

Bantam Realty Trust, LLC

v.

City of Keene

Docket No.: 26197-11PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “City’s” 2011 assessment of \$3,962,900 (land \$692,000; building \$3,270,900) on Map 166/Lot 01-005.0000, 15 Kit Street, a light industrial and office building on 10 acres (the “Property”). (As noted below, the Taxpayer also owns, but did not appeal, eight (8) other lots with a combined assessment of \$120,500 and the City did not stipulate these lots were proportionately assessed in 2011.) 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 Christopher Snow of Property Tax Advisors, Incorporated, argued the assessment on the Property was excessive because:

- (1) the best evidence of market value is a “Market Analysis” prepared by Mr. Snow (the “Snow Analysis,” Taxpayer Exhibit No. 1), which utilized the sales comparison and income approaches to value and arrived at a market value estimate of \$2.9 million;
- (2) in addition to the Snow Analysis, two additional comparable sales (in Taxpayer Exhibit No. 2) and the “Property Tax Cards” (in Taxpayer Exhibit No. 3) support the Taxpayer’s arguments that the Property was disproportionately assessed; and
- (3) the assessment should be abated to \$2.9 million adjusted by the level of assessment in the City.

The City, represented by Thomas P. Mullins, City Attorney, argued the appeal should be dismissed because:

- (1) as discussed in the “Trial Memorandum” filed at the hearing, the Snow Analysis was not prepared by an expert appraiser but rather by the Taxpayer’s representative who is a real estate broker, not a licensed appraiser, and has an acknowledged financial interest in the outcome of this appeal which makes his market value estimate less credible;
- (2) the best evidence of the market value of the Property is the “Real Estate Appraisal” prepared by Stephen G. Traub (the “Traub Appraisal,” Municipality Exhibit A) which used the sales comparison and income approaches to value and arrived at a market value estimate of \$3,931,200;
- (3) Mr. Traub utilized five comparable sales and his adjustments are more reasonable and better supported than those made in the Snow Analysis (see Municipality Exhibits B and C) and the

conclusions reached in the Traub Appraisal are more credible because, unlike Mr. Snow, Mr. Traub is a qualified, independent expert; and

(4) the Taxpayer has not met its burden of proving disproportionality and the appeal should be dismissed.

The parties agreed the level of assessment in the City was 100.4% in tax year 2011, 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 carry its burden of proving the assessment was disproportional for tax year 2011. The appeal is therefore denied as a result of the rulings detailed below.

A. Procedural Motions

At the April 10, 2014 hearing, the board first heard arguments on the City's January 24, 2014 Motion in Limine (the "Motion") and the City's January 28, 2014 Objection to Notice of Additional Comparable Sales (the "Objection"). In the Motion, the City argued the Taxpayer's representative, Mr. Snow, should be precluded from "testifying as an expert witness" and the Taxpayer should be precluded from entering the Snow Analysis as an exhibit because it is not an appraisal. In the Objection, the City argued the Taxpayer should be precluded from entering into evidence information regarding two comparable sale properties (contained in Taxpayer Exhibit No. 2) as they transferred after the April 1, 2011 assessment date. The board denied both the Motion and Objection for the following reasons.

First, the board does not agree with the arguments in the Motion that the Snow Analysis is not an appraisal and therefore should be excluded. The Snow Analysis may not be titled an appraisal, but it does meet the board's definition of what constitutes an appraisal. See Tax

102.07.¹ The Snow Analysis is clearly a “written opinion of value of a specific property” developed using the comparative sales and income approaches. The board has made similar rulings in prior decisions. Cf. Benning Street, LLC v. City of Lebanon, BTLA Docket No. 24657-08PT (December 9, 2011) at p. 4. The board finds the qualifications of Mr. Snow (or the lack thereof) go to the weight to be given the Snow Analysis, not its admissibility. Further, nothing in the board’s definition of appraisal requires a preparer of one to be an appraiser licensed by the State of New Hampshire.

Second, the board denied the Objection as the date a sale occurs goes to the evidentiary weight given to it, not to its admissibility. The board notes the City’s own expert (Mr. Traub) utilized a sale that occurred in November, 2011, more than seven months after the April 1, 2011 date of assessment. (Traub Appraisal, p. 53.)

At the conclusion of the Taxpayer’s presentation, the City made an oral motion to dismiss the appeal on two grounds. The board denied the motion to dismiss for the reasons stated below.

