STATE OF NEW HAMPSHIRE

SUPREME COURT

DOCKET NO.: 2018-680

VENTAS REALTY LIMITED PARTNERSHIP

V

CITY OF DOVER

N.H. SUPREME COURT RULE 7 MANDATORY APPEAL
(STRAFFORD SUPERIOR COURT)

BRIEF OF THE APPELLANT – VENTAS REALTY LIMITED PARTNERSHIP

Kevin P. Rauseo, Esq.
krauseo@hamker.com
N.H. Bar No. 12528

Andrew J. Piela, Esquire
apiela@hamker.com
N.H. Bar No. 10518

HAMBLETT & KERRIGAN, PA
20 Trafalgar Square; Suite 505
Nashua, NH 03063
(603) 883-5501

Attorney Kevin P. Rauseo, Esq.
will represent the Appellant
at Oral Argument

(15 Minute Oral Argument Requested)

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QUESTIONS PRESENTED FOR REVIEW

1. Does public policy require the trial court to reject the city's argument that nursing expenses should be reduced and the petitioner should be turning away complicated patients in order to reduce nursing expenses and, as such, allow the city to determine how much nursing staff is appropriate?

   Record Citation: Pltf. Trial Memorandum at pgs. 7-9, 12 (Appendix at 9-11, 14) [hereinafter App.]; Pltf. Mot. to Reconsider at pg. 3-4 (App. at 23-24)

2. Is the trial court required to consider the impact its decision has third party individuals, namely nursing home patients?

   Record Citation: Id.

3. Did trial court err in adopting the city's argument that the petitioner should reduce its nursing expenses to 35% of gross revenue without considering that

the petitioner's patients require intensive nursing care, the critical shortage of nurses in the employment market, and the fact that state law mandates certain health care duties must be carried out by nurses versus lesser skilled care providers?

Record Citation: Id.

4. Did the trial court err in not considering the effect of state and federal regulations on the petitioner's income and expenses?

   Record Citation: Pltf. Mot. to Reconsider at pgs. 1-2, 4 (App. at 21-22, 24)

5. Did trial court err by relying on data and facts from after the assessment date?

   Record Citation

   Record Citation: Pltf. Trial Memorandum at pg. 7. (App. at 9)

6. Did the trial court err in using projected income and expenses for the tax year after the assessment date and not using the property's actual income and expenses for the year prior to determine fair market value?

   Record Citation: Id.

7. Did the trial court erred in basing its decision in part on a sale price, which neither appraiser considered to be market value, and was the result of a transaction that neither party considered an arm's length transaction?

   Record Citation: Pltf. Trial Memorandum at pgs. 16-17 (App. at 18-19).

STATEMENT OF THE CASE

This is an appeal from the Strafford Superior Court’s (Howard, J.) denial of the plaintiff’s, Ventas Realty Limited Partnership, [hereinafter Ventas] petition to abate property taxes assessed by the defendant, City of Dover [hereinafter City] on a

nursing home facility for 2014. The Superior Court held Ventas had "not sufficiently proved the property's fair market value under the income capitalization approach, and accordingly has not met its burden of proof to show that it is entitled to an abatement for the 2014 tax year." Brief at pg. 49.

STATEMENT OF FACTS

In 2014, Ventas owned property in Dover utilized as a skilled nursing facility. Brief at pg. 31. Until 2013, Kindred Healthcare leased this property. Id. When Kindred Healthcare did not renew its lease, Ventas, in May of 2013, leased the property to National Healthcare Associates [hereinafter NHCA], which operated the facility as the Dover Center for Health and Rehabilitation [hereinafter facility]. Id. On April 1, 2014, the City of Dover, assessed the property at $4,308,500. Id.

The facility was originally built in 1969, and underwent new construction in the mid-1980's. Id. at pg. 32. As of April 1, 2014, the facility was in need of substantial improvements. See Id. For example, it needed significant electrical work in order to meet current building code. App. at pg. 4. The backup generator was insufficient to heat the entire building, which Ventas discovered one Thanksgiving Day when the building lost power. Id.

Further, the facility was described as "tired" and "worn" with many outdated fixtures including cabinets and flooring. Brief at pg. 32; Trial Transcript at pg. 83/lines 5-13 [hereinafter Trans.]. The director of operations testified that facility looked, in April 2014 "dark, [and] kind of dingy looking" and, "there [were] a lot of physical plant issues, in terms of wear and tear on the building." Trans. at pg. 83/lines 5-13. It only had a few individual patient rooms (the facility had only six as of April 1, 2014) and

the majority of the rooms were fitted for double occupancy. Id. at pg. 84/lines 15-17. The hall rugs were stained and the patient rooms had outdated bed boards, windows, and closets. Id. at pg. 83/lines 5-13.

The lack of private rooms placed the facility at a competitive disadvantage because patients are more likely to request an individual versus a shared room[1]. Trans. at pg. 84/lines 22-24. Moreover, because many of the patients had significant "co-morbidities" such as infections, private rooms were often necessary to insure safe patient care. Id. at pg. 84/line 24 to pg. 85/line 3.

As a result, in 2014, Ventas was in the process of obtaining a "Certificate of Need" [hereinafter CON] which, if granted, would allow it fund over $2.6 million in improvements. Trans at pg. 85/lines 4-7; pg. 87/lines 10-17. The CON was issued in April of 2015 so, as of the time of the defendant's April 1, 2014 assessment, no work had been done. Brief at pg. 32-3. Moreover, due to the significant repairs that were needed with the physical plant, many of the anticipated renovations could not be completed. Trans. at pg. 88/line 24 to pg. 89/line 8.

