

MTS Development Corp.

v.

City of Lebanon

Docket No.: 26031-10PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “City’s” 2010 assessment of \$1,374,600 (land \$162,200; building \$1,212,400) on Map 91/Lot 233, 2 West Park Street, a commercial building on 0.22 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 Richard Balagur, argued the assessment was excessive because:

(1) an appraisal prepared by Bruce A. Taylor (the “Taylor Appraisal,” Taxpayer Exhibit No. 1) estimates the market value of the Property was \$1,200,000 as of the April 1, 2010 assessment date;

(2) Mr. Taylor utilized a discounted cash flow analysis, based on historical income and expense data, to estimate the market value of the Property (Taylor Appraisal, p. 59);

(3) Mr. Balagur utilized the first year’s income and expenses from the discounted cash flow analysis and applied the City’s methodology of developing a “tax loaded” capitalization rate which resulted in a lower indication of market value (\$1,183,941) than the Taylor Appraisal (see Taxpayer Exhibit No. 3);

(4) the City’s appraisal estimating a market value of \$1.6 million is flawed and unreliable; and

(5) the assessment should be abated based on the Taxpayer’s market value estimate adjusted by the level of assessment in the City.

The City argued the assessment was proper because:

(1) the City performed a revaluation in tax year 2010;

(2) the board’s prior decision was for a different tax year (2006) and should have no bearing on the proportionality of the assessment in tax year 2010;

(3) the Taxpayer did not call Mr. Taylor as a witness and this is objectionable and should diminish the weight given to the Taylor Appraisal as well as the fact that it is “riddled with mistakes” and is “flawed” in its analysis;

(4) the Taylor Appraisal is a “summary appraisal,” as stated in the July 16, 2010 letter from Mr.

Taylor in this appraisal, is limited in content and is stated to be a “leased fee interest” appraisal

based on a single approach and is not a fee simple appraisal reflective of the market;

(5) an appraisal for the City prepared by Andrew LeMay, a New Hampshire certified general

appraiser with Real Estate Consultants of New England, Inc. (the “LeMay Appraisal,”

Municipality Exhibit A) used both the sales comparison and income approaches to estimate a

market value of \$1,600,000 as of the assessment date, which is higher than the indicated value of

the assessment under appeal;

(6) Mr. LeMay testified at the hearing and the LeMay Appraisal is more credible and better

supported than the Taylor Appraisal; and

(7) the Taxpayer did not meet its burden of proving disproportionality and the appeal should be

denied.

The parties agreed the DRA’s estimate of the level of assessment in the City was 97.2%, the median ratio calculated by the department of revenue administration.

Board’s Rulings

Based on the evidence presented, the board finds the Taxpayer did not meet its burden of proving the tax year 2010 assessment on the Property was disproportional. The appeal is therefore denied.

A proportional assessment is one based on a credible estimate of the market value of the Property adjusted by the level of assessment in the municipality. See RSA 75:1 and, e.g., Porter v. Town of Sanbornton, 150 N.H. 363, 368 (2003). To obtain a tax abatement, the Taxpayer was required to establish, by a preponderance of the evidence, the market value of the Property was

below \$1.4 million, rounded. (\$1,374,600 assessment divided by 97.2% level of assessment = \$1,414,198.) (See also LeMay Appraisal, p. 30.)

The Taxpayer relied upon the \$1.2 million market value estimate in the Taylor Appraisal, as well as Mr. Balagur's refinements (in Taxpayer Exhibit No. 3) to that appraisal which had the effect of lowering the value indication further. For a number of reasons, the board finds neither the Taylor Appraisal, nor Mr. Balagur's refinements, satisfy the Taxpayer's burden of proving disproportionality.

There were many unanswered questions regarding the validity of the Taylor Appraisal. Mr. Taylor did not attend the hearing and therefore was not available for questioning by the City or the board regarding his assumptions and conclusions.¹ The board overruled the City's objections to the introduction of the Taylor Appraisal as evidence, but stated it would only give this appraisal the weight it deserves.

The stated function of the Taylor Appraisal is "to determine market value in leased fee estate" for the Property. (Taylor Appraisal, p. 5.) The City argued this was improper in a tax abatement appeal because the basis for valuing property for tax purposes is fee simple value, not leased fee value.² The City's assessor explained the leased fee value of a property may be higher, lower, or the same as its fee simple value depending on the correlation between contract (or "actual") rents and market level rents.

¹ When asked by the board during the August 21, 2013 hearing as to why Mr. Taylor was not present, Mr. Balagur testified he tried to communicate with Mr. Taylor about six months prior to the hearing to seek his attendance, but did so by "e-mail," which was not responded to. A prior continuance of the hearing was granted to the Taxpayer for the ostensible reason of Mr. Taylor's unavailability to attend the then scheduled hearing date. (See the Taxpayer's November 19, 2012 request for a continuance.)

