

Nashua 281 Realty Ventures, LLC

v.

City of Nashua

Docket Nos.: 26956-12PT/27507-13PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “City’s” 2012 assessment of \$6,781,500 (land \$2,445,100; building \$4,336,400) and 2013 assessment of \$6,686,700 (land \$2,445,100; building \$4,241,600) on Map A/Lot 975, 281 Daniel Webster Highway, a commercial building on 2.220 acres (the “Property”). 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 argued the assessments were excessive because:

- (1) after being marketed for sale with Atlantic Retail Properties with an asking price of \$4,900,000, the Property was purchased by the Taxpayer in an arm's-length transaction in March, 2012 for \$4,150,000;
- (2) the Property was occupied by Borders Books but was vacated when the retailer filed for bankruptcy protection and it was vacant at the time of sale;
- (3) after the March, 2012 sale, the Taxpayer invested approximately \$100,000 demising the Property into two retail units, one of which was leased on February 16, 2012¹ to Eastern Mountain Sports ("EMS") for 80% of the Property (22,204 square feet) and the other unit was vacant during the entire 2012 and 2013 tax years;
- (4) the Taxpayer spent approximately \$422,000 in tenant fit-up expenses prior to EMS occupying the leased space in March, 2013;
- (5) the Property contains 27,500 square feet of retail space and is oriented on two floors which negatively impacts its market value;
- (6) the Property shares parking and a common wall with Bob's Furniture;
- (7) Christopher Snow, representative for the Taxpayer, completed market analyses (the "Snow Analyses," Taxpayer Exhibit Nos. 1 and 2) and, using the sales comparison and income approaches to value, arrived at an opinion of market value of \$3,750,000 for 2012 and \$3,700,000 for 2013, respectively; and
- (8) the Taxpayer carried its burden of proving the assessed values under appeal are disproportional and should be abated based on a market value of \$3,750,000 and \$3,700,000 for tax years 2012 and 2013, respectively.

¹ As of the date of sale, the Property had the lease in place.

The City argued the assessments should be abated based on market values of \$5,500,000 for tax year 2012 and \$6,000,000 for tax year 2013 and argued these values were proper because:

- (1) Mr. Snow is not a licensed appraiser and his compensation is contingent based upon the outcome of these appeals and therefore his opinions of value are not independent and impartial;
- (2) also using the sales comparison and income approaches to value, Kevin A. McManus of McManus & Nault Appraisal Company, Inc. prepared the “McManus Appraisal” (Municipality Exhibit A) and arrived at market value opinions of \$5,500,000 and \$6,000,000 for tax years 2012 and 2013, respectively;
- (3) the Taxpayer entered into the lease with EMS after the contract to purchase the Property was written, but before the sale occurred and, therefore, the sale price of \$4,150,000 understates its market value as of the April 1, 2012 and April 1, 2013 dates of assessment; and
- (4) the appeals should be granted based on the market value opinions expressed in the McManus Appraisal of \$5,500,000 and \$6,000,000 for tax years 2012 and 2013, respectively.

The parties agreed the level of assessment in the City was 109.7% and 96%, the median ratios calculated by the department of revenue administration. At the hearing on the merits, Mr. Snow requested and was granted leave from the board to submit a trial memorandum by July 22, 2015. The Taxpayer filed its Trial Memorandum on July 18, 2015; the City filed “Request for Findings of Fact and Rulings of Law” on July 21, 2015 and the board has incorporated its response as Addendum A to the decision.

Board’s Rulings

Based on the evidence, the board finds the proper assessments to be \$4,552,600 for tax year 2012 and \$3,984,000 for tax year 2013. These assessments are based on a market value

finding of \$4,150,000 for both years under appeal and application of the 2012 and 2013 median ratios stipulated to by the parties.