On April 1, 2014, the facility primarily served patients who had been discharged from a hospital and needed additional rehabilitative care before they could return home. Brief at pg. 32. This is in contrast to other "comparable" nursing home facilities, which provided long term/residential care to their patients. See Id. In particular, the Ventas facility is well-known for its respiratory therapy services. Trans. at pg. 91/lines 19-25; pg. 92/lines 2-7. Given the acuity level of the patients, the

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[1] Wentworth-Douglass Hospital is the primary source of patient referrals. Trans at pg. 84/lines 7-8. In 2013, Wentworth-Douglass asked NHCA if there were plans to renovate the facility. According to NHCA's Director of Operations, this was a clear signal that Wentworth-Douglass was concerned about the overall condition of the facility, which could translate into fewer patient referrals. Trans. at pg. 84/lines 6-14.

facility needs to provide significant skilled nursing care and other support services such as radiology, laboratory and intravenous drug administration, well above comparable long-term care facilities. App. at pg. 10. Many of the patient care tasks, such as respiratory therapy, can only be done by specialists whose numbers are not needed in comparable long-term care facilities. See Trans. at pg. 92/lines 2-7. In addition, the facility's patient turnover is more frequent than in other, long-term care facilities, which also required Ventas to employ additional support staff. See Id. at pg. 100/line 24 to pg. 101/line 6.

In July of 2015, Ventas, as part of a corporate restructuring, formed a new real estate investment trust called Care Capital Properties, LLC [hereinafter CCP]. Brief at pg. 33. As part of this restructuring, Ventas transferred to CCP in August of 2015. Id. The transfer was part of a large corporate in which Ventas transferred 355 skilled nursing facilities to the newly created CCP, which share the same address and staff with common directors as Ventas. Trans. at pg. 75/lines 1-9. Both appraisers agreed that this transfer was not an “arms-length sale” and no money changed hands between Ventas and CCP. See Trans. at pg. 45/lines 1-14; pg. 181/lines 2-6. However, the transfer tax stamp on the deed indicates CCP acquired the property for $4,308,500, which is the same amount of the defendant's April 1, 2014 assessment. Brief at pg. 33.

Ventas filed an abatement petition in August of 2015 and a bench trial was conducted in June of 2018. At trial, Ventas' expert utilized an income capitalization method to determine the properties' fair market value. Brief at pg. 34. To arrive at this number, Ventas' expert first calculated the facility's gross income ($10,147,068)

and expenses ($9,936,601) by stabilizing the facility's actual numbers reported for May 1, 2013 through December 31, 2013, and the trailing eleven (11) months preceding the April 1, 2014 assessment. Id. Ventas' expert chose May 1, 2013, the date when NHCA began operating the facility, as his starting point. Id. He compared the income and expenses to competitor's income and expenses, and determined the subject's expenses were reasonable. Trans. at pg. 33/lines 19-23. From these gross numbers, Ventas then calculated the net operating income and from that subtracted replacement reserves, added back property taxes. Brief at pg. 35. Finally, Ventas reduced the net operating income by 20% to account for income allocated to the business, multiplied that number by a capitalization rate of 12.6% and subtracted $150,000 for depreciated personal property, ultimately concluding the property had a fair market value of $1,700,000. Id.

The City's expert, who also used the income capitalization approach, took the facility's actual expense numbers for May 1, 2013 through December 31, 2014. Brief at pg. 36-7. From that, she determined the facilities' forecasted gross income to be $10,063,865, or about $60,000 less than Ventas' expert. Id. at pg. 36. However, the City's expert determined the appropriate gross expenses were $9,016,402, or about $900,000 less than Ventas' expert, again reduced expenses from other nursing homes in the area. Id. at pg. 37. With a net operating income of $1,047,463, using a capitalization rate of $13.5%, and reducing that number for furniture, fixtures, equipment and business assets, the City's expert concluded the property had a fair market value of $4,700,000 as of April 1, 2014. Id.

The most significant area of disagreement between the two experts was the calculation of the facility's gross expenses. See Brief at pgs. 44-5. In the area of nursing costs, Ventas' expert opined the appropriate number was $3,471,204 while the City opined the appropriate amount was $2,899,095, or a difference of over $500,000. Id. at 36, note 5.

The Superior Court issued its decision in August of 2018. Brief at pgs. 3-49. In its order, the Court found the equalization rate for Dover in 2014 was 95.1. Id. at pg. 39. The Superior Court also found the income capitalization method was, consistent with the parties' agreement, the most appropriate method to value the property. Id. at pg. 40. After considering both experts' opinions, the Court ruled the income capitalization method required consideration of both the facility's actual expenses and income, and market projections of what the facility could spend and earn. See Id. at pg. 45.

The Superior Court was critical of Ventas' expert who, it found, "did not utilize comparable properties as evidence of market projections . . . Rather, he merely explains why actual income and expenses of comparable properties are different from the actual income and expenses of the subject property." Id. at pgs. 43-4. The Court therefore concluded that Ventas' expert did not establish sufficiently reliable income to show the facility's future income. Id.

