

**Brian and Nancy Whitworth**

**v.**

**City of Rochester**

**Docket Nos.: 25735-10PT & 26496-11PT**

**DECISION**

The “Taxpayers” appeal, pursuant to RSA 76:16-a, the “City’s” assessments of \$495,200 (land \$130,600; improvements \$364,600) in tax year 2010 and \$494,900 (land \$130,600; improvements \$364,300) in tax year 2011 on Map 138/Lot 114, a car wash on 0.46 acres of land at 2 Ancil Court (the “Property”). For the reasons stated below, the appeals for abatement are denied.

The Taxpayers have the burden of showing, by a preponderance of the evidence, the assessments on the Property were disproportionately high or unlawful, resulting in the Taxpayers 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 Taxpayers must show the Property’s assessments were higher than the general level of assessment in the municipality. Id. The board finds the Taxpayers failed to prove disproportionality.

The Taxpayers, represented by Walter H. Liff, argued the assessments were excessive because:

- (1) a January 30, 2012 Appraisal Report prepared by Vern J. Gardner Jr., MAI, SRA (the “Gardner Appraisal,” Taxpayer Exhibit No. 1) estimates the market value of the taxable “real estate” was \$375,000 as of April 1, 2010 and this market value did not change in 2011;
- (2) the Property is a car wash (the “Tri-City Car Wash”) comprised of equipment, as well as real estate, and the equipment is personal property that is not taxable as real estate; and
- (3) the assessments should be abated to the \$375,000 estimate of the real estate value in the Gardner Appraisal (adjusted by the level of assessment in each tax year).

The City argued the assessments were proper because:

- (1) the City performed a revaluation in tax year 2010 and the assessor reviewed the assessments on all car washes, concluding value adjustments were warranted because the Property and other car washes had been underassessed in prior years;
- (2) the undisputed highest and best use of the Property is a car wash and the Gardner Appraisal estimates a total market value of \$585,000, which is supportive of the assessments under appeal because it is not proper to extract \$210,000 for car wash equipment integral to the Property that gives it utility as a car wash and not some alternative use; and
- (3) the Property was proportionally assessed in each tax year and the appeals should be denied.

The parties agreed the levels of assessment in the City were 96.5% in tax year 2010 and 100.3% in tax year 2011, the median ratios calculated by the department of revenue administration. They also agreed prior to the start of the January 9, 2013 hearing to a consolidation of the two appeals for hearing and decision.

**Board's Rulings**

Based on the evidence, the board finds the Taxpayers failed to meet their burden of proving the Property was disproportionately assessed in tax years 2010 and 2011. The appeals are therefore denied.

Assessments must be based on market value, as prescribed in RSA 75:1.<sup>1</sup> Proportionality is determined by establishing a credible estimate of the Property's market value and adjusting this estimate by the level of assessment in the City in each tax year. See, e.g., Porter v. Town of Sanbornton, 150 N.H. 363, 367 (2003). 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).

To prevail in this appeal, the Taxpayers had the burden of establishing the market value of the Property was below the equalized value of the City's assessment in each tax year: \$513,200 in 2010 and \$493,400 in 2011. (\$495,200 assessment divided by 96.5% level of

---

<sup>1</sup> "The selectmen shall appraise... all other taxable property at its market value. Market value means the property's full and true value as the same would be appraised in payment of a just debt due from a solvent debtor."

assessment in 2010 = \$513,200, rounded, equalized value; and \$494,900 assessment divided by 100.3% level of assessment in 2011 = \$493,400, rounded, equalized value.)

Upon review of all of the evidence and arguments presented, the board finds the key issue in dispute is how much of the total market value of the Property consists of taxable real estate (realty) instead of personal property (personalty) not subject to such taxation. The Gardner Appraisal estimates the total value (described, in general terms, as comprising “Real Estate and Equipment” in this appraisal) to be \$585,000, with the “Real Estate” component valued at \$375,000. The City did not present evidence disputing the overall \$585,000 value estimated in the Gardner Appraisal, but did not agree with Mr. Gardner’s estimate that \$210,000 of the total value is attributable to non-taxable “Equipment” which should be excluded from the assessment.

The board finds merit in the City’s position that the Property was not disproportionately assessed in 2010 and 2011. The City is authorized, and indeed required, to assess and tax all “real estate,” including both land and buildings under RSA 72:6 and RSA 72:7; see also RSA 21:21. The Taxpayers have the burden of proving the City overassessed the real estate value of the Property and have not met this burden for at least three reasons.

First, in New Hampshire as well as in other states, taxable real estate or “realty” includes equipment which has lost its character as personal property and has become a fixture and part of the realty includable in the building value. See Appeal of Town of Pelham, 143 N.H. 536, 539 (1999), where the supreme court summarized the established law as follows:

A chattel [personal property] loses its character as personalty and becomes a fixture and part of the realty when there exists an actual or constructive annexation to the realty with the intention of making it a permanent accession to the freehold, and an appropriation or adaptation to the use or purpose of that part of the realty with which it is connected... [W]hether an item of property is properly classified as personalty or a fixture turns on several factors, including: the item's nature and use; the intent of the party making the annexation; the degree and extent to which the item is specially adapted to the realty;

[and] the degree and extent of the item's annexation to the realty. . . . [Quoting from N.E. Tel. & Tel. Co. v. City of Franklin, 141 N.H. 449, 453 (1996).]

