

Morello Realty, LLC

v.

Town of Littleton

Docket No.: 25988-10PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2010 assessment of \$609,800 (land \$110,300; improvements \$499,500) on Map 78/Lot 113, 106 Main Street (Route 302), a commercial building on 0.69 acres of land (the “Property”). For the reasons stated below, the appeal for abatement is granted.

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 met its burden of proving disproportionality.

The Taxpayer argued the assessment was excessive because:

(1) the Schubert Appraisal (Taxpayer Exhibit No. 1) estimates the market value of the Property, a multi-tenant commercial development known as “Parker’s Marketplace,” was \$450,000 as of the assessment date and this appraisal is the best evidence of value;

- (2) Mr. Schubert considered all three valuation approaches before concluding the income approach was the most reliable approach and his application of this approach is reasonable;
- (3) the market for commercial property was declining, as the Town's own appraiser (Mr. Gardner) has acknowledged;
- (4) the \$625,000 sale price paid in September, 2008 for the Property was not negotiated by the Taxpayer, but was the price it was forced to pay (in order to exercise a right of first refusal) because of apprehension regarding how a different buyer would affect the restaurant owned by the Taxpayer's principals which rented space on the Property;
- (5) the downtown location of the Property is inferior to the "Miracle Mile" (Meadow Street) area of the Town and Mr. Gardner's location adjustments, including his incremental acreage value adjustments, are not reasonable;
- (6) there is substantial deferred maintenance on the Property (detailed in the Schubert Appraisal, p. 59) for roof repair, replacement of 21 old windows, the "Restaurant Hood system" and "common Area Carpet" which a knowledgeable purchaser would evaluate and apply as a deduction to the price he or she would be willing to pay for the Property; and
- (7) the 2010 assessment should be abated to \$450,000, adjusted by the level of assessment

The Town argued the assessment was proper because:

- (1) the Town completed a revaluation in 2010 performed by Vision Appraisal;
- (2) the Taxpayer purchased the Property in September, 2008 for \$625,000, a price supported by another appraisal (the "Harwood Appraisal") prepared in that time frame which estimated a \$638,000 market value;
- (3) the prior owner found another potential buyer willing to pay \$625,000 and the Taxpayer exercised a right of first refusal to acquire the Property at that price;

- (4) while the Taxpayer's owners claim they overpaid for the Property, the PA-34 form (Municipality Exhibit D) was signed by one of them and attests to the \$625,000 price as being fair market value;
- (5) the Schubert Appraisal submitted by the Taxpayer relies upon a single approach to value and this detracts from its validity;
- (6) the Gardner Appraisal (Municipality Exhibit A) is the best evidence of the market value of the Property and estimates a value (\$625,000) that is supportive of the assessment of the Property determined during the revaluation by Vision Appraisal; and
- (7) the appeal should be denied.

The parties agreed the level of assessment in the town in 2010 was 98.2%, the median ratio calculated by the department of revenue administration. The Taxpayer has filed a separate appeal for tax year 2011, BTLA Docket No. 26267-11PT, which is still pending and did not consent to a consolidation of the 2011 appeal for hearing and decision with this appeal.

Board's Rulings

Based on the evidence presented, the board finds the Taxpayer met its burden of proving disproportionality and that a proportional assessment for tax year 2010 is \$540,100 (based on a market value finding of \$550,000, adjusted by the 98.2% level of assessment.) The appeal is therefore granted for the following reasons.

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 Property is a multi-tenant commercial building on Main Street (Route 302), the main thoroughfare in the Town, and has its own off-street parking, “an attribute many downtown properties do not have.” (Schubert Appraisal, p. 15.) The building, originally constructed in the 19th century, was ‘renovated in the 1980’s into its current use.’ (See Gardner Appraisal, p. 70; and Schubert Appraisal, p. 19.) The building has four levels and the assessment-record card estimates an effective building area of 14,827 square feet.

The largest tenant occupies 25% of the building and is a restaurant owned and operated by the Taxpayer’s owners (Wayne and Lisa Morello). This restaurant (“Italian Oasis”) is on the second level (leading out to the parking lot behind the building) and has a kitchen occupying space on the first level, which is at street grade. In addition to the restaurant, the Property is configured with seven other tenant spaces, two used for law firm offices, three for retail businesses and two vacant offices. (See Gardner Appraisal, p. 64.) The building has internal atriums and common areas, but no elevator, which, according to the Taxpayer’s evidence, limits the desirability of the third and fourth levels as rental spaces.

In arriving at a proportionate assessment, all relevant factors affecting market value must be considered. Paras v. City of Portsmouth, 115 N.H. at 67-68. While price does not equate to market value in all instances, the board has the discretion to determine whether the sale price

reflects market value. See, e.g., Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. at 256; and Appeal of Town of Peterborough, 120 N.H. 325, 329 (1980).