With regard to the adjustments made by the City's expert to Ventas' expenses, the Court ruled that an assessment must be based upon the property's fair market value as determined by the market income and expense, not its actual income and expenses. Brief at pgs. 41-2. The Court found that, it is only when the property's

specific characteristics render its ability to generate market level income unlikely will the Court consider its actual income to be indicative of the fair market value. Id. at pgs. 45-6. The Court concluded that Ventas did not establish the fair market value or demand for its specialized services in 2014 in comparison to its competitors as well as how Ventas' actual expenses differ from what its competitors experience on the open market. See Id.

Finally, the Court ruled that Ventas' representation to the City assessor that the property had a value of $4,308,500 when it was transferred to another realty trust as part of a corporate restructuring, "casts further doubt" on its claim that its paying a disproportionate amount of taxes. Brief at pg. 48. The Superior Court denied Ventas's petition for an abatement and Ventas' motion for reconsideration, Brief at pgs. 30-49, 51.

SUMMARY OF ARGUMENT

1. The Superior Court inappropriately reduced the nursing and medical costs incurred by the facility when it determined the property value under the income capitalization method. Specifically, the City's proposal in its assessment to reduce nursing expenses by $500,000 should not have been credited as it was not supported by any evidence that demonstrated such a reduction could have been made without endangering patient health or that the "comparable facilities" which supported the appraisal actually performed patient care services that were similar to the plaintiff.
2. Public policy would not condone the adoption of an assessment that arbitrarily lowers nursing expenses.

3. The 2015 transfer of the facility was not an arms-length sale and, therefore, was entitled to no consideration by the Superior Court.

ARGUMENT

A. Standard of Appellate Review

"The superior court's jurisdiction in an abatement proceeding is appellate, and it has the power to review the municipality's decision to determine if an abatement is warranted." LSP Assn. v. Town of Guilford, 142 N.H. 369, 372 (1997). The plaintiff in an abatement proceeding has the burden of showing it is paying "more than its proportional share of taxes." Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 254 (1994). In other words, the issue at trial is whether the City's "assessment was disproportionally higher in relation to the property's true value than was the case as other property." Id. at 254-5.

"Determination of fair market value is an issue of fact." Appeal of Pennichuck Water Works, 160 N.H. 18, 37 (2010); see also City of Manchester v. Town of Auburn, 125 N.H. 147, 155 (1984) (valuation of property is a question of fact). Questions of fact are reviewed for an unsustainable abuse of discretion. In re: Martel, 157 N.H. 53, 56 (2008). However, this Court reviews issues of law de novo. See In re: Wilson, 161 N.H. 659. 661 (2011).

B. The Superior Court inappropriately reduced the nursing and medical costs incurred by the facility when it determined the property value using the income capitalization method.

A regulated industry can show that, due to the restrictive environment in which it operates, the market value of its property is so impacted that it renders the assessment disproportional. See Appeal of P.S.N.H., 170 N.H. 87, 95 (2017).

Governmental restrictions imposed upon the property can also considered in determining the property's fair market value. See N.E. Power Co. v. Town of Littleton, 114 N.H. 594, 605 (1974) (restrictions imposed by federal license on property is a relevant factor in determining fair market value). In Royal Gardens Co. v. City of Concord, 114 N.H. 668, 671 (1974), for example, the Supreme Court held that the impact of federal regulations on the amount of rent that a facility could charge its tenants was relevant in determining the property's value under the income capitalization method. See also Cascade Court Ltd. Ptnr. v. Noble, 20 P.3d. 997, 1000-1 (Wash. App. 2001) (appraisal should have considered the rent restrictions imposed by statute when valuing property).

The single largest area of discrepancy between the experts' opinions vis-a-vis the income capitalization method was the expenses associated with nursing care. Brief at pg. 36. Ventas' expert used the stabilized expenses for May 1, 2013 through December 31, 2013, and the trailing eleven (11) months preceding the April 1, 2014 assessment. Brief at pg. 35. The City's expert rationalized the facilities actual expenses against "comparable" facilities. Brief at pg. 35; Trans at pg. 223/lines 13-16. The result was a difference of approximately $500,000, largely composed of nursing expenses. Brief at pg. 36, note 5.

In its order, the Superior Court made much of the fact that the plaintiff used its actual expenses and costs versus market expenses and costs. See Brief at pg. 41-2. In making this ruling, the Superior Court seemed to believe that a property's actual expenses and income is not appropriate could never be used in calculating its fair market value. Id. at pg. 36, note 5. The Supreme Court, however, has never made

such a holding, and, in certain circumstances, has held that actual income and expenses should be considered instead of market income and expenses. See Royal Gardens, 114 N.H. at 671; Rollsworth Tri-City Trust v. City of Sommersworth, 126 N.H. 333, 336-7 (1985) (court may use actual costs and income versus market rates if it finds actual costs and income are comparable to the market); see also Demoulas v. Town of Salem, 116 N.H. 775, 782 (1976) ("We do not mean to suggest that consideration of actual income is improper in all cases"). To find that Ventas failed to sustain its burden of proof solely because it used actual expenses versus "market expenses" was erroneous.

At trial, the Superior Court heard testimony that the facility is unique from many other nursing homes that were used as comparable properties in the area of patient care. Specifically, the Ventas facility is not a long-term care facility that treats medically stable clients, but instead is predominantly used for short term, rehabilitation care. App. at pg. 10. The plaintiff's facility receives patients who, after discharge from local hospitals, are too sick or infirm to return home immediately without skilled intervention and/or short term rehabilitation. Trans. at pg. 103/lines 4-17. The facility is especially well-known in the area of providing respiratory therapy and rehabilitation and has a full time respiratory therapist. See Trans. at pg. 91/lines 19-25; pg. 92/lines 2-7. In order to accomplish its goals, it relies heavily on its nursing and support staff. Id. at pg. 105/lines 17-21.