Other than the very general description of the “Equipment” at issue as ‘tunnel, bays and vacuum stations’ in the Gardner Appraisal (p. 44), there was little, if any, detailed information presented by the Taxpayers to support a finding that all or a part of these components that make the Property a car wash should be regarded as personalty and not transmissible real estate. The limited and quite sketchy evidence presented (including the photographs identified below) supports the contrary finding that the “Equipment” referenced by Mr. Gardner was actually or constructively annexed or affixed to the building, generally through attachment to the walls and floors with specialized plumbing and draining, with the intention of keeping these components in place permanently for the duration of its useful life (or until at least such time as they become non-functional or obsolete or the highest and best use of the Property is changed).

In making this finding, the board has used its judgment and experience and considered the relevant factors articulated above in Pelham and other cases. The factors considered include the nature and use of the ‘tunnels, bays and vacuum stations,’ the likely intent in acquiring and annexing these components to the Property, the extent these components are specially adapted to the size and layout of the building, and the degree and extent of annexation.

A direct illustration of when equipment becomes a fixture and part of the real estate for purposes of property taxation is King Ridge v. Sutton, 115 N.H. 294 (1975). In that decision, the supreme court concluded that “property comprising ski lifts” (“cables, engines, gear boxes, towers, motive sources, sheave wheels, chairs, t-bars, cable grips and all other peripheral property comprising ski lifts”) “are taxable as real estate within the scope of RSA 72:6.” Id. at 295 and 299.

The photographs of the Property showing the car wash operation (Gardner Appraisal, pp. 23-25, and Taxpayer Exhibit No. 5) leave little doubt that much, if not all, of the three components described as “Equipment” by Mr. Gardner function in a manner equivalent to the cables, engines, ski lift chairs and t-bar pulleys found to be taxable real estate in King Ridge. Similarly, water meter equipment installed by a taxpayer (measuring water flowing through water mains owned by a water company), like the pumping equipment installed in gas stations, have also been held to be “an integral part of the physical plant and are taxable as real estate.”<sup>2</sup>

The Taxpayers’ representative (Mr. Liff) asserted that, in his experience, there is a ‘used market’ for the buying and selling of some car wash equipment items, but this is not probative because the same can be said of the type of equipment found to be real estate in ski areas or gas stations for that matter. The mere fact some car wash equipment may have salvage or other value, if it is removed or replaced, does not mean the items installed at the car wash are not taxable as part of the real estate.

More recently, the board has ruled a “fabric cover,” held aloft by a pressurized air system to serve as the roof of a sports “dome,” was taxable real estate. Danielson Realty Trust v. Town of Milford, BTLA Docket No. 23075-06PT (January 26, 2010). In Danielson (p.10), the taxpayer emphasized the fabric cover was only anchored by steel cables and could, in theory, be moved to another location, arguably making it nontaxable personalty, but the board found “the dome creates the interior building environment that allows for year round indoor sports activities to occur for the building to achieve its highest and best use and thus the dome component is taxable as part of the building.” Danielson cited other cases of relevance to this issue, including:

---

<sup>2</sup> See Rosebrook Water Co. v. Carroll, BTLA Docket No. 19382-01PT (March 24, 2004), p. 7, citing Haselton v. Town of Derry, BTLA Docket No. 16932-96PT (January 15, 1999); VSH Realty Inc. v. Town of Tilton, BTLA Docket No. 16224-95PT (March 20, 1997);, and Haselton v. Town of Derry, BTLA Docket No. 14962-93PT (December 20, 1996).

590 Realty Co. v. City of Keene, 122 N.H. 284, 285 (1982) (special features at a physician's clinic affixed to real estate were to be considered in determining highest and best use); and Creative Biomolecules, Inc. v. City of Lebanon, BTLA Docket No.16861-96 (April 14, 2000) at pp. 4 – 5 (specialized components such as electrical fixtures and “clean-room” features collectively create the interior building environment, comport with the plain and ordinary meaning of “building” and are taxable as part of the building, citing RSA 72:7 and the Pelham decision).

Second, the board is not persuaded by the evidence presented that the summary calculations made by Mr. Gardner are a reasonable method of extracting non-realty value from his estimate of the total market value of the Property. As a preliminary matter, there is a lack of documentary support in the Gardner Appraisal for the statement that the ‘tunnel, bay and vacuum stations’ had a replacement cost of \$354,588 and a depreciated value of \$222,724 (which Mr. Gardner rounded and then deducted from his total market value estimate in each of his three approaches to value<sup>3</sup>). (If, in fact, the “Equipment” referenced by Mr. Gardner had a lower estimated cost, then the residual real estate value in his calculations would be higher.)