The board finds there are at least two reasons why the \$625,000 purchase price in September, 2008 is not reflective of the market value of the Property as of the assessment date (April 1, 2010), nineteen months later.

First, Mr. and Mrs. Morello testified this price was set without negotiation when they caused their company, the Taxpayer, to exercise a right of first refusal in their restaurant lease.¹ They explained in their testimony at the hearing they agreed to this price out of apprehension regarding what would happen to their restaurant if someone else bought the Property. In the board's experience, relocating an existing business, such as an established restaurant, due to a change in ownership and the prospect of increased and perhaps unduly higher rents, is not an uncommon occurrence and typically involves substantial moving and other costs, including potential loss of business through the relocation process and perhaps beyond. In light of these considerations, the board finds the representations on the PA-34 form regarding market value (relied upon by the Town in its cross-examination of the Taxpayer's owners) are not necessarily dispositive on the issue of market value at the time of purchase. On balance, considering the evidence as a whole, the board is persuaded the Taxpayer may have been atypically motivated and overpaid somewhat for the Property.

¹ There was no evidence presented by either party regarding the other bidder for the Property to confirm whether or not the \$625,000 offer was bona fide. While there was reference to an appraisal prepared at the time of purchase (the Harwood Appraisal) estimating a \$638,000 market value at or near the time of purchase, neither party presented it as evidence at the hearing. Thus, the board could give this appraisal no weight. The board considered the Town's arguments that, because of the signed PA-34 form (Municipality Exhibit D), the Taxpayer should be deemed to admit the \$625,000 purchase price was "market value," but the board finds the remaining evidence, including the testimony presented, weighs against this conclusion. See, e.g., FPG STIP Claremont LLC v. City of Claremont, BTLA Docket Nos. 23780-07PT /24265-08PT (January 19, 2010), pp. 3 and 14 (not always reasonable to rely on statements in PA-34 to reach a market value conclusion).

Second, there is undisputed evidence the market for commercial property in the Town was declining between the September, 2008 sale date and the April 1, 2010 assessment date. The Town's own appraiser, Mr. Gardner, recognized the market for this type of property was declining at a rate that could have been as high as 10% per year and applied a negative 5% annual rate to his comparables, but also stated later in his appraisal that the Property is "in a market that is declining by three percent per year." (See Gardner Appraisal, pp. 48-49 and 70.) Applying a negative 5% annual rate to the September, 2008 purchase price results in a time-adjusted value of approximately \$575,000 as of the April 1, 2010 assessment date. Adjusting for the likelihood of at least some duress with respect to agreement on the purchase price would make a reasonable time-adjusted estimate even lower, say \$550,000.

In determining market value, the board paid close attention to the professional appraisal submitted by each party. As noted above, the Gardner Appraisal estimated a much higher value (\$625,000) than the Schubert Appraisal (\$450,000). Weighing the evidence as a whole, and noting the significant points of agreement as well as certain disagreements in the two appraisals, the board arrived at its own estimate of value using the income approach for the reasons explained below.

The board finds Mr. Schubert appropriately considered all three approaches to value, and relied only on the income approach, explaining on pages 39 and 40 of his appraisal why he did not have enough reliable data to arrive at credible estimates of market value using either the cost or sales comparison approaches. With respect to the Town's criticisms regarding his use of just one approach, the board finds Mr. Schubert's decision to rely on the income approach was not unreasonable. The most likely buyer of the Property would probably be an investor, whose

primary motivation for purchasing the Property is its income potential and therefore the income approach, properly applied, is an acceptable method of estimating value.

Mr. Schubert used what he called “stabilized” income and expenses. In his appraisal, he relied upon the Taxpayer’s 2009 actual effective gross income, applied an 8% management fee and removed real estate taxes from the remaining operating expenses to estimate a net operating income of \$64,244. He then calculated and applied a tax-loaded capitalization rate of “12.932%” and deducted estimated “costs to cure” of \$49,853 to arrive at his estimate of a \$450,000 market value as of the April 1, 2010 assessment date. (See Schubert Appraisal, pp. 55, 56 and 59.)

Mr. Gardner, for his part, developed estimates utilizing all three approaches, but states he placed the “most weight” on the income approach and estimated a much higher \$697,500 value using this approach with an 11% capitalization rate. (See Gardner Appraisal, pp. 62-71.) He reconciled his cost approach (\$623,400) and sales comparison (\$500,000) estimates with the income approach to arrive at a value of \$625,000. The board notes Mr. Gardner’s sales comparison approach, even if accepted at face value, results in a substantially lower market value conclusion (\$125,000 below his reconciled value). As for the cost approach, the board finds the value conclusion reached is not credible due to the lack of comparable land sales and the difficulties in accurately estimating depreciation from all sources.