The City produced no comparable property that offered the same mix of services that the plaintiff offered. For example, it pointed to no comparable property that was uniquely focused, like the plaintiff, on short-term rehabilitation. See Trans.

at pg. 97/line 20 to pg. 99/line 9. It pointed to no comparable property that had as an extensive new patient admittance numbers as the plaintiff. See App. at pg. 10 (facility had 1119 admissions and discharges while closest comparable facility only had 751); Trans. at pg. 102/lines 2-10. It found no comparable property that had as extensive a pulmonary rehabilitation service[2], Trans. at pg. 226/lines 13-16; pg. 105/lines 8-12, or made extensive use of intravenous medications, id. at 105/lines 14-16. The City's appraiser did not even consider the number of independent or assisted living beds each facility had to be "relevant to the analysis." Trans. at pg. 186/lines 9-12. Therefore, under Royal Gardens, given the unique nature of the property, it was quite appropriate and even necessary for the Court to consider actual expenses versus market expenses under the income capitalization calculation.

Further, the nursing profession is regulated by statute and regulations developed by the Board of Nursing. Each level of the nursing profession, from registered nurse, to licensed practical nurse, to nurse's aide, have clearly defined roles, which describe what they can and cannot do. For example, only nurses and specially trained licensed practical nurses can administer intravenous medications. See RSA 326-B:13, III. The ability for a nurse to delegate medication administration to a nursing assistant is subject to a number of restrictions. See e.g. N.H. Code Admin. R. (Nur) §404.09-11; §404.04(b)(4). The delivery of medication through certain types of delivery systems, the calculation of medication dosages, and the delivery of the initial medication dose cannot be delegated at all. Id. at §404.07(d). A nurse cannot delegate patient care tasks to a nursing assistant except under limited

[2] The City appraiser did concede, however, that facilities with higher patient acuity levels could expect to have more expenses than lower acuity facilities. Trans. at pg. 195/lines 17-20.

circumstances, and must both rigorously monitor the assistant and be ready to take over care if the situation requires. See Id. at § 404.06.

It is therefore not surprising that the plaintiff's facility administrator largely allows the nursing directors to set the appropriate costs and staffing levels that are necessary. Trans. at pg. 89/line 12 to pg. 91/line 3; pg. 104/lines 21-23. Executives making nursing staff level decisions are mainly made by nurses. Id. at pg. 90/lines 11-23. Therefore, Ventas contends the only way one can truly determine if the plaintiff's actual nursing costs were too high is to have someone who is familiar with nursing and patient care roles to examine the numbers.

When cross-examined, however, the City's expert admitted that she had no medical or nursing training. Trans. at pg. 178/lines 13-18. Aside from reviewing Medicare and Medicaid reimbursement numbers, she made no effort to ascertain the acuity levels of the clients in the plaintiff's facility or the comparable facilities. Trans. at pg. 177/lines 16-20; pg. 225/lines 10-12. She made no attempt to determine how many assisted living and independent care beds were in each comparable facility. Id. at pg. 186/lines 9-12. Without knowing what the patients at each facility needs in terms of care, the City appraiser candidly admitted, forecasting accurate patient expenses is reduced to guess work. Id. at pg. 227/lines 6-9[3]. Therefore, she had no idea what tasks could only be performed by nurses, what tasks could be delegated by the nursing staff or nurses' assistants or non-nursing staff. She, likewise, had no idea what a safe staffing level was for this facility, given its patient needs, and whether the suggested cuts to the facility expenses would cause the remaining

[3] The City's Appraiser acknowledged that she did no investigation on what State of New Hampshire requires for minimum staffing levels for nursing homes. Trans. pg. 177/lines 16-20.

nurses to (a) risk their licenses through the inappropriate delegation of nursing tasks, or (b) risk patient health and safety by not having enough care gives to provide the attention they need. She certainly had no idea if her "comparable facilities" were skimping on staff. Id. at pg. 228/line 21 to pg. 29/line 2[4].

In sum, the Superior Court, in accepting the City's appraiser's opinion on this point, fell into the same trap that led another trial court into reversible error in the Royal Gardens case. Specifically, the Court failed to take into account the fact that nurses can only perform certain tasks at the facility, and cannot delegate those tasks to lesser trained medical staff. It failed to take into account the unique nature of the plaintiff's facility given the care it provides. It failed to consider that the other facilities offered by the City's appraiser were not comparable at all in many important areas, such as acuity of patients and patient turnover. The Court certainly heard no evidence from the City that suggests that the facility was overstaffed for the type of care it provided, especially given the acuity level of the patients it treats. Therefore, absent evidence from the City that demonstrated the facility's expenses were excessive for this particular property, it was error for the Trial Court to adopt the City's opinion as to appropriate nursing expenses, which was based on a "market rate," and thus, the City's capitalization of income calculation.

