taxpayer failed to prove disproportionality.

The Taxpayer argued the assessment was excessive because:

(1) an appraisal prepared by Arol J. Charbonneau, Jr., a certified general appraiser with Crafts Appraisal Associates, Ltd. (the “Charbonneau Appraisal,” Taxpayer Exhibit No. 10), estimated

the market value of the Property was \$915,000 as of December 21, 2009, using both the sales comparison and income approaches, and this is “primary evidence of value”;

(2) the Town, as shown on the assessment-record card (“ARC”), may have relied on the \$872,000 renovation costs to the Property stated on page 30 of the Charbonneau Appraisal in denying an abatement, but this is incorrect because the actual renovation costs incurred in the 2007-2008 period were \$478,679.39 (as stated in Taxpayer Exhibit No. 7) and many of these costs were to make the Property habitable (after it had been ‘condemned’ by the Town);

(3) the actual purchase price of the Property was “\$465,600.08” (*id.*), not the \$600,000 recorded sale price between related parties; and

(4) the best evidence of the market value of the Property is the \$915,000 estimate in the Charbonneau Appraisal and this value should be adjusted by the level of assessment in the Town, resulting in an abated assessment of \$902,367.

The Town argued the assessment was proper because:

(1) the Taxpayer presented the Charbonneau Appraisal without obtaining the consent of Mr. Charbonneau, who prepared the appraisal for financing purposes, expressly restricted how it could be used and did not approve use of the appraisal for tax abatement purposes and his appraisal should be excluded as evidence for the reasons set forth in Municipality Exhibit A;

(2) Mr. Charbonneau did not attend the hearing and was not available to answer questions regarding his methodology and assumptions which are “somewhat flawed” and therefore should be given no weight;

(3) the two transfers of the Property (for \$600,000 in January, 2007 and \$920,000 in December, 2009) were not arm’s-length transactions and the Town did not treat the latter as a qualified sale representative of the Property’s market value;

- (4) as of the April 1, 2010 assessment date, the Property was in a good, fully renovated condition, as shown by the photographs submitted (see Municipality Exhibit C);
- (5) the Charbonneau Appraisal confirms there is a strong demand for student housing in the Town and states the highest and best use is for student housing (at p. 34), which is a more valuable use of the Property than as a “fraternity house”;
- (6) Mr. Charbonneau’s sales comparison approach is flawed as the most appropriate unit of comparison is price per bed, not price per square foot, and the assessment breaks down to approximately \$38,000 per bed, which is reasonable when compared to Mr. Charbonneau’s sale comparables;
- (7) the sales approach is further flawed as Mr. Charbonneau made no time adjustments even though he used sales dating back to January, 2004;
- (8) in his income approach, Mr. Charbonneau did not include the income generated by the 19 parking spaces which, based on market rates of \$300 per semester, would have increased the income stream to the Property and the resulting appraised value would have been higher and more supportive of the assessment;
- (9) two more recent arm’s-length sales of student housing properties not used by Mr. Charbonneau (32-34 Madbury Road and 5 Denison Road; Municipality Exhibit D) are supportive of the assessment; and
- (10) the Taxpayer did not meet its burden of proving disproportionality.

The parties agreed the level of assessment in the Town was 101.4%, 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 for the reasons discussed below. The board will first discuss the Town's July 10, 2012 Motion to Exclude and Dismiss (the "Motion," Municipality Exhibit A) and then explain why the Taxpayer failed to meet its burden of proving disproportionality.

#### **A. The Town's Motion**

The board considered the Motion when it was presented at the hearing by the Town's assessor. The board heard oral arguments, deliberated and then denied the Motion. The Motion contained two objections and was denied for the reasons set forth below.

The first objection was to some of the documentation submitted as evidence by the Taxpayer's representative, Mr. Christopher Snow. The documentation included photographs of the Property taken on November 21, 2006 and other information pertaining to prior renovation work on the Property. The board finds it is not improper to admit evidence regarding the condition of the Property prior to the date of the assessment (April 1, 2010). The board must determine for itself what weight to be given to such evidence and has done so, as prescribed in Tax 201.30 (Evidence).

