White Duck Realty, LLC

v.

City of Nashua

Docket Nos.: 26462-11PT/26750-12PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "City's" 2011 and 2012 assessments of $6,501,100 (land $2,429,800; building $4,071,300) on Map A/Lot 786, 168 Daniel Webster Highway, a commercial building on 6.41 acres (the "Property"). The board held a consolidated hearing on these two appeals. For the reasons stated below, the appeals for abatement are granted.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the assessments were 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 assessments were higher than the general level of assessment in the municipality. Id. The Taxpayer carried this burden.

The Taxpayer, represented by Christopher Snow of Property Tax Advisors, Inc., argued the assessments were excessive because:

(1) after being marketed for sale for approximately four years, the Taxpayer purchased the Property in March, 2011 in an arm's-length transaction for $4,000,000;

(2) the Taxpayer presented a "Market Analysis Report" prepared by Christopher Snow (the "Snow Analysis," Taxpayer Exhibit No. 4) which used the sales comparison and income approaches to value and estimated the market value of the Property was $4,000,000 as of April 1, 2011 and 2012[1];

(3) while the Taxpayer submitted a financing appraisal prepared by Crafts Appraisal Associates, Ltd. (the "Crafts Appraisal," Taxpayer Exhibit No. 5), it does not necessarily agree with the conclusions arrived at, specifically because it did not address the $4,000,000 sale price; however, the Crafts Appraisal does support the Taxpayer's position only the first floor area should be considered in the valuation of the Property as the "mezzanine" adds "minimal value" (Id., p. 40);

(4) after the March, 2011 purchase of the Property, the Taxpayer expended approximately $500,000 in renovating the Property, however, the City did not change the assessed value from 2011 to 2012 because, according to the testimony of Douglas Dame, Assessor III, "the Property is in litigation and the City would just have to abate more money"; and

(5) the totality of the Taxpayer's evidence (the Snow Analysis, the Crafts Appraisal and the $4,000,000 sale price) supports the Taxpayer's position the Property was disproportionately assessed in 2011 and 2012 and therefore the appeals should be granted based on a market value of $4,000,000 for tax years 2011 and 2012.

[1] Mr. Snow testified there was not a measurable change in market value between 2011 and 2012.

The City, represented by Andrew LeMay, Deputy Assessor, argued the assessments were proper because:

(1) the March, 2011 sale price of $4,000,000 did not reflect the true market value of the Property as it was sold by a "liquidation company" (see Municipality Exhibits E and F) and it was not available for sale for a full four years as it appeared to have been "set off-market" at two different times (see Taxpayer Exhibit No. 7, p.3, unnumbered);

(2) in 2001, a previous owner of the Property spent approximately $1,000,000 to construct the mezzanine to be utilized as furniture display area and the mezzanine contributes value to the Property and should be considered in the calculation of the Property's "gross leasable area" (see Municipality Exhibit A);

(3) in March, 2011, the Taxpayer obtained mortgages in the amount of $2,350,000 and $1,645,000 from Northway Bank and $1,656,000 from Granite State Economic Development Corporation, which is evidence the sale price of $4,000,000 was not reflective of the Property's market value (see Municipality Exhibit C);

(4) several comparable sale properties utilized in the Snow Analysis should not be relied upon as they were sold to abutters or were sold under duress when the owner went out of business; and

(5) the assessments are proportional and the appeals should be denied.

The parties agree the level of assessment in 2011 was 105.4% and in 2012 was 109.7%, the median ratios as calculated by the department of revenue administration.

Board's Rulings

Based on the evidence, the board finds the proper assessments to be $5,164,600 for 2011 and $5,375,300 for 2012, based on a market value finding of $4,900,000 for each year.

The Property is a single-tenant retail building located on 6.41 acres on Daniel Webster Highway, one of the state's premier retail districts. The Property is sited in the northernmost section of the retail district, has limited visibility from Daniel Webster Highway and is behind a strip-style shopping center and an automotive dealership. It was constructed in 1991 as a furniture store, and has been occupied (interspersed by several periods of vacancy) by various furniture stores since that time (Levitz, Furniture World and now Ashbrook Furniture). It was constructed with first floor area totaling 48,612 square feet, and in 2001 34,800 square feet of mezzanine space was constructed.

"In an abatement case, the taxpayer has the burden of proving by a preponderance of the evidence that the Property at issue was assessed disproportionately to other property in the Town." Appeal of Sokolow, 137 N.H. 642, 643 (1993). Assessments must be based on market value, as prescribed in RSA 75:1. Proportionality is determined by focusing on market value adjusted by the level of assessment in the Town. See, e.g., Porter v. Town of Sanbornton, 150 N.H. 363, 367 (2003); see also Appeal of Net Realty Holding Trust, 128 N.H. 795, 796 (1986); Appeal of Great Lakes Container Corporation, 126 N.H. 167, 169 (1985); and Appeal of Town of Sunapee, 126 N.H. 214, 217-18 (1985).

To determine whether the taxpayer met its burden of proving disproportionality, the board considered and weighed 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, "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. 68; see also Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 256 (1994).

The Taxpayer relied upon the Snow Analysis, which utilized the sales comparison and income approaches to value and estimated a market value of $4,000,000 as of April 1, 2011, and Mr. Snow testified the market value of the Property was unchanged for April 1, 2012. The Snow Analysis placed most weight on the sales comparison approach, and within that approach, placed significant weight on the March, 2011 sale of the Property as a comparable sale.