1. The evidence supports the reasonableness of the nursing expenses.

The New Hampshire Constitution mandates that a municipality assess all taxpayers at the same proportion of fair market value. See Appeal of Andrews, 136 N.H. 61, 64 (1992). The plaintiff must prove by a preponderance of the evidence that

[4] Indeed, at the time of the assessment, the Ventas facility had a "2 star" (out of 5) rating by Medicaid for nursing staff, indicating that the facility was understaffed. Trans at pg. 106/lines 13-17.

it is paying more than its proportional share of taxes. See Id. To carry this burden, the plaintiff must establish that the subject property is assessed at a higher percentage of its fair market value than the percentage at which property is generally assessed in a town as of April 1 of the subject year. See Appeal of the Town of Sunapee, 126 N.H. 214, 217 (1985). Fair market value under the tax statute means the price, which the property will bring in a fair market, after reasonable efforts have been made to find the purchaser who will give the highest price for it. See Public Sen. Co. of N.H. v. Town of Seabrook, 126 N.H. 740, 742, (1985). To establish disproportionally, the plaintiff must show that their assessment is higher than the general assessment in the Town for the particular tax year. See Andrews, 136 N.H. at 64. Federal and State regulations limit the amount of income that can be generated by a particular property must be considered by the Court in determining value for the subject property. See Royal Gardens, 114 N.H. at 671-72.

The uncontroverted trial testimony was that the patient census drives revenue and dictates expense patterns. Trans. at pg. 29/lines 17-20. The subject's overall expenses were lower than the other facilities in the area, with the exception of Rochester Manor.[5] Trans. at pg. 33/lines 2-10. As for nursing expenses, the evidence demonstrated that the plaintiff's expense are reasonable. The City's own appraiser acknowledged that nursing expenses typically represent "30-45% of gross revenues, or nearly half of all operating expenses … [and] in recent years, nursing expenses have increased more than the general rate of inflation as a result of a nurse shortage combined with in thriving economy and low unemployment". See

[5] From the analysis of the Medicare cost reports the subject's post-acute patients are more than Rochester Manor. Trans. pg. 112/lines 2-5.

Confidential Appendix at pg. 230 [hereinafter Conf. App.]. In fact, the City's appraiser determined that the subject property's total nursing expenses equaled 42.6% of the gross revenue, which is in the range she found as typical. (emphasis added.)[6] See Id. at pg. 143.

Twice each year the State of New Hampshire reviews what of care skilled nursing facilities are providing to its patients. Trans. at pg. 92/lines 13-17. From the information provided state issues a rating, known as CMI rating, from data it collects from the facilities. Trans. at pg. 92/lines 9-15. At the time of assessment, the subject property had a two-star rating. Trans. at pg. 106/lines 11-13. A two-star rating means they are understaffed. Trans. at pg. 93/lines 21-23. Accordingly, cutting nursing staff further is inappropriate. Trans. at pg. 107/lines 1-2. In fact, cutting nursing expense can have a negative impact. Trans. at pg. 77/line through pg. 78/line 7.

The Superior Court was incorrect in finding that the plaintiff's appraiser failed to compare its services to the competitors/market. Brief at pg. 46-7. The clear evidence show that he compared the subjects expense to the expense of three other local facilities.[7] Conf. App. at 44; see also Trans.at pg. 31/line25 through pg. 32/line 22. After comparing with the competitors, the taxpayer's appraiser concluded the subject's expenses were reasonable. Trans. at pg. 33/line 19-23. This finding is buttressed by the City's appraiser determination that the subject property's total nursing expenses equaled 42.6% of the gross revenue, which is in the range she

[6] Ms. Kosich determined that total nursing expenses from May 1, 2013 to December 31, 2013 annualized equaled $136.30 per resident day or $42.6% of revenue for a total of $4,323,193.00.
[7] The taxpayer's appraiser did not use Riverside Rest Home, as it is a government facility. Trans. at pg. 185/lines 12-19.

found as typical, supporting that the subject properties expenses are market expenses. (emphasis added.) See Conf. App. at pg. 221.

When asked whether she would need to know the patient care level for each patient in the facility before making a decision if a nurse is needed, the City's appraiser responded, "that's getting into a level of detail that nobody is going to look at for an appraisal." Trans. at pg. 227/lines 3-4. She agreed that taxpayer and its competitors have an obligation to provide an appropriate level of medical care to its patients and that those are decisions that need to be made by medical professionals and not appraisers. Trans. at pg. 227/line 10 to pg. 228/line 2. She further agreed that refusing to treat a patient due to a high level of care is morally problematic and bad business. Trans. at pg. 228/lines 8-20. Therefore, the Superior Court's finding which accepted the City appraiser's opinion regarding nursing expenses at the petitioner's facility is an unsustainable exercise of discretion.

2. The taxpayer is not required to demonstrate that its patient level of care will not change in 2014.

The Superior Court stated "The court recognizes that the facilities specialized services may make some of its expense higher than that of competitors which do not offer those services. However, Ventas has not established the market value of these services or the demand for those services in 2014 compared to its competitors. Instead, Ventas merely points to the specific services and the increased output of typical services to explain why its actual expense from prior years differ from the actual expenses of its competitors. As discussed above, Ventas is not entitled to a tax abatement merely because it can distinguish its services and occupancy from other comparable properties, rather it must show that it has been assessed above its

fair market value compared to other properties." Brief at pg. 46. The Superior Court stated further "the taxpayer cannot merely point to its actual income and expenses to prove that it cannot generate market level net income. Rather, the taxpayer must demonstrate that the property specific characteristics-in this case, its services render its ability to generate income at the market level unlikely." Id. at 45-6.