In the second objection, the Town presented several arguments in support of its claim the Charbonneau Appraisal, prepared for financing purposes for a bank client, not the Taxpayer, should be excluded as evidence in this appeal. The board does not agree.

The market value standard under relevant New Hampshire law is materially the same as the market value definition in the Charbonneau Appraisal (p. 17). See e.g., RSA 75:1 and Porter v. Town of Sanbornton 150 N.H. 363, 367 (2003). Appraisers, and their appraisal reports, are

governed by a uniform set of standards commonly known as “USPAP.”<sup>1</sup> These standards do not allow the results of such an appraisal to be driven solely by its intended use; instead, they are driven by the scope of work undertaken by the appraiser and the definition of market value utilized in the report. To allow such a blanket exclusion (of appraisals prepared for financing purposes) would be too extreme and unwarranted in this appeal.

Further, the board does not agree an appraiser preparing two reports of the same property, as of the same date, with the only difference being the intended use (one for tax abatement and the other for financing), would arrive at two different market value conclusions. When the standards governing an appraiser’s work, the scope of work and the definition of market value are all the same, the outcome of the appraisal should also be the same.

On the other hand, when legitimate questions arise regarding an appraiser’s methodology and/or assumptions, his or her absence at the hearing to respond to those questions affects the weight the board can give to the appraisal. The board ultimately found it could give the Charbonneau Appraisal only limited weight because of the issues discussed below.

The board also considered the Town’s additional argument the Charbonneau Appraisal should be excluded because Mr. Charbonneau, in response to a written inquiry from the Town just prior to the hearing, ‘denied’ the Town’s request “to utilize” his appraisal.<sup>2</sup> To the extent there may be a liability issue regarding the use of the appraisal, the board finds this issue is not properly before it and is a separate matter between the Taxpayer and Mr. Charbonneau.

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<sup>1</sup> Uniform Standards of Professional Appraisal Practice (“USPAP”)

<sup>2</sup> See the Town’s June 25, 2012 letter (part of Municipality Exhibit A), to which Mr. Charbonneau checked the box marked: “I **deny** the use of this report for the purpose of the abatement process.”

B. The Taxpayer's Burden of Proving Disproportionality

As noted above, the Taxpayer has the burden of proving the Property was disproportionately assessed. 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).

There is no dispute regarding the following pertinent facts. The Property has a good location on a 0.94 acre lot on the corner of Madbury Road and Garrison Avenue in Durham's Central Business District (close to the UNH campus). The Property is improved with a two and one-half story wood-frame building constructed around 1927 with a gross living area of 6,120 square feet, approved for a maximum occupancy of 32 students.

The Property was originally built as a single-family home but later utilized as a fraternity house operated by the NH Beta Association of SAE (“NHBA”). In October 2006, NHBA approached SAE Services, Inc. (n/k/a SAE Financial & Housing Corporation) (“SAE”) to advise

it that NHBA, because of financial difficulties,<sup>3</sup> “was about to lose the house” (Taxpayer Exhibit No. 7). Apparently, NHBA had discontinued its activities, but was required to continue the Property’s use as a fraternity house in order to maintain the conditional use permit granted by the Town. The chapter then leased the Property to TKE Fraternity (TKE).<sup>4</sup> SAE ultimately paid \$465,600.08 for all debts incurred by NHBA and the Property was deeded to SAE in January 2007. The transfer price was listed as \$600,000 based on a September 2006 appraisal.

Between July 2007 and August 2008, SAE spent “\$478,679.39” on renovations to the Property. The maximum occupancy was reduced from 50 to 32 to be competitive with campus housing and dorms and to meet the expectations of the current student population. In December 2009, SAE transferred the Property to the Taxpayer with a recorded sales price of \$920,000.

The Town argued neither transaction was arm’s-length in nature as each was an intra-corporate transfer (between related parties). Neither sale reflects an arm’s-length transaction between a willing buyer and a willing seller and the board finds neither can be given weight as evidence of market value. The board “has the discretion to evaluate the credibility of the evidence [presented] and may choose to reject that evidence in whole or in part.” Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 256 (1994) (citations omitted).