The City first argued the Taxpayer owns eight other properties in the City and did not submit any evidence to establish the proportionality of those separate assessments or the proportionality of the total assessment of the Taxpayer’s entire estate. Mr. Snow responded the Taxpayer did not challenge the proportionality of those assessments and, in any event, their total assessment (\$120,500) is nominal in comparison to the assessed value of the Property (close to \$4 million). The City did not provide any evidence that the Taxpayer’s other properties were underassessed. Because there is a presumption of validity to each assessment and because these

¹ Tax 102.07 defines an appraisal as “a written opinion of value of a specific property that relies on the comparative sales, income or cost approach and any tax assessment report that relies on assessment information or comparison. A sales or market analysis for listing a property for sale is not included in this definition. A cost calculation sheet by itself is not included in this definition.”

assessments constitute a very small part (about 3%) of the Taxpayer's entire estate, the board finds dismissal of the appeal on this ground is not warranted.

As a second ground for dismissal, the City argued the Taxpayer did not carry its burden of proof because Mr. Snow is not a licensed real estate appraiser and the Snow Analysis is not an unbiased opinion of value as he has a financial interest in the outcome of the appeal. (See Trial Memorandum, unnumbered pp. 2-3.) Consistent with the denial of the Motion, the board finds the City's objections go to the weight of the evidence presented by Mr. Snow (the Snow Analysis and his testimony) rather than being an adequate ground for dismissal or exclusion of this evidence and the board so ruled at the hearing of this appeal.

Additionally, non-attorneys are permitted to represent taxpayers before the board. (See RSA 71-B:7-a.) Unlike licensed appraisers who are bound by the ethics rules enumerated in the Uniform Standards of Professional Appraisal Practice ("USPAP"),² there is nothing in either the statutes or the board's rules that preclude a tax representative such as Mr. Snow from being paid for their services on a contingency basis or for advocating for their client.

B. Market Value Evidence

Turning to the evidence presented, the parties disagree by about \$1 million on the issue of the market value of the Property in 2011. (As noted above, the Snow Analysis presented by the Taxpayer estimates a value of \$2,900,000 and the Traub Appraisal presented by the City estimates a market value of \$3,931,200.)

Mr. Snow and Mr. Traub agree the sales comparison and income capitalization approaches to value should be considered in the estimation of market value of the Property.

² The Ethics Rule of USPAP states "an appraiser must not advocate the cause or interest of any party or issue." Further, "an appraiser must not accept an assignment, or have a compensation arrangement for an assignment, that is contingent on... the attainment of a stipulated result (e.g., that the loan closes, or taxes are reduced)." The Appraisal Foundation, USPAP, 2014-2015 ed., pp. U-7 & U-8.

Mr. Snow placed slightly more weight on the income capitalization approach, while Mr. Traub placed primary reliance on the sales comparison approach. The board finds, based on the historic use of the Property (generally owner-occupied), and the quality and quantity of market data presented in the Traub Appraisal and Snow Analysis, the sales comparison approach results in the most credible opinion of market value. Both Mr. Snow and Mr. Traub agreed the appropriate unit of comparison was the sale price per square foot of gross building area.

The Snow Analysis utilized eight comparable sales that occurred between February, 2008 and March, 2011. The comparable sales ranged in size from approximately 50,000 square feet to just over 218,000 square feet and had sale prices ranging from \$1,377,800 to \$5,015,000, or \$17 per square foot to \$63 per square foot. (See Snow Analysis, p. 19.) After adjustments for physical differences, Mr. Snow concluded the comparable sales provided a range of value indications from \$17 to \$32 per square foot. Mr. Snow reconciled to \$26 per square foot, resulting in a market value estimate, using this approach, of \$2,850,000, rounded. (Id., p. 10.)

The Traub Appraisal utilized five comparable sales that occurred between December, 2009 and November, 2011. They ranged in size from approximately 50,000 square feet to 157,000 square feet and had sale prices ranging from \$2,050,000 to \$5,015,000, or \$29 per square foot to \$63 per square foot, rounded. (See Traub Appraisal, p. 54.) After adjustments for market conditions and physical differences, Mr. Traub concluded the comparable sales provided a range of value indications from \$34 to \$37 per square foot. Mr. Traub reconciled to \$36 per square foot, resulting in a market value indication of \$3,931,200 for the Property. (Id., p. 56.)