Firstly, the subject provides specialty care and is known for pulmonary/respiratory program. Trans. at pg. 91/line 16 to pg. 92/line 7. In fact, th plaintiff's competitors do not have a full-time respiratory therapist. Trans. at pg. 99/lines 15-20. The subject property caters to different patient populations from its competitors. Trans. at pg. 99/lines 3-9. The plaintiff treats a significant amount of post-acute patients who are clinically complex and in need of skilled care. Trans. at pg. 103/line 4-17. Ventas relies on the nursing professionals to determine staffing levels to meet the needs of the patient population that they service. Trans. pg. 104/lines 14-20. The City admits the facilities that treats patients with greater medical needs will have higher expenses than those who treat lower acuity levels. Trans. pg. 195/lines 17-21.

Secondly, to the extent the Superior Court decision requires the subject property to take patients with less care requirements like its competitors, this is contrary to law and an unsustainable exercise of discretion. Such a requirement would tax all nursing facilities based on the highest performing facilities who do not services to complex medical care patients. Under this rationale, all nursing homes should be assessed like those facilities that only take private pay and insurance patients, leaving Medicare and Medicaid facilities at a disadvantage. This has never been the

standard in New Hampshire and overlooks that this facility was in poor condition compared to its competitors.[8] At the time of the assessment, only the subject facility was contemplating a certificate of need. In fact, after taking over on May 1, 2013, one the first thing their contacts at the hospital that refer them patients told them was they have been waiting for some time for the renovations to the subject facility. Trans. pg. 82/lines 17-25. There is a lot of competition in the area and the subject relies heavily on Wentworth-Douglas Hospital, which had recently under-went its own renovation. Trans. pg. 84/lines 3-14. The hospital was getting some concerns back from patients when they came to the subject and the hospital expected it to change. Id.

The subject property was worn, dark and dingy. The hall rugs were stained. There were issues with the closets, beds, bathrooms and windows. There were issues with the generator, electrical issues and HVAC issues. Trans. pg. 83/lines 19-24. The city's appraiser acknowledges that the building conditions impacts hospital referrals. Trans. pg. 192/line 23 through pg. 193/line 1. Despite that, the city's appraiser adjusted the subject's income and expenses based on facilities in superior condition.

Lastly, there is no evidence to indicate that the patient acuity levels will improve in 2014. The property was still not renovated and still maintained pulmonary programs. The city's appraiser agreed that the facility's acuity levels will continue to increase, placing greater demands on professional caregiving. Trans. pg. 193/lines 13-16; Conf. App. at pg. 158. Accordingly, the Superior Court's ruling is unsustainable.

[8] The City's Appraiser did not inspect the interior of the competitors and agreed that she cannot determine the condition of the interior from the outside. Trans .at pg. 193/lines 2-10.

C. Public policy would not condone an assessment that was premised upon the arbitrary lowering of nursing expenses.

Arbitrary reduction of the facility's nursing expenses raises significant public policy questions. The definition of public policy is somewhat amorphous, and can be based upon a statutory or non-statutory source. See Karch v. BayBank, FSB, 147 N.H. 525, 537 (2002) (discussing public policy definition in the context of a common law wrongful discharge claim). Something may be contrary to public policy if it "is injurious to the interests of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or, as it is sometimes put, if it is at war with the interests of society and is in conflict with the morals of the time." Harper v. Healthsource N.H., Inc., 140 N.H. 770, 775 (1996) (citations omitted).

This Court has previously observed "the public has a substantial interest in the operation of private hospitals." Bricker v. Sceva Speare Mem. Hosp., 111 N.H. 276, 279 (1971). Likewise, in Harper, this Court has held that the relationship between a medical provider and their patient is of significant public concern. See 140 N.H. at 776. In Harper, for example, this Court held that a physician's claim that he was terminated because he believed an insurance company was making erroneous entries in patient files showed a possible violation of public policy. Id. at 777.

Though it operates as a for profit entity, the facility provides a significant service to the people of Dover. It cares for some of the city's most acutely ill population, especially in the area of respiratory and short-term rehabilitation. These patients are also some of the poorest citizens, as the overwhelming majority of its patients are dependent upon Medicare. See App. at pg. 22 (89% of facility's revenue

flows from Medicare/Medicaid recipients, with 60% being Medicaid patients). Therefore, the facility is limited to what it can charge patients, but is still expected to maintain a necessary level of care. Moreover, if the facility's staffing drops to a point where patient care is impacted, hospital referrals, which are the facility's primary source of new patients, will disappear. It goes without saying that providing safe health care for acutely sick patients is something that public policy would encourage.

As shown above, the Superior Court credited an assessment of the property, which arbitrarily concluded the facility was spending too much in nursing services. It made this determination despite the fact that no evidence was introduced showing where the facility was overstaffed or, more important, whether a reduction in staff would impact the patients' care. The end result requires the facility either to cut staff, possibly below safe levels, or shut its doors.

To make this determination without any reliable evidence from a medically trained professional, requires the Superior Court to engage in guesswork. Patient safety and patient care, as a matter of public policy, should not be left to chance. Therefore, Ventas submits that the decision to accept the City's appraisal, which reduced the facility's expenses by hundreds of thousands of dollars without any medical evidence showing how these cuts would affect the level of care or patient safety, was contrary to public policy.

