

Cropsey & Mitchell Company, Inc.

v.

Town of Tilton

Docket No.: 26862-12PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” tax year 2012 assessment of \$973,100 (land \$104,100; building \$869,000) on Map U06/Lot 1, 322 W. Main Street, an office building on 0.7 acres of land (the “Property”).¹ (The Taxpayer also owns two other lots in the Town, but the parties did not dispute the proportionality of the assessments on those lots in tax year 2012.) 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

¹ The board heard and decided prior (2009 and 2010) tax abatement appeals involving the Property and other lots owned by the Taxpayer and/or affiliated entities. [See Cropsey & Mitchell Company v. Town of Tilton, BTLA Docket Nos. 25219-09PT and 25973-10PT (November 2, 2012), hereinafter, the “Prior Decision.”] Based on the evidence presented in those appeals, the board found the Property had a market value of \$1.1 million in 2009 and \$1 million in 2010; after adjustment by the 97.3% level of assessment in 2010, that assessment was abated to \$973,000. (Prior Decision, pp. 9-10.)

The Taxpayer filed a tax year 2011 appeal in the Belknap County Superior Court (Docket No. 12-CV-305), challenging the \$973,000 assessment and that appeal was denied on June 9, 2014. The Taxpayer also filed a tax year 2013 appeal (BTLA Docket No. 27239-13) challenging the \$973,100 assessment, which the board consolidated for hearing and decision with the tax year 2012 appeal. (See March 19, 2015 Order.) On April 13, 2015, however, the Taxpayer notified the board by letter of its withdrawal of the 2013 appeal, leaving only this 2012 appeal for hearing and decision.

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 argued the assessment was excessive because:

- (1) the local commercial real estate market remains relatively weak and challenging for the reasons noted in the testimony of a commercial property investor and manager (Raymond "Rusty" Bertholet);
- (2) as shown in Taxpayer Exhibit No. 2, the Property has experienced declining "Gross Rent" over the past eight years (2008 through 2014) and applying the Property's actual income to a gross income multiplier of 3.85 (mentioned in a prior Town appraisal) results in a market value for the Property of \$325,000 - \$350,000, even lower than the \$500,000 market value estimate in the "Schubert Appraisal" (Taxpayer Exhibit No. 1);
- (3) the Taxpayer's representative (Mark Lutter) does not accept the value conclusion in the Schubert Appraisal and Mr. Schubert did not attend the hearing because he is "very expensive" and Mr. Lutter decided it would not be 'cost-effective' to call him as a witness;
- (4) James Cropsey, a shareholder and the manager of the Taxpayer, is a real estate broker and does not agree with the Town's argument the Property is 'mismanaged';
- (5) the Property has limited on-site and street parking, is 'adversely' impacted by a parking "easement" (owned by the Town for public parking in order to use an adjacent park) and the majority of the parking spaces dedicated to the tenants of the Property are remote and situated on the other side of the park; and

(6) the assessment on the Property should be abated based on a market value of \$500,000 (the value in the Schubert Appraisal and the value testified to by Mr. Cropsey) or lower (the \$350,000 asserted by Mr. Lutter).

The Town argued the assessment was proper because:

(1) the Taxpayer purchased the Property in 2000 “as a shell structure in need of major renovation,” with transfer stamps indicating a sales price of \$483,000, as stated on pp. 1 and 11 of the Town’s appraisal (the “Cunningham Appraisal,” Municipality Exhibit A), and then made extensive and costly improvements since that time, as shown in the photographs in that appraisal, which augment market value;

(2) the 2011 and 2012 assessments are based on the abatements granted by the board in the Prior Decision and the Taxpayer’s appeal of the 2011 assessment to the superior court was denied;

(3) the Cunningham Appraisal prepared by Barry Cunningham, a New Hampshire certified general appraiser, estimates the market value of the Property was \$900,000 as of the April 1, 2012 assessment date, is the best evidence of market value and is supportive of the assessment under appeal (when adjusted by the level of assessment in tax year 2012);

(4) the Town believes the high historical vacancy rates emphasized by the Taxpayer largely result from ‘poor management’ in that the Taxpayer chose not to enter into a listing agreement with a qualified commercial broker to find tenants and delayed in demising the larger rental spaces on the Property into smaller units (which are in greater demand);

(5) the prior appraisal by Mr. Cunningham (submitted as Taxpayer Exhibit No. 3) was prepared for the 2011 tax appeal (filed and heard in the superior court) and Mr. Cunningham explained in his testimony why there were some minor differences between his two appraisals;

(6) the Schubert Appraisal is “inherently flawed” in multiple respects and the additional sales and other evidence presented by the Taxpayer’s representative are not credible; and

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

The parties did not dispute the level of assessment in the Town in tax year 2012 was 108.7%, the median ratio calculated by the department of revenue administration.

Board’s Rulings

Based on the evidence, the board finds the Taxpayer did not carry its burden of proving disproportionality. Therefore, the appeal is denied.

