

Stratham Subaru

v.

Town of Stratham

Docket No.: 27584-15LC

DECISION

The “Taxpayer” appeals, pursuant to RSA 79-A:10, the “Town’s” RSA 79-A:7 land use change tax (“LUCT”) of \$39,500 on one acre of land (the “Property”) removed from a 52.32 acre parcel enrolled in current use located at 6-16 Frying Pan Lane, Map 9, Lot 113 (the “Larger Parcel”). The LUCT, issued on June 4, 2014, was based on a \$395,000 full value assessment on the Property as of the actual date of change in use, November 4, 2013. For the reasons stated below, the appeal for abatement of the LUCT is granted.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the Town’s LUCT assessment was erroneous or excessive. (See Tax 205.06.) The board finds the Taxpayer met this burden.

The Taxpayer argued the LUCT was erroneous or excessive because:

(1) the Property is part of the Larger Parcel owned by another (Kirk Q. Scamman) and the Taxpayer, as a condition for entering into a ground lease (the “Lease”) with the owner, was obligated to pay the LUCT resulting from removal of the one acre from current use;

- (2) the Lease was entered into in 2013 for a 15-year initial term with a fixed rent of \$1,000 per month (\$12,000 per year) and also provides for two five-year renewal options (at market rates);
- (3) an appraisal prepared by a licensed New Hampshire appraiser, Charles F. Schubert, Jr. of Applied Economic Research, Inc. (the “Schubert Appraisal,” Taxpayer Exhibit No. 1), estimates the Property had a market value of \$120,000 as of November 4, 2013 using the sales comparison and income approaches and is the best evidence of value;
- (4) because of the restrictive conditions imposed by the Town Planning Board, reflected on the recorded site plan approved by the Town (see Taxpayer Exhibit No. 5), the location on a rural two-lane road and lack of visibility to the “major commercial corridor” (Route 108), Mr. Schubert properly concluded: “At best, this property is a less desirable secondary commercial use and at worst its use is limited to an auto storage lot;” and
- (5) the LUCT should be abated to \$12,000, based on a market value of \$120,000 as of the date of change of use (November 4, 2013).

The Town argued the LUCT, if abated, should be abated to no less than \$35,000 (based on a market value of \$350,000) because:

- (1) the Property is in a valuable commercial zone and is located only 130 feet from Route 108 (Portsmouth Avenue), a major corridor where there is much valuable development (including the Taxpayer’s Subaru dealership and other automobile dealerships) and is in close proximity (0.8 miles) to Route 101;
- (2) the use restrictions noted by the Taxpayer were voluntarily proposed to the Town Planning Board at the time of site plan approval and do not diminish its value;

(3) in the Town-wide 2014 revaluation, the Town concluded land on the main commercial corridor would have a value of \$700,000 per acre and adjacent land in the same commercial zone but without direct frontage on the corridor would be valued at \$350,000 per acre;

(4) the Schubert Appraisal does not properly adjust for location and other differences between the Property and the comparable sales; and

(5) if the appeal is granted, the LUCT should be abated based on the Town's subsequent 2014 assessment of \$350,000 for the Property.

Board's Rulings

Based on the evidence presented, the board finds the Taxpayer met its burden of proving the Property's market value, as of the date it was removed from current use (November 4, 2013), was \$120,000. Consequently, the appeal is granted and the LUCT is abated to \$12,000 (10% of this market value, as prescribed in RSA 79-A:7. I.).

David Yanofsky, the owner of Stratham Subaru who occupies the Property for automobile storage, testified he negotiated the Lease because, as a condition for franchise renewal, Subaru required him to acquire additional land to expand and store inventory. He further stated the Property is not visible from Portsmouth Avenue and the "Site Plan" (Taxpayer Exhibit No. 5), approved by the Town Planning Board on July 17, 2013, restricted the use of the Property as follows:

The automobile storage area shall be used only for the loading and unloading of and storage of vehicles. There shall be no showing, displaying, sales, and/or service of vehicles on the property.

No unauthorized personnel or customers shall be allowed within the auto storage area.

The automobile storage area shall not exceed a maximum of 98 vehicles.

There shall be no parking and/or storage of vehicles within the unloading area.

Further, zoning in the area of the Property was changed to the “Gateway” district several years prior which is highly restrictive in how this commercial Property can be used. Among other things, the Town required significant landscaping “located in such a way to block the visibility of the parking lot when driving in both directions along the Route 108” as well as a 6 foot chain linked fence and a “cantilever gate... with double posts on rollers on either side.” See the February 6, 2013 “Stratham Planning Board Meeting Minutes” at p. 2 in the Schubert Appraisal, p. A-30.