D. The Superior Court erred in crediting the City's expert use of post assessment data.

In a tax abatement action, the critical piece of information is the property's fair market value as of the date of the assessment. <u>See</u> <u>Bedford Dev. Co. v. Town of Bedford</u>, 122 N.H. 187, 188 (1982). In calculating the facility's value as of April 1,

2014, Ventas' expert considered the expenses incurred up to April 1, 2014. App at pg. 6. The City's expert, however, used the facility's income and expenses incurred through December 31, 2014. Brief at pg. 44. The Superior Court found the City's opinion more reliable, citing Coliseum Vickery Realty Co. v. Nashua, 126 N.H. 368 (1978) and a number of unpublished Board of Tax and Land Appeal decisions, for the proposition that "an assessor must utilize market projections in addition to the property's actual income and expenses to forecast a property's future net income. Brief at pg. 42.

A review of the Vickery case does not stand for the proposition that an assessor can use post assessment information to justify their opinion of value as of the date of assessment. Instead, Vickery only stands for the proposition that the trier of fact can consider market rate expenses or income instead of the subject's actual expenses and income if it finds the subject property was capable of performing better than it actually did on the open market. 126 N.H. at 369-70. In fact, this court found that it was improper to use data post-assessment date in reaching the assessed value. Rollsworth, 126 N.H. at 337.

Despite agreeing that it is improper to use data after April 1, 2014, the Superior Court the City's Appraiser's conclusion reliable because she "relied on several other valid factors to reach her conclusion. Brief at pg. 44. This was in error as it ignores the fact that the City's post assessment data is unreliable. See Rollsworth, 126 N.H. at 337 (reversing trial court for using income derived from rents received post-assessment date). Here, the City's appraised used income and

expense data for all of 2014.[9] Conf. App. at pgs. 221-222; Trans. at pg. 145/lines 14-18. Because City's projections are based on the entire 2014, then her entire analysis is tainted and unreliable. Trans. pg. 146/line 4 through pg. 147/line 16.

E. The Superior Court erred in considering the July 2015 transfer between Ventas and CCR.

The Superior Court, citing a Board of Tax and Land Appeal decision, ruled that Ventas' representation of the property's value during a 2015 transfer could corroborate the City's assessment value. Brief at pgs. 48-9. Under New Hampshire law. "unless it is found on evidence that the sale was not consummated in a fair market, the sale price of a piece of property stands as evidence of its value." Poorvu v. City of Nashua, 118 N.H. 632, 633 (1978). A corporate restructuring generally does not constitute a bona fide sale. See e.g. Texas Antilles, Ltd. v. Creque, 273 F.Supp 2nd 660, 663 (D.V.I. 2003) (transfer of property as part of corporate restructuring was not a sale and therefore did not trigger a right of first refusal) (citing cases).

In this case, the 2015 transfer was not a "sale" and the Court should not have considered it. Instead, it was a transfer between two related corporate entities that was necessary to achieve a corporate restructuring. Trans .at pg. 75/lines 1-9. There was no exchange of any money between these companies. The property was not advertised for sale on the open market. Ventas did not retain a realtor to assist in the marketing of the property. There is no evidence that Ventas entertained other bids for the property. Indeed, Ventas made an economic decision to pay the assessed amount in transfer tax stamps because (a) the transfer did not fall within one of

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[9] The City's Appraisal also acknowledged she calculated the inflation analysis using data from 2012 through 2016, which she agreed was wrong. Trans. pg. 198/lines 3-8.

exceptions found in RSA 78-B:2 that existed in 2015, and (b) it would be cheaper to pay the transfer tax than to hire an attorney and litigate the issue with the Department of Revenue Administration if there was a challenge to the transfer tax amount. Further, neither expert considered this transfer as a comparable sale or based their opinion of value on this transfer. See Trans. at pg. 45/lines 1-14 & pg. 181/lines 2-6.

More important, the 2015 transfer, even if it could be considered an arms-length transaction, would not be relevant in the present case. As stated above, the issue the Court must determine is the subject property's fair market value on the date of the assessment. See Bedford Dev. Co. v. Town of Bedford, 122 N.H. 187, 188 (1982). How the property performed after the April 1, 2014 assessment is, as recognized by the Superior Court, not appropriate for consideration. Brief at pg. 44. Therefore, an arms' length transfer that occurred in July 2015 would almost certainly be based upon data that was not available to a purchaser on April 1, 2014 (that is, income and expenses that occurred between April 1, 2014 and July 2015).

Finally, the July 2015 transfer occurred after the facility received a Certificate of Need in April 2015, which allowed it to expend over $2 million in much needed improvements. The issuance of that certificate would certainly have a dramatic impact on the property value as it could now conduct needed upgrades, improvements and increase the number of private rooms. As such, any transfer that occurred after April 2015, arms-length or not, would not be reflective of the property's value in 2014. Therefore, as there was no evidence that the 2015 transaction was a "fair market sale" it should not have been considered by the Court.

CONCLUSION

The Superior Court erred in its September 2018 decision because it credited the City's opinion of value which (1) reduced Ventas' operating expenses without any analysis as to how the reduction would impact patient care and (2) considered expenses for the facility that were incurred after April 1, 2014. The Superior Court also erred when it considered the amount of tax stamps paid by Ventas in a 2015 intracompany transfer as indicative of Ventas' opinion of the property's fair market value. Therefore, the September 29, 2018 order should be reversed and this case remanded for a further hearing to determine the property's fair market value as of April 1, 2014.