The board reviewed the testimony of both appraisers, including both direct and cross examination, and the extensive critiques leveled by each party at the other’s appraiser. Parsing through these issues, the board identified the germane points of agreement and dispute to make its own market value findings using the income approach.

To begin with, these appraisers generally agree that a “stabilized” effective gross income estimate of about \$156,000 for 2010 is reasonable for the Property. (Cf. Schubert Appraisal,

p. 56, where Mr. Schubert calculates “\$156,673”; and Gardner Appraisal, p. 65, where Mr. Gardner calculates “\$155,542.32.”) The board also noted their relatively similar operating expense estimates, excluding management fee and replacement reserve estimates discussed further below. (“\$74,749.97,” derived from figures in the Schubert Appraisal, p. 56; and “\$66,441.76” in the Gardner Appraisal, p. 65). Based on the evidence presented, the board finds an estimate of \$70,000 for stabilized operating expenses (near the mid-point of these two estimates) is reasonable.

Mr. Schubert contended management fee expenses of “\$12,534” should be applied (Schubert Appraisal, pp. 54 and 56), which is 8% of his effective gross income estimate and about 7% of his indicated potential gross income (\$178,000, rounded, applying his 12% estimate for vacancy and collection costs). Mr. Gardner contended management fee expenses should be \$5,000. This estimate is approximately 5% of \$98,100, calculated as 60% of his estimated “gross potential” rent estimate (\$163,500), using a 40% “expense ratio.” (See Gardner Appraisal, pp. 64 and 66.) The board finds 7% of potential gross income is not unreasonable for this type of commercial property and has therefore used a management fee expense allocation (\$12,500) that is near Mr. Schubert’s estimate.

There is only a nominal difference (\$300) in their respective replacement reserve estimates: Mr. Gardner estimated \$5,000 and Mr. Schubert estimating \$4,700 for this item. (See Gardner Appraisal, p. 66; and Schubert Appraisal, p. 56.) The board finds \$5,000 is reasonable, given the evidence presented regarding the age and condition of the building.

The parties differ somewhat in their computation of the appropriate tax-loaded capitalization rate, with Mr. Schubert calculating a 12.932% rate and Mr. Gardner calculating an

11% rate. Weighing the conflicting evidence, and applying its judgment and experience, the board finds a 12% rate, near the middle of this range, is reasonable.

Both appraisers assume a buyer would be likely to require a deduction for “deferred maintenance” items from the indicated purchase price. Mr. Gardner applied \$12,500 as a deduction (Gardner Appraisal, p. 69) and Mr. Schubert applied approximately \$50,000 as a deduction (Schubert Appraisal, p. 59). The board reviewed the specific deferred maintenance items discussed at the hearing and finds a total deduction of \$25,000 is reasonable for the approximate estimated cost of repairing the roof and replacing 21 windows.

The income approach, with the adjustments noted above, yields a market value indication of approximately \$550,000. (\$68,500 net operating income, capitalized at 12% less \$25,000 deferred maintenance items = \$546,000, rounded.) This value conclusion is consistent with the alternative estimate of \$550,000 discussed above, which placed some weight on the time-adjusted sale price and conditions of sale of the Property in November, 2008. There is never one exact, precise or perfect assessment; rather, there is an acceptable range of values which, when adjusted to the municipality’s general level of assessment, represents a reasonable measure of proportionality and the resulting tax burden. See Wise Shoe Co. v. Town of Exeter, 119 N.H. 700, 702 (1979).

Finally, the board has examined the remaining evidence presented, including the somewhat heated and protracted disputes between the parties regarding which appraisal was “misleading.” These disputes were largely unhelpful to the board’s principal task of determining the most reasonable estimate of market value using the best evidence, regardless of its source or which party presented it. Good faith disagreements between appraisers in their value conclusions or their assumptions and methodology, as well as innocuous misstatements or

inadvertent typographical errors, are not uncommon and do not, without other evidence, justify a charge that an appraisal is “misleading,” especially if any such misstatements or errors are acknowledged by the appraiser.

In summary, the board finds \$550,000 to be the most reasonable estimate of the market value of the Property as of the April 1, 2010 assessment date. Applying the 2010 level of assessment to this market value estimate results in an abated assessment of \$540,100.

If the taxes have been paid, the amount paid on the value in excess of \$540,100 for tax year 2010 shall be refunded with interest at 6% per annum from date paid to refund date. RSA 76:17-a.

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: Mark Lutter, Northeast Property Tax Consultants, 14 Roy Drive, Hudson, NH 03051, representative for the Taxpayer; Chairman, Board of Selectmen, Town of Littleton, 125 Main Street, Suite 200, Littleton, NH 03561; and Municipal Resources, Inc., 295 No. Main Street, Salem, NH 03079, Contracted Assessing Firm.

Date: March 12, 2013

Anne M. Stelmach, Clerk