The Property is a two-story retail building with 27,500 square feet that is attached to another, larger, retail building occupied by Bob's Furniture. It is sited on a 2.22 acre lot on the west side of Daniel Webster Highway, one of the most vibrant retail areas in the state. The Property was 100% occupied by Borders Books, but was vacated due to their bankruptcy filing and was offered for sale with an asking price of \$4,900,000. On December 21, 2011, the Taxpayer entered into a contract to purchase the Property for \$4,150,000 (see Taxpayer Exhibit No. 6). On February 16, 2012, the Taxpayer entered into an agreement to lease approximately 80% of the Property to EMS (see Municipality Exhibit C). The sale of the Property closed on March 9, 2012 (see Warranty Deed in Taxpayer Exhibit Nos. 1 and 2.) After the sale, the Taxpayer spent \$100,000 demising the Property into two units and an additional \$422,000 in tenant fit-up for EMS. The Taxpayer was issued a certificate of occupancy for the EMS space in February, 2013 (see Municipality Exhibit F) and the second retail unit remained vacant the entirety of the 2012 and 2013 tax years.

“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 board has the discretion to evaluate and determine the credibility of the sales 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). However, where it is demonstrated that the sale was an arm’s-length transaction, the sale price is one of the “best indicators of the property’s value.” Appeal of Lakeshore Estates, 130 N.H. 504, 508 (1988).

The board finds the best evidence of market value for both years under appeal is the March, 2012 sale price of \$4,150,000 paid by the Taxpayer for the Property. The evidence regarding the sale was generally undisputed. The Property was listed for sale with an asking price of \$4,900,000, was listed with an professional commercial real estate broker, was exposed to the market, both the buyer and seller were acting with full knowledge and the \$4,150,000 sales price was arrived at as the result of an arm’s-length negotiation.

The Taxpayer relied upon the Snow Analyses (Taxpayer Exhibit Nos. 1 and 2) which utilized the sales comparison and income approaches to value and arrived at market value opinions of \$3,750,000 as of April 1, 2012, and \$3,700,000 as of April 1, 2013. Mr. Snow testified, based on information obtained from the listing broker, the March, 2012 sale price of \$4,150,000 was “pushed higher” than market value due to a competitive bidding war between two competing retailers, both outdoor sports retailers who are direct competitors with each other. Further, the board finds Mr. Snow’s selection of comparable properties and adjustments were generally reasonable and provided support for the \$4,150,000 sale price as an indication of market value.

The City relied upon the McManus Appraisal (Municipality Exhibit A), which also utilized the sales comparison and income approaches to value and estimated the Property’s market value was \$5,500,000 in 2012 and \$6,000,000 in 2013. While mindful of the Taxpayer’s burden, the board was unable to place any weight on the McManus Appraisal for several reasons.

First, Mr. McManus displayed a lack of knowledge regarding several of his comparable sale properties and the terms under which they sold. For instance, Mr. McManus utilized the sale of 220 Daniel Webster Highway in Nashua (Sale 2), a retail store occupied by Best Buy. Mr. McManus indicated it sold in August, 2011 for \$9,521,867, or \$210.66 per square foot. (Id.) During cross examination, Mr. McManus testified he was unaware the Best Buy property sold as part of a “bulk sale” of twelve (12) stores that sold for a total of \$53,500,000, and the recorded sale prices were allocated and not necessarily reflective of market value. Additionally, Mr. McManus was unaware his Sale 3, 8 Sexton Avenue, Nashua, was a “sale-lease back” and was part of a “bulk sale.” Further, he did not confirm these sales with a party to the transactions. “Independent confirmation of the comparable sales data is a crucial step in allowing the board to

determine if the information regarding the comparable sales are correct and if they were arm's-length in nature." Ila J. Snyder v. Town of Stratham, BTLA Docket No.: 25100-09PT (December 13, 2012).