In addition, inherent in Mr. Gardner's calculations is a very key, but unsupported assumption that the car wash equipment in place had transmissible value (if physically removed from the car wash, taking into account removal and transportation costs) that would be about 63% of the original cost stated in the Gardner Appraisal. ( $\$222,724$  divided by  $\$354,588 = 62.8\%$ .) Given the lack of any details regarding the age and condition of the tunnel, bay and

---

<sup>3</sup> Instead of a rounded value of \$225,000, Mr. Gardner's final reconciled value estimate shows a net difference of \$210,000 between his estimated total market value (\$585,000) and his “Real estate value” (\$375,000). (See Gardner Appraisal, p. 60.)

vacuum station components and their likely value in the ‘used market’ for car wash equipment, the board does not find this assumption to be credible.

A lower “Equipment” value assumption, using Mr. Gardner’s methodology and estimated costs, results in a larger allocation of the total value of the Property to the real estate. If, for example, the board were to accept Mr. Gardner’s total \$585,000 estimate at face value, it is not unreasonable to conclude the value of the equipment is likely to be \$75,000 or less (rather than either his \$210,000 or \$225,000 estimates; see fn. 3). The board finds a lower estimate in this range is more reasonable in light of at least two considerations: (i) under established law, as detailed above, much, if not all, of the “Equipment” referenced by Mr. Gardner is likely to constitute taxable fixtures rather than non-taxable personalty; and (ii) the transmissible value of any car wash equipment that could in fact be deemed personalty, in the absence of any evidence to the contrary, is likely to be much less than the approximately 63% recoverable cost percentage employed by Mr. Gardner. Applying \$75,000 as a deduction from Mr. Gardner’s \$585,000 total market value estimate would make his “real estate” value conclusion close to or above the equalized market values of the Property reflected in the assessments (\$513,200 and \$493,400 2010 and 2011, respectively).

Third and finally, the board has substantial doubts as to whether Mr. Gardner’s \$585,000 reconciled estimate is a credible opinion of market value given the information presented in his appraisal and his testimony at the hearing. In his sales comparison approach, Mr. Gardner considered four car wash sales which, when adjusted for differences with the Property, indicated values ranging from \$644,963 to \$1,084,388, well above his \$585,000 estimate. (See Gardner Appraisal, pp. 55 and 60.) Mr. Gardner states he placed the “most weight” on the sales comparison approach but did not estimate a value within this range. The board is not persuaded

by his reasons for disregarding the likely value conclusion from this use of the sales comparison approach and his application instead of a 3.75 gross revenue “multiplier” to one year (2010) of reported revenues from the car wash (“\$155,899.55”), rather than a stabilized estimate of revenues.<sup>4</sup> The board further noted Mr. Gardner’s market value estimate using the cost approach (\$641,500) was somewhat higher than \$585,000. Mr. Gardner’s income approach was not adequately developed or supported by stabilized revenue and expense information.<sup>5</sup>

Turning to the City’s arguments, an analysis of whether the Property is a “special use” property is not necessary since, for the reasons explained above, the Gardner Appraisal and the Taxpayers’ remaining evidence falls short of what is required to satisfy their burden of proving the Property was disproportionally assessed in either tax year 2010 or 2011. In addition, the City presented credible testimony that all car washes, as well as other property, were assessed in a consistent manner. A consistent assessment methodology is some evidence of proportionality. See Bedford Development Co. v. Town of Bedford, 122 N.H. 187, 189-90 (1982).

For all of these reasons, the board finds the Taxpayers did not meet their burden of proving disproportionality. The appeals are therefore denied.

---

<sup>4</sup> While a gross revenue multiplier method may be an appropriate methodology in some instances, the selection of a 3.75 multiplier was not well supported for several reasons. First, some of the sale prices included in Mr. Gardner’s analysis were of real estate only and some were inclusive of both real estate and personalty. In several instances in his testimony, Mr. Gardner was unclear as to what the sale prices included and he acknowledged “the data was confusing.” Second, the majority of sales utilized in the analysis occurred between 2001 and 2007 and there was no discussion of whether any consideration was given to changing market conditions. For these reasons, the board can place no weight on the value indication arrived at via this multiplier approach.

<sup>5</sup> There are a many uncertainties and difficulties relating to Mr. Gardner’s use of the income approach to estimate a \$575,000 value, including his use of a very high (15%) capitalization rate he justified, using data on ten car wash sales (obtained from another appraiser), by dividing what he calls “Net Revenues” (not net operating income?) in his appraisal by the selling prices. The board finds this is not proper appraisal methodology and use of a lower, more reasonable capitalization rate, without any other modifications, would increase Mr. Gardner’s market value estimate significantly. If he had used a 13% capitalization rate and his net operating income estimate in his calculations, for example, his estimate of value would have increased by about \$85,000 (to \$660,000, rounded ). (\$85,745/.13=\$659,576.92.)

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

---

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: Walter H. Liff, PO Box 96, New Castle, NH 03854, representative for the Taxpayers; and City of Rochester, Assessing Department, 31 Wakefield Street, Rochester, NH 03867.

Date: 2/19/13

---

Anne M. Stelmach, Clerk