Given the evidence in this appeal, the board finds the most appropriate approach to value is the comparable sales approach. Because of the quantity and quality of comparable sales

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<sup>3</sup> NHBA took a first mortgage on the Property in 2002 borrowing money from alumni to cover mortgage payments and other expenses for the year the Property sat vacant. Subsequently, due to TKE defaulting on their lease with over \$40,000 in unpaid rental payments, NHBA again went to the alumni to cover “mortgage payments and past due debts such as taxes and utilities.” Id.

<sup>4</sup> The Property remained vacant from May 2005 through October 2006, was condemned by the Fire Marshall and NHBA defaulted on their loan which caused the bank with the first mortgage to initiate foreclosure proceedings. In October 2006, to prevent foreclosure on the Property, SAE paid the principal and all other fees due in the amount of \$275,124.65 to the bank who assigned their interest to SAE. The chapter noticed SAE of other “brother loans” it was required to pay off.

presented by the parties, utilization of this approach results in the most credible opinion of value.<sup>5</sup> The board also considered the income approach but gave it no weight for the reasons stated below.

Mr. Charbonneau used both the comparable sales and income approaches to value the Property. The board finds, however, the Charbonneau Appraisal understates the Property's market value for a number of reasons.

First, Mr. Charbonneau concluded the highest and best use of the Property, as improved, is its current use as student housing due in part to the limited supply and continued high demand in Durham (Taxpayer Exhibit No. 10, p. 34). He determined the "most meaningful unit of comparison" to be sale price per square foot, but this conclusion is unsupported and unwarranted.

In the board's experience and judgment,<sup>6</sup> the most meaningful unit of comparison for this type of property (whether used for fraternity housing or other student housing) is sales price per bed. (See Varsity Durham, II, LLC v. Town of Durham, Docket Nos.: 24681-08PT/25379-09PT (March 9, 2012); and 5 Dennison Road, LLC v. Town of Durham, Docket No.: 25335-09PT (March 23, 2012).) The Town has a well "insulated" market for student housing (very localized and proximate to the campus) and there is a shortage of on-campus housing provided by the

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<sup>5</sup> There are three accepted approaches to value: 1) the cost approach; 2) the comparable sales approach; and 3) the income approach. Appraisal Institute, The Appraisal of Real Estate, Ch. 7, p. 130 (13<sup>th</sup> ed. 2008). While there are three approaches to value, not all three approaches are of equal import in every situation. Id. at 141; International Association of Assessing Officers, Property Appraisal and Assessment Administration, Ch. 4, p. 108 (1990). In New Hampshire, the supreme court has recognized that no single method is controlling in all cases, Demoulas v. Town of Salem, 116 N.H. 775, 780 (1976), and the tribunal reviewing the valuation is authorized to select any one of the valuation approaches based on the evidence. Brickman v. City of Manchester, 119 N.H. 919, 920 (1979).

<sup>6</sup> The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence. See RSA 541-A:33, VI; Appeal of City of Nashua, 138 N.H. 261, 264-65 (1994); see also Petition of Grimm, 138 N.H. 42, 53 (1993) (administrative board may use expertise and experience to evaluate evidence).

University of New Hampshire.<sup>7</sup> For these reasons, the board finds it more reasonable to analyze the comparable sales' evidence on a sales price per bed basis.

Second, Mr. Charbonneau made a negative adjustment to the sale price for "preferred financing" on comparable #1. There is no explanation in his appraisal of what this consisted of and how it impacted the selling price; therefore, the board did not adjust the \$915,000 sale price. (As noted above, Mr. Charbonneau was not present at the hearing and could not answer these and other questions.)

Third, based on the testimony at the hearing, comparable #2 was renovated on the exterior but no interior renovations were made; therefore, it is inferior in condition to the Property. The Charbonneau Appraisal described the property to be in fair condition at the time of the sale (January 2004), but the Town's assessor testified it was in "deplorable" condition. Weighing this testimony by an experienced assessor familiar with the local student housing market, the board finds this comparable requires substantial adjustments for condition that Mr. Charbonneau did not make. Consequently, the board did not place any weight on the indicated market value of this comparable.