² A "leased fee estate is an ownership interest held by a landlord with the right of use and occupancy conveyed by lease to others; the rights of the lessor (the leased fee owner) and the lessee (leaseholder) are specified by contract terms contained within the lease," whereas a "fee simple estate implies absolute ownership unencumbered by any other interest or estate." (The Appraisal Institute, The Appraisal of Real Estate, 11th ed., pp. 7-8.)

The board agrees the Taylor Appraisal leaves this and other important questions unanswered. The Taylor Appraisal did not contain sufficient information for the board to conclude whether the Property's contract rents were at, below or above market rents as of the April 1, 2010 date of appeal. The information in the Taylor Appraisal regarding comparable market rents was limited to a single table and there was no information regarding how the Property compared to the comparable rental properties, either qualitatively or quantitatively. Therefore, there is insufficient evidence for the board to decide whether a leased fee estimate of value (such as the estimate in the Taylor Appraisal) is below or above the market value of the fee simple interest of the Property as of the assessment date.

Mr. Taylor relied on the income approach to estimate market value and did not use the sales comparison approach “[d]ue to a lack of current similar sales” and did not use the cost approach “due to the building’s age and condition.” (Taylor Appraisal, p. 43 and 61.) Mr. Taylor performed a 10-year discounted cash flow analysis³ to estimate the market value of the Property. However, a major flaw in his analysis appears to be Mr. Taylor developed and applied a “capitalization rate” to his income stream (which would have been appropriate in a stabilized income capitalization approach as utilized by Mr. LeMay), rather than a “discount rate”, indicating some confusion regarding the two concepts. (See Taylor Appraisal, pp. 46-51.)

The City also properly questioned the basis of Mr. Taylor's rent estimates. It is not clear whether Mr. Taylor adequately took into account the difference between ‘triple net’ and gross rent data. For this and other reasons, the board is unable to determine whether the rents used by Mr. Taylor correspond with market rents.

³ A discounted cash flow analysis utilizes a discounted rate “to calculate the present value of anticipated future cash flows.” (The Appraisal Institute, The Appraisal of Real Estate, 11th ed., p. 462.)

Mr. Taylor also utilized a high 25% rate for “vacancy & credit loss” in his analysis. (Taylor Appraisal, pp. 63 and 59.) The board finds this rate is not adequately supported. The City’s assessor testified actual vacancy rates for office space in the City were in the 4-7% range. Applying a much higher vacancy rate decreases the calculated net income in the income approach. While there was significant vacant space on the second floor due to a tenant vacating the Property, Mr. Taylor apparently assumed the vacant space could not be leased and vacancy and credit loss would remain at this high level (25%) for at least ten years, the entire holding period utilized in his discounted cash flow analysis. This assumption is untenable and further undercuts the credibility of the Taylor Appraisal.

The City also noted it is unclear how Mr. Taylor reached his operating expense estimate of \$215,670 from the actual historical expense data given to him by the Taxpayer or any other source. In addition, the City expressed concerns regarding certain capital expenses (replacement of roofing and air conditioning compressors, flooring, etc.) and other items improperly included in Mr. Taylor’s calculation of expenses (such as depreciation, loan interest and New Hampshire business enterprise taxes). The board agrees, and finds the improper inclusion of numerous expenses further lessens the credibility of the value opinion expressed in the Taylor Appraisal.

Mr. Balagur, in Taxpayer Exhibit No. 3, utilized the income and expenses estimated by Mr. Taylor for the first year of the discounted cash flow, then deducted real estate taxes and adjusted Mr. Taylor’s “capitalization rate” by the City’s level of assessment to arrive at a revised estimate of value. However, as detailed above, the board finds the income and expense estimates in the Taylor Appraisal are not credible and therefore Mr. Balagur’s revision (in Taxpayer Exhibit No. 3), based on the same premises, are also flawed.

For its part, the City presented the LeMay Appraisal, which estimated a market value of \$1.6 million as of the assessment date. Mr. LeMay utilized the income capitalization approach and the sales comparison approach and placed primary reliance on the income approach. The board noted the Taxpayer's criticisms of the LeMay Appraisal at the hearing, but finds, on balance, the LeMay Appraisal is the best evidence of market value and is supportive of the assessment under appeal.

For all of these reasons, the board finds the Taxpayer failed to meet its burden of proving disproportionality. 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

Michele E. LeBrun, Chair

Albert F. Shamash, Member

Theresa M. Walker, Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: MTS Development Corp., c/o Richard Balagur, President, 20 West Park Street, Lebanon, NH 03766, Taxpayer; Shawn M. Tanguay, Esq., Gardner, Fulton & Waugh, PLLC, 78 Bank Street, Lebanon, NH 03766, counsel for the City; and Chairman, Board of Assessors, City of Lebanon, 51 North Park Street, Lebanon, NH 03766.

Date: September 12, 2013

Anne M. Stelmach, Clerk