In addition to Mr. Yanofsky’s testimony, the Taxpayer relied upon the testimony and appraisal of Mr. Schubert. Mr. Schubert testified the Property is on Frying Pan Lane, a two-lane, local, no through truck traffic road, the view of the Property from Route 108 is blocked by a gas station/donut shop, the entire lot is “set down in comparison to the road so there are physical barriers to limit visibility to the rear of the parking lot,” and the “location and circumstances regarding this [P]roperty render it a less than prime location.” (Schubert Appraisal at p. 8.) Further, just south of the Property, on Route 108, properties have municipal water and sewer and the area is more densely developed. Thus, he concluded the highest and best use of the Property “[a]t best” to be a “less desirable secondary commercial use and at worst... limited to an auto storage lot.” Id., p. 25. The Property does not have Town water or sewer connections.

Mr. Schubert utilized the sales comparison approach and the income capitalization approach in arriving at his final estimate of value of \$120,000 for the Property. In the sales comparison approach, Mr. Schubert analyzed four comparable properties that ranged in size from 0.4 acres to 2.0 acres (located in Kingston, Northwood, Plaistow and Seabrook). After making what the board finds were generally reasonable and well supported adjustments, he arrived at a

range in value from \$115,500 to \$125,109, resulting in an indicated value of \$120,000. (*Id.*, pp. 29-47 and Taxpayer Exhibit No. 6.) As corroboration, Mr. Schubert also “developed a direct capitalization model to estimate the value of the leased fee interest” of the Property (p. 48) to estimate a market value of \$120,000. (*Id.*, pp. 48-50).

The Town was represented by Andrea Lewy, its assessor, who testified the Property is approximately 130 feet from the commercial corridor and contended surrounding properties sold for \$1 to \$2 million but did not present any actual sales data to support this contention. Ms. Lewy further stated the Property was 0.8 miles from Route 101, a highly travelled road (24,000 vehicles per day), although she agreed the visibility to the Property “isn’t the best.” Ms. Lewy testified a fair number for the site is “probably” \$350,000, based on two sales on Portsmouth Avenue showing a \$700,000 site value, adjusted by 50%. She stated the Property could support development of “something a little more low key” such as a chiropractor’s office, a real estate office or a dollar store.

In making market value findings, the board considers and weighs all of the evidence presented, 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, in arriving at a proportionate LUCT all relevant factors affecting market value must be considered. Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1995).

The board finds the Taxpayer carried its burden in proving the LUCT was disproportionately assessed. The Taxpayer submitted credible evidence how the Lease rate was

determined and the limitations and restrictions affecting the highest and best use of the Property. The board further finds the value conclusion in the Schubert Appraisal is credible and supported by the testimony. While the Town argued the comparable sales utilized by Mr. Schubert were not in locations similar to the Property, Ms. Lewy did not view or analyze any of the comparables to support this argument. Further, to the extent the Town argued the restrictions on the Property should not impact value because they were allegedly self-imposed, the board disagrees. A thorough review of the Stratham Planning Board Meeting Minutes (pp. 1-8) in the Schubert Appraisal supports the Taxpayer's arguments that the restrictions were imposed on the Property in order to obtain Planning Board approval. The board finds these restrictions adversely impact the present and future uses of the Property and therefore its market value.

For these reasons, the board finds the value of the Property as of the date of change of use was \$120,000, resulting in a LUCT of \$12,000. If the LUCT has been paid, any amount paid in excess of \$12,000 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

Motion for Costs

At the close of the hearing, Mark Lutter, the Taxpayer's representative, stated he would be filing a motion for costs and did so on May 22, 2015 (the "Motion"). Ms. Lewy filed an "Objection" on June 1, 2015. The board, after consideration of the evidence at the hearing and a review of the Motion and Objection, grants the Motion in the amount of \$862.50 for Mr. Schubert's time in attending and testifying at the hearing and for the reasons stated in the Motion. The Town's Objection does not satisfy the board that it acted with the requisite degree of diligence in responding to the Taxpayer's appraisal and other evidence prior to the hearing, which resulted in unnecessary costs for the Taxpayer. Tax 201.39(d) provides [c]osts for a

party's expert witness shall be limited to those reasonable fees incurred for the witness's testimony, but no costs shall be awarded for the witness's research or preparation in accordance with Fortin v. Manchester Housing Authority, 133 N.H. 154, 157-60 (1990). Thus, the board finds no additional costs (\$825.00) for Mr. Schubert's "Trial Preparation" can be assessed against the Town. Consequently, a total of \$862.50 is awarded in costs against the Town and in favor of the Taxpayer.

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: Mark Lutter, Northeast Property Tax Consultants, 14 Roy Drive, Hudson, NH 03051, representative for the Taxpayer; Chairman, Board of Selectmen, Town of Stratham, 10 Bunker Hill Avenue, Stratham, NH 03885; and Current Use Board, c/o Department of Revenue Administration, 109 Pleasant Street, Concord, New Hampshire 03301, Interested Party.

Date: July 10, 2015

Anne M. Stelmach, Clerk