The Property (known as “Riverfront Place”):

is a converted 3-story, historic mill building constructed at least 100 years ago. The mill building... together with the adjoining parking area... is 0.7 acres in size, with 535 feet of frontage on the Winnepesaukee River and 621 feet of frontage on W. Main Street (Route 3). A municipal park along the river front separates Riverfront Place from another lot owned by the Taxpayer [“Lot 6,” also known as 14 Mill Street, “a non-contiguous, undeveloped lot situated about 800 feet away from the mill building (with access via a proposed walkway through the Town’s riverfront park)”].

(Prior Decision, p. 4.) It is well established that:

Determining the proportionality of an assessment requires an estimation of market value adjusted by the level of assessment in the Town. See, e.g., RSA 75:1; and Appeal of Andrews, 136 N.H. 61, 64 (1992). . . .

In a tax abatement proceeding, the valuation of property is a question of fact for the tribunal to resolve, after considering all the relevant evidence before it. See Rye Beach Country Club v. Town of Rye, 143 N.H. 122, 127 (1998), citing City of Manchester v. Town of Auburn, 125 N.H. 147, 154 (1984) and other authorities. In addition, the court has noted “[t]here are multiple approaches to the valuation of property” and “no rigid formula which can be used to arrive at full and true value for property tax assessment”; and the trial judge can “accept or reject such portions of the evidence presented as he [finds] proper, including that of the expert witnesses.” Crown Paper Co. v. City of Berlin, 142 N.H. 563, 570 (1997) (citations, quotations and brackets omitted).

In making market value findings, the board considers and weighs all of the evidence, including any appraisal submitted, applying the board's "experience, technical competence and specialized knowledge" to this evidence. See RSA 71-B:1; and 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 has the ability, recognized in the statutes, to utilize its "experience, technical competence and specialized knowledge in evaluating the evidence before it"). Further, where there is conflicting evidence, the board must determine for itself the weight to be given each piece of evidence because "judgment is the touchstone." See, e.g., State of New Hampshire v. Frederick, BTLA Docket No. 23317-07ED (December 3, 2008); cf. Appeal of Public Serv. Co. of N.H., 124 N.H. 479, 484 (1984), quoting from New England Power Co. v. Littleton, 114 N.H. 594, 599 (1974), and Paras v. 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).

(Prior Decision, pp. 6-7); see also LLK Trust v. Town of Wolfeboro, 159 N.H. 734, 740 (2010):

"[w]hen faced with conflicting [expert] testimony, a trier of fact is free to accept or reject an expert's testimony in whole or in part [citation omitted.] . . . [and can] credit the opinion of one expert over the opinions of other experts."

The parties appear to recognize that no abatement is warranted unless the Taxpayer meets its burden of proving, by a preponderance of the evidence, the market value of the Property as of April 1, 2012 was materially less than \$900,000, rounded (\$973,100 assessed value divided by 108.7% level of assessment). The Taxpayer presented the Schubert Appraisal (prepared by Charles F. Schubert, Jr., a New Hampshire certified general appraiser with Applied Economic Research, Inc.) which utilizes the sales and income approaches to value and estimates a market value of \$500,000.

As noted above, Mr. Lutter, the Taxpayer's representative, chose not to have Mr. Schubert attend the hearing to testify as an expert witness, a decision apparently made based on "cost" concerns. Mr. Lutter is an experienced tax representative and should be well aware of the probative value of direct testimony and cross-examination of appraisers and other expert witnesses, especially when the key issue is the market value of a somewhat unique commercial

property: in this instance, a partially renovated mill building. Mr. Schubert's absence from the hearing eliminated the possibility of questions from the Town and the board regarding his methodology, assumptions and market value conclusion for tax year 2012 and greatly lessens the weight that can be given to his appraisal. The Town, in comparison, did present Mr. Cunningham, a qualified appraiser, as an expert witness and the board finds the Cunningham Appraisal and his testimony (both on direct and cross-examination) provide credible evidence for his market value conclusion.

The board further notes Mr. Lutter and the Town's assessor (Loren Martin) both criticized the Schubert Appraisal, albeit for different reasons: the former arguing Mr. Schubert's value estimate (\$500,000) was too high and the latter arguing it was too low. In the board's experience, it is illogical, if not unheard of, for a taxpayer to obtain and present an appraisal and then make very substantial criticisms about it.

Aside from this anomaly, the board finds there are significant weaknesses in the Schubert Appraisal that result in an understatement of the Property's market value. The board does not agree with Mr. Schubert's election to "divide[] the subject property into two components" and use two separate sets of comparable sales to estimate the value of each component, and then simply add the values together to arrive at a value opinion for the whole property. (Schubert Appraisal, p. 42.) As noted in the Prior Decision (pp. 7-8), "this approach, in effect, values the mill building as comprising two separate economic units. . . . A potential buyer is more likely to value Riverfront Place as a single economic unit" and therefore use an "effective area" (comprising of all of the "finished" space and a portion of the "unfinished" space) to arrive at a value for the Property as a whole.