Second, Mr. McManus utilized the March, 2012 sale of the Property as a comparable sale (Sale No. 1); however, he adjusted the sale price upward 30% as the Property was sold as "not subject to a lease" but, as of the April 1, 2012 assessment date, was 80% leased to EMS. The board does not agree with the substantial 30% upward adjustment Mr. McManus made to the sale price of the Property for "Rights Conveyed" as it was not leased at the time of sale, but was leased as of the April 1, 2012 date of assessment. Mr. McManus' sales comparison chart (id.) indicates all of the other comparable properties were sold with "Fee Simple subject to market rate lease," and the Property sold with "Fee Simple." However, the term "fee simple" implies that if a property is leased, it is leased at market terms; there is only a difference between "fee simple" and "leased fee" if the lease is either below or above market terms. Additionally, the evidence shows the Taxpayer negotiated the purchase of the Property and the EMS lease during a relatively short time frame. In the board's experience, it is not uncommon for commercial real estate investors to agree to purchase a property only after they know they have secured a tenant for a property. Therefore, the board does not find the 30% adjustment warranted.

Perhaps most disturbingly, however, is the evidence presented by the Taxpayer regarding the different comparable sale and lease properties Mr. McManus used in completing another appraisal assignment for the City for tax year 2013, the "White Duck Appraisal" (Taxpayer Exhibit No. 4), located at 168 Daniel Webster Highway in Nashua. The White Duck property is

a single user retail building with 48,612 square feet and a mezzanine.² In the White Duck Appraisal, Mr. McManus uses the sale of the Property as a comparable sale, but does not make the 30% adjustment discussed previously for rights conveyed. Other than the sale of the Property, he uses completely different sales in the White Duck Appraisal, which in general appear to be much more comparable to the Property than those actually utilized in the McManus Appraisal. With a few exceptions, the board has the same concerns regarding his selection of comparable lease properties.

For all the reasons discussed above, the board finds the best evidence of market value is the March, 2012 sale price of \$4,150,000 for the Property and finds the proper assessments to be \$4,552,600 for tax year 2012 and \$3,984,000 for tax year 2013.

If the taxes have been paid, the amount paid on the value in excess of \$4,552,600 for 2012 and \$3,984,000 for 2013 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 2013 assessment (\$3,984,000) 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, 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

² 168 DW Highway was the subject of a prior board decision: White Duck Realty, LLC. V. City of Nashua, BTLA Docket No. 26462-11PT and 26750-12PT (July 21, 2014).

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

Theresa M. Walker, Member

ADDENDUM A

The “Requests” from the parties are replicated below, in the form submitted and without any typographical corrections or other changes. The board’s responses are in bold face. With respect to the Requests, “neither granted nor denied” (“NGD”) generally means one of the following:

- a. The Request contained multiple requests for which a consistent response could not be given;
- b. The Request contained words, especially adjectives or adverbs, that made the request so broad or specific that the request could not be granted or denied;
- c. The Request contained matters not in evidence or not sufficiently supported to grant or deny;
- d. The Request was irrelevant; or
- e. The Request is specifically addressed in the Decision.

In accordance with Tax 201.36(b), “[p]arties shall be limited to a combined total of 25 requests for findings of fact and/or rulings of law.” Leave to submit additional requests was not requested by the City; therefore, the board has answered the first 25 requests.

CITY OF NASHUA’S REQUEST FOR FINDINGS OF FACT AND RULINGS OF LAW

NOW COMES the City of Nashua by and through the Assessing Office hereby makes the following request of findings of fact and rulings of law:

Findings of Fact

1. Nashua 281 Realty Ventures, LLC (Nashua 281) owns certain improved real property in Nashua, New Hampshire identified as Assessor’s Map A/Lot 975, and known as 281 Daniel Webster Highway (subject property): through its agent, Mr. Chris Snow of Property Tax Advisors, Inc., appeals the City of Nashua’s denial of its application for abatement of property taxes for tax years 2012 and 2013.

Granted.

TIMELINE

2. December 21, 2011 Auburn NY Associates (seller) and Nashua 281 (buyer) signed a purchase and sale agreement (sale agreement) establishing a price of \$4,150,000 for the subject property

Granted.

3. December 21, 2011 the property was vacant, no leases had been executed

Granted.

4. February 16, 2012 (67 days after the sales agreement was signed) the buyer entered into a lease agreement with Eastern Mountain Sports (EMS).

Granted.

5. April 1, 2012 approximately 80% of the property was subject to a net lease to EMS.

Granted.