Mr. Snow and Mr. Traub utilized three of the same comparable sales: 10 Iron Horse Drive, Bedford sold in June, 2010 for \$5,015,000, or \$32 per square foot (Snow Analysis, Comp 1; Traub Appraisal, Comp 1); 11 Corporate Drive, Keene sold in July, 2010 for \$3,143,500, or

\$63 per square foot (Snow Analysis, Comp 4; Traub Appraisal, Comp 3); and 17-23 Dumain Avenue, Nashua sold in March, 2010 for \$2,050,000, or \$29 per square foot (Snow Analysis, Comp 5; Traub Appraisal, Comp 4). The board finds these three comparable properties, with some adjustments, provide the best indication of the market value of the Property in tax year 2011.

The major difference between the parties is the market value impact of the fact the Property has more office space (approximately 25%) than typical light industrial buildings (with 5% to 15%). Mr. Snow argued this “excess” office space is a form of functional obsolescence, is inefficient and detracts from its market value. While Mr. Traub agreed the Property has more than the “usual” amount of office space for industrial buildings, he believes it enhances the value of the Property as it can be leased to a third-party and provides the owner an income stream. As of April 1, 2011, this additional office space was leased and continued to be leased as of the date of the hearing.

The office space at issue has separate access and is located in a two-story addition that is attached to the front of the single-story industrial building (which also has finished office space). The board finds the two-story office space enhances the market value of the Property as there is a demand for office space in the Keene market and the physical layout of the Property provides for relatively simple segregation of this two-story office space from the industrial space. Therefore, the board finds the contributory value of this office space was properly adjusted for in the Traub Appraisal.

Since Mr. Snow made no such adjustments, the board finds the sales comparison approach in the Snow Analysis understates the market value of the Property. When modified to include appropriate adjustments for the contributory value of this office space, the modified

market value indications arrived at in the Snow Analysis are generally supportive of the assessment under appeal.

The board did not place any weight on the income approaches to value in either appraisal for several reasons. First, the Property was generally designed to be a single user building and has historically been primarily owner occupied (with the exception of the two-story office space). Second, the most likely buyer of the Property would occupy the industrial space and would lease the office space to offset carrying costs. Finally, industrial buildings similar in size to the Property are typically purchased for owner occupancy, not by investors motivated by their income generating potential.

If the board were to give weight to the income approach in valuing the Property, the assumptions and conclusions in the Snow Analysis are subject to serious question. As noted in Section IV. A. of the Trial Memorandum submitted by the City, making reasonable modifications to the key income, expense and capitalization rate assumptions in the Snow Analysis leads to an indication of value using the income approach (approximately \$4.6 million) that is supportive of the equalized value of the assessment under appeal (approximately \$3.947 million).

Mr. Snow's lower estimate (\$2.9 million) rests in large part on estimating a "modified gross" rental rate of \$5.50 per square foot for the light industrial space. His only support for using this rate are six comparable properties leased on a 'triple net' rental basis; he adjusted the 'triple net' rent indications upward by approximately 10% to account for the differences between modified gross and triple net lease rates. Mr. Snow then deducts total of \$186,000 for "Heat" and "Electricity." (See Snow Analysis, pp. 30 and 39-40.)

Not only does Mr. Snow provide no historical income or expense information to support these estimates, but they appear to be illogical for many reasons, including the fact this \$186,000 expense deduction constitutes over 25% of his estimated potential gross income calculation. A reasonably prudent landlord is unlikely to agree to only a 10% upward adjustment in rent (in a modified gross rent lease) if the landlord then has to absorb significantly higher heat and electricity expenses (in the magnitude of 25%). Additionally, given the omission of historical or market-based expense information in the Taxpayer's presentation, there is also reason to question (as the City has) whether the 17% deduction for "Non-reimbursable Expenses" utilized by Mr. Snow is reasonable.

In summary, based on the market value evidence presented, the board finds the Taxpayer did not carry its burden of proving disproportionality. Therefore, the appeal is 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

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: Christopher Snow, Property Tax Advisors, Inc., 56 Middle Street, Portsmouth, NH 03801, representative for the Taxpayer; Thomas P. Mullins, Esq., 3 Washington Street, Keene, NH 03431, counsel for the City; and Chairman, Board of Assessors, City of Keene, 3 Washington Street, Keene, NH 03431.

Date:

Anne M. Stelmach, Clerk