The sales comparison approach in the Schubert Appraisal uses “sales that are somewhat dated” going back to 2002 (see pp. 78-79 and 97). This led Mr. Schubert, on pages 80-84 of his appraisal, to mention a more recent sale he did not include in his sales comparison approach (2½ Beacon Street, Concord, which sold for \$650,000 in October, 2011) which he states “is the most credible indication available for determining the value” of the Property and “is most persuasive as evidence. . . .” The Town’s appraiser, Mr. Cunningham, found this sale to be a good comparable sale property and actually used it in his own appraisal. Unlike the Schubert Appraisal, however, the Cunningham Appraisal (pp. 33-34) makes an adjustment to the sales price (to \$925,000) because the “[b]uyer bought [the] property knowing he would have to spend \$275,000 to renovate and partition larger spaces into smaller spaces.” The board finds this adjustment was reasonable, as were the other adjustments in the Cunningham Appraisal (id.), which resulted in an indicated value of approximately \$39 per square foot. [Mr. Cunningham’s final indications from the sales comparison (\$38.03) and income (\$39.32) approaches bracket this \$39 per square foot adjusted value and is probative of his conclusion the Property had a market value of \$900,000 in tax year 2012, which is supportive of the proportionality of the assessment. (See Cunningham Appraisal, p. 45.)]

The board can place no weight on the income approach in the Schubert Appraisal for many of the same concerns and reasons stated in the Prior Decision (p. 7), where the board also noted Mr. Schubert gave “little weight” to the income approach. In this appeal, the Schubert Appraisal essentially arrives at a similar conclusion, noting “the sales comparison approach was developed because of the lack of current financial feasibility demonstrated by the income capitalization approach.” (Schubert Appraisal, p. 97.)

The board next reviewed the package of information submitted by Mr. Lutter (Taxpayer Exhibit No. 2, the “Taxpayer Packet”), which contained a comparison of the Schubert and Cunningham Appraisals, brief descriptions of properties in the Lakes Region either listed for sale or sold or being offered for lease. This limited information is not sufficient for the board to make reliable findings regarding how these properties are comparable to the Property and what, if any, value adjustments might be appropriate.

In his presentation, Mr. Lutter emphasized that an earlier appraisal prepared by Mr. Cunningham (Taxpayer Exhibit No. 3, p. 35) calculated a gross income multiplier (“GIM”) of “3.85.” Although Mr. Cunningham made this calculation based on one sale and only for a limited purpose (as a “Test of Reasonableness,” *id.*), Mr. Lutter argues this specific GIM should be applied to the Property’s actual income (not ‘projected’ gross rent as Mr. Cunningham did): multiplying this GIM by the actual gross rent in 2012 (“89,093”), Mr. Lutter calculates an “MV” (market value) of “343,008” for that year. (Taxpayer Exhibit No. 2, p. 4.) The board does not agree with either Mr. Lutter’s reasoning or his market value conclusion.

In order to result in a credible opinion of market value, a GIM must be applied to a *stabilized* gross income, not the Property’s actual income from any specific year. Equally important, proper valuation methodology requires extraction of multipliers from many comparable sales, then reconciling the indicated multipliers into a GIM that is appropriate for the property being appraised. Calculating a GIM from only one sale does not lead to a credible market value conclusion and the methodology espoused by Mr. Lutter can clearly distort the outcome of a valuation analysis in either a downward or upward direction. As an example, the board reviewed the December 2008 sale of 426 South Main Street in Laconia utilized in the Schubert Appraisal (pp. 48-50). This property sold for \$725,000 and was reported to have

“scheduled gross income” of \$26,832, which results in a GIM of approximately 27. Using Mr. Lutter’s logic, if a GIM of 27 is applied to the Property’s actual income in 2012 of \$89,093 (Taxpayer Exhibit No. 2, p. 2), the resulting market value indication is approximately \$2.4 million, much higher than the equalized value of the assessment on the Property (approximately \$900,000).

As a final consideration, the board notes Mr. Schubert, the Taxpayer’s own expert appraiser, concluded the market was fairly stable “after 2010” and therefore applied no further time adjustment to his comparable sales. (Schubert Appraisal, p. 42.) The board made a market value finding of \$1 million in 2010 and no evidence was presented in this appeal to cast doubt on the credibility of that value for that tax year.² As noted above, the indicated market value of the \$973,100 assessment in 2012 is approximately \$900,000 and this provides a reasonable ‘cushion’ or ‘error margin’ for the proportionality of this assessment.³

For all of these reasons, the board is not persuaded by the evidence presented that the Taxpayer met its burden of proving the \$973,100 assessment of the Property in tax year 2012 was disproportional. Consequently, 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 In this regard, as one board member stated in response to one of Mr. Lutter’s remarks in his opening statement at the hearing, the board is not ‘tied’ to market value findings made in prior year appeals, but instead decides each appeal based on the market value evidence presented.

³ 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 one’s tax burden. See Wise Shoe Co. v. Town of Exeter, 119 N.H. 700, 702 (1979).

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: Mark Lutter, Northeast Property Tax Consultants, 14 Roy Drive, Hudson, NH 03051, representative for the Taxpayer; Chairman, Board of Selectmen, Town of Tilton, 257 Main Street, Tilton, NH 03276; and Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258, Contracted Assessing Firm.

Date: 5/28/15

Anne M. Stelmach, Clerk