The Property was marketed for sale beginning in October, 2008 with an asking price of $8,000,000. The Property was actively marketed through a national firm and eventually sold in March, 2011 for $4,000,000. Mr. Snow testified he spoke with the listing broker who indicated the Property did not attract any "national" retailers due in part to the mezzanine space (which limits the ceiling height on the first floor to approximately nine feet), and the eventual sale price of $4,000,000 was the "cleanest offer" received.

The City argued the sale price did not represent the Property's true market value for several reasons: the seller was a "liquidation company," the Crafts Appraisal estimated the Property had a market value of $5,200,000 as of the date of sale (see Taxpayer Exhibit No. 6) and Taxpayer obtained mortgages totaling more than the sale price.

While the $4,000,000 sale price is some evidence of the Property's market value, it is not necessarily conclusive evidence. The board has the discretion to evaluate and determine the credibility of the sale price being indicative of market value. See Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 256 (1994); Appeal of Town of Peterborough, 120 N.H. 325, 329 (1980). While Mr. Snow testified the $4,000,000 offer was the

"cleanest," he did not know if it was the highest offer nor was he aware if it was the only offer. The board finds, however, the transaction was arm's-length in nature and the sale price should be given some weight.

The Taxpayer and the City disagreed whether the mezzanine should be included in the calculation of the Property's gross building area and/or its net leasable area. The board finds the question that needs to be addressed is not if the mezzanine should be included as gross area or leasable area because of a particular textbook definition, but whether or not it contributes to the market value of the Property.[2] The board finds the mezzanine suits the needs of the Taxpayer as a furniture retailer, but would have limited utility for most other retailers due to the resulting limited ceiling heights on the first floor and in the mezzanine (approximately nine feet). The board was not persuaded by the City's argument that the mezzanine is a desirable attribute of the Property because many other retail properties in the area have mezzanines, because just as many retail properties, if not more, were constructed without mezzanines or with higher overall ceiling heights.

There are three 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 (13th 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

[2] In arriving at a proportionate assessment, all relevant factors affecting market value must be considered. Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1975).

to select any one of the valuation approaches based on the evidence. Brickman v. City of Manchester, 119 N.H. 919, 920 (1979).

Given the evidence in this appeal, the board finds the use of the comparable sales approach results in the most credible market value opinion due to the Property's historical use, the most likely buyer of the Property would be an owner occupant and the quality and quantity of available sales data. Further, the Property was constructed to be occupied by a single user and investors are typically more likely to purchase multi-tenant properties, partially in an effort to minimize their risk.

The board finds the best evidence of market value is several sales utilized in the Snow Analysis (p. 35) and the Crafts Appraisal of retail buildings in desirable retail areas of the state:

- 1100 South Willow Street, Manchester (33,110 square feet) sold June, 2009 for $3,500,000 or $105.71 per square foot (Snow Analysis, p. 35; Crafts Appraisal, p. 42);
- 270 Daniel Webster Highway, Nashua (22,033 square feet) sold March, 2010 for $2,550,000 or $115.74 per square foot (Snow Analysis, p. 35);
- 1700 Woodbury Avenue, Portsmouth (34,959 square feet) sold September, 2009 for $3,500,000 or $100.12 per square foot (Snow Analysis, p. 35; Crafts Appraisal, p. 42); and
- 1875 South Willow Street, Manchester (46,611 square feet) sold September, 2008 for $5,610,000 or $120.36 per square foot (Crafts Appraisal, p. 42).

The board finds the mezzanine does not increase the market value of the Property in direct proportion to its size, but on balance does contribute to the market value of the Property. Based on its judgment and experience, the board finds an upward adjustment to the comparable sales is appropriate for the mezzanine. "The mezzanine at the subject would be considered advantageous for some potential users and detrimental to other potential users. While it adds square footage for display for some users, it limits first floor ceiling height to other users. In the

current market, it is my opinion that the mezzanine… adds minimal value." (Taxpayer Exhibit No. 5, p. 40.)

In addition to adjustments for the mezzanine, the comparable sales require adjustments for market conditions (time), location, size, lot size, and condition. After making the appropriate adjustments, the comparable sales provide a range of value indications from $95 to $117 per square foot. The low end of the range is 1700 Woodbury Avenue, Portsmouth, which is the most dissimilar location to the Property. The high end of the range is 1875 South Willow Street, Manchester, which has a different highest and best use than the Property as it is a multi-tenant retail building. The remaining sales provide value indications of $106 and $116 per square foot. Additionally, the board finds it appropriate to consider the sale price of the Property, which sold in March, 2011 for $4,000,000, or $82.28 per square foot.

Based on the totality of the evidence, using its judgment and experience, the board finds a value indication of $100 per square foot is appropriate for the Property, resulting in a market value of $4,900,000 rounded ($100 x 48,612 square feet) for each tax year. This market value results in assessed values of $5,164,600 for 2011 and $5,375,300 for 2012.

If the taxes have been paid, the amount paid on the value in excess of $5,164,600 for 2011 and $5,375,300 for 2012 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Until the City undergoes a general reassessment or in good faith reappraises the property pursuant to RSA 75:8, the City shall use the ordered 2012 assessment for subsequent years. RSA 76:17-c, I and II.

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, <u>not the date this decision is received</u>. 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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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; and Chairman, Board of Assessors, City of Nashua, PO Box 2019, Nashua, NH 03061.

Date: July 21, 2014

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Anne M. Stelmach, Clerk