Fourth, comparable #3 is located in Manchester, New Hampshire, and as noted by Mr. Charbonneau, its use is as a public rooming house. The board finds the demographics of this location and its use are too dissimilar to the Durham market, making it not reasonably comparable to the Property, especially in light of the more than adequate market data available within the Durham market for student housing to arrive at a credible estimate of market value. Thus, the board has excluded this comparable from its analysis.

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<sup>7</sup> "According to the University of New Hampshire Master Plan the school has the capacity to house 50% of the university's full time undergraduates.... New facilities are needed immediately to accommodate this demand." (Taxpayer Exhibit No. 10, p. 22.)

The board disagreed with some of the methodology used in this appraisal, but gave it careful consideration and found several comparable sales utilized provide meaningful indications of value. In further response to the Charbonneau Appraisal, the Town argued comparable #1, #2 and #3 predate the date of valuation by a number of years and no time adjustment was made by either Mr. Charbonneau or the Taxpayer's representative. The Town further indicated there were two other sales which are better comparables and support the proportionality of the assessment. The board finds merit in these points and will discuss the Town's comparables briefly below.

32-34 Madbury Road, a student housing project with a maximum capacity of 28 students, sold in April 2007 for \$1,260,000, or \$45,000 per bed. This was an arm's-length transaction and it was in above average condition for its age. The assessed value at the time of sale was \$1,315,300, which when equalized to \$1,297,100, results in a market value estimation of \$46,300 per bed.

5 Denison Road, a student housing project with a 90-bed count diagonally across the street from the Property, sold for \$4,200,000, or \$46,700 per bed. The assessed value at the time of sale was \$3,985,800 which when equalized to \$3,930,769, results in a market value estimation of \$43,675 per bed.

The Town argued these two sales are more probative of market value occurred for the Property as they are more proximate to the April 10, 2010 date of assessment than three of the comparables used in the Charbonneau Appraisal. Had they been used, it would have arrived at a more credible indication of market value for the Property and would have been supportive of the assessed value.

In arriving at its decision, the board has relied upon comparable #1 and #4 in the Charbonneau Appraisal and the two comparables utilized by the Town. These sales are:

<b>Address</b>	<b>Date</b>	<b>Sales Price</b>	<b>Bed Count</b>	<b>Sales Price/Bed</b>
10 Madbury Road	07/07/2004	\$915,000	22	\$41,591
17 Garrison Road	05/20/2008	\$1,335,000	24	\$55,625
32-34 Madbury Road	04/06/2007	\$1,260,000	28	\$45,000
5 Dennison Road	06/09/2008	\$4,200,000	90	\$46,667

Using its judgment and experience, placing more weight on the most recent sales and considering all relevant factors, the board finds a market value indication of \$42,600 per bed is appropriate for the Property. The indicated market value of the Property, based on its assessed value, is \$1,220,118 (\$1,237,200 divided by 101.4%) which equates to a price per bed of about \$38,200. A market value indication in the range of \$42,600 per bed is therefore supportive of the proportionality of the assessment.

The board has also reviewed the income approach estimate of market value prepared by Mr. Charbonneau but found it could give it no weight for several reasons. For example, the income utilized was based on a 2008 contract, not on market data as of the date of assessment. Additionally, the Charbonneau Appraisal did not include income generated by the Property during summer months nor from renting its 19 parking spaces; therefore, the net operating income reported and the resulting market value estimate, are likely understated.

In summary, the board finds the Taxpayer failed to meet its burden of proving disproportionality and 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, Esq., Member

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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; Durham Assessing Office, Town of Durham, 15 Newmarket Road, Durham, NH 03824; and Cross Country Appraisal Group, LLC, 210 North State Street, Concord, NH 03301, Contracted Assessing Firm.

Date: November 16, 2012

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Anne M. Stelmach, Clerk