6. March 9, 2012 the property was sold to Nashua 281 Realty Ventures, LLC.

Granted.

NO CONTRACT REQUIREMENT TO LEASE

7. The sale contract has no clause requiring that the property be leased in order for the sale to be consummated.

Granted.

8. The lease agreement had no influence on the sale price because it was signed well after the contract date.

NGD.

INVESTMENT RISK LEVELS CHANGE WITH OCCUPANCY

9. Investment property offering an investor low risk will be more attractive than one with high risk.

Granted.

10. Because the property was vacant on the date the sale agreement was signed the buyer was assuming the risk of a delay in short term income, a higher risk of extended vacancy and the payment of broker leasing fees.

NGD.

11. The sale price reflected the value of the property as vacant and the risks inherent with it as described by Mr. McManus on page 62 (2nd paragraph) of his report.

NGD.

12. If Nashua 281 Realty Ventures LLC were to sell the property on April 1, 2012 the existence of the net lease to EMS would decrease the risk of a delay in short term income, reduce the risk of extended vacancy and eliminate the payment of broker leasing fees for the purchaser.

NGD.

McMANUS APPRAISAL REPORT

13. The City of Nashua (City) hired Mr. Kevin McManus certified general appraiser of McManus & Nault to prepare an appraisal to estimate the market value for the subject property as of 2012 and 2013

Granted.

14. On page 62 (2nd paragraph) of his report McManus states “A leased investment property attracts a premium as compared to the market for a similar vacant property. Because of lack of delay in short term income, the lower risk of extended vacancies, and lack of broker fees.”

NGD.

15. On page 61 of his report McManus states that the purpose of the adjustment to the rights conveyed for sale #1 is to reflect the lower risk profile for the subject property as of the date of value.

NGD.

16. On page 62-63 of his report McManus presents the reasoning and analysis in support of his “rights conveyed” adjustment for the fact that the risk profile of the subject property was lower after the signing of the lease than it was before the lease was signed.

Granted.

SNOW APPRAISAL REPORT

17. Mr. Snow authored two appraisal reports in which he estimated a value for the subject property for the 2012 and 2013 tax years³; Mr. Snow testified that he had a 50% financial interest in any award issued in the case.

Granted.

18. Mr. Snow never claimed that his report was impartial or objective.

NGD.

³ Snow Appraisal 281 Daniel Webster Highway, Nashua NH 2012 & 2013 Sale History page 4 each report.

19. Under questioning Mr. Snow admitted that for sale #1 (page 18) the gross leasable area listed as 83,412 sq. ft. (price per square foot \$48) was not consistent with the data reported for this same sale offered in an earlier report he submitted in BLTA case 26462-11PT; in that case the area was listed as 48,612 sq. ft. (price per square foot of \$82.28).

NGD.

20. Using 83,412 sq. ft. in the 2012 & 2013 reports resulted in a lowered sq. ft. value which favored the cause of the taxpayer.

NGD.

Rulings of Law

1. In valuing the bundle of rights for a property, all relevant factors that have an effect on value must be considered. *Gary & Andrea Atturio, et .al. v Town of Thornton* NHBTLA 21276-04PT / 22204-05PT; see also *Paras V City of Portsmouth*, 115 N.H. 63, 67-68 (1975).

Granted.

2. In making market value findings, the board must determine for itself issues of credibility and the weight to be given to each piece of evidence... *Varsity Durham, LLC v Town of Durham* NHBTLA 24680-08PT / 25378-09PT.

Granted.

3. 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. *Id.*

Granted.

4. The issue in any tax abatement case is whether the taxpayer has been required to pay a disproportionately higher tax than other taxpayers in the district. Appeal of Public Service Co of New Hampshire, 120 N.H. 830, 833, 424 A2d. 197, 198 (1980).

Granted.

5. Actual market value is not technically the matter in issue in tax abatement proceedings but, rather, is only a matter in evidence.” Id.

Granted.

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; Chairman, Board of Assessors, City of Nashua, PO Box 2019, Nashua, NH 03061.

Date: 9/16/15

Anne M. Stelmach, Clerk