Respectfully submitted
VENTAS REALTY
LIMITED PARTNERSHIP
By Its Attorneys
Hamblett & Kerrigan, P.A.
20 Trafalgar Square, Suite 505
Nashua, N.H. 03062

603-883-5501

Date: May 14, 2019

/s/ Kevin P. Rauseo
Kevin P. Rauseo, Esq.
N.H. Bar No. 12528
krauseo@hamker.com

Date: May 14, 2019

/s/ Andrew J. Piela
Andrew J. Piela, Esq.
N.H. Bar No. 10518
apiela@hamker.com\

REQUEST FOR ORAL ARGUMENT

Pursuant to N.H. Supreme Ct. R. 16(3)(h) the petitioner requests fifteen (15) minutes of oral argument. Oral argument will be presented by Attorney Kevin P. Rauseo.

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the word limitation set forth in Supreme Court Rule 16(11). The total number of words are 6902.

Date: May 14, 2019

/s/ Kevin P. Rauseo
Kevin P. Rauseo, Esq.

CERTIFICATE OF SERVICE

I hereby certify the above Brief has been served in accordance 2018 Supreme Ct. Supp. R. 18 to Walter Mitchell, Esq.

Date: May 14, 2019

/s/ Kevin P. Rauseo
Kevin P. Rauseo, Esq.

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Strafford Superior Court
259 County Farm Road, Suite 301
Dover NH 03820

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: **Ventas Realty Limited Partnership v City of Dover**
Case Number: **219-2015-CV-00333**

Enclosed please find a copy of the court's order of September 29, 2018 relative to:

Court Order (re: 6/1/18 & 6/4/18 Bench Trial)

October 22, 2018

Kimberly T. Myers
Clerk of Court

(277)

C: Kevin P. Rauseo, ESQ; Walter L. Mitchell, ESQ; Judith E. Whitelaw, ESQ; Keriann Roman, ESQ

NHJB-2503-S (07/01/2011)

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS. SUPERIOR COURT

Ventas Realty Limited Partnership

v.

City of Dover

Docket No. 219-2015-CV-00333

ORDER

The plaintiff Ventas Realty Limited Partnership ("Ventas") a real estate investment trust, seeks an abatement of property taxes on property located at 307 Plaza Drive ("the property") for the 2014 tax year, asserting that the City of Dover unlawfully taxed the property in excess of its fair market value. The City objects. After considering the evidence presented at a two-day bench trial and the applicable law, the court finds and rules as follows.

Facts

In 2014, Ventas owned the property, which contains a skilled nursing facility serving short-term and long-term patients. Until 2013, the property was leased to Kindred Healthcare. (Pl.'s Ex. 1 at 34). Kindred Healthcare did not renew the lease in 2013, and Ventas leased the property to National HealthCare Associates ("NHCA"). NHCA now operates the facility as Dover Center for Health and Rehabilitation. (Def.'s Ex. F at 9).

On April 1, 2014, the City assessed the property at a value of $4,308,500. As of the date of valuation, the facility contained 112 patient beds along with a large rehabilitation room, an occupational therapy room, two shower-tub rooms, small therapy rooms, meeting areas, offices, two garages, and a parking lot. (Pl.'s Ex. 1 at 36). There were only two private patient rooms, while the remainder of the rooms were semi-private, containing two beds each. (Id.). The

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facility's lack of private rooms placed it at a competitive disadvantage, and thus it often utilized semi-private rooms as private rooms in order to meet the increasing demand for private rooms. (Id. at 41).

The facility was originally built in 1969 as a nursing home and underwent additional construction in the mid-1980s. (Def.'s Ex F at 1). Between the additional construction in the mid-1980s and April 1, 2014, the date of the tax valuation, the facility did not undergo any improvements. (Id.). Because of the limited investments in the building over the years, its interior appeared "tired" and "worn" and contained many outdated aesthetic features such as cabinets and flooring. (Pl.'s Ex. 1 at 32, 41). According to Ventas' expert, Raymond Dennehy, the appearance placed the facility at a competitive disadvantage in the market. (Id. at 41).

The facility serves patients who have recently been discharged from the hospital but require additional care. It is not an assisted living facility, which typically provides day-to-day assistance to residents; instead, it provides skilled nursing care to patients with serious medical needs who will eventually leave the facility rather than reside there permanently. The majority of the facility's patients are insured by Medicaid, with the remainder of the insured patient base covered by Medicare and private insurance. (Pl.'s Ex. 1 at 47). Though the facility receives patient referrals from hospitals throughout the region, the majority of its patients are from nearby Wentworth-Douglass Hospital. According to Kevin Prisco, the Director of Operations for NHCA, Wentworth-Douglass asked NHCA when it took over the lease in 2013 whether NHCA planned to renovate the facility. To Prisco, this indicated that Wentworth-Douglass was concerned about the worn condition of the facility.

At the time of the City's assessment, Ventas was in the process of preparing an application to submit to the State to obtain a Certificate of Need ("CON") to conduct extensive

renovations to the property. The CON application summarized the goals of the renovation, including installation of new finishes such as floors, walls, and lighting, and replacing cabinets in each patient room. Ventas also proposed to redesign the entrance of the building to include a lobby, new administrative area, and new reception area for visitors. Further, the application provided for eighteen single-patient rooms, and upgrades in ancillary patient care areas including the gym and the occupational and speech therapy areas. Ventas also proposed to create a nursing suite. (Pl.'s Ex. 1 at 37–38). The CON application did not request any expansions to the building; it sought only remodeling and finishing upgrades. (Id.).

In April 2015, the plaintiff received the CON, which authorized renovations totaling $2,869,800. (Id.). The plaintiff planned to begin the renovations that year and complete them by 2016. (Id.). Many of the remodeling and finishing upgrades were implemented.[1] (See Def.'s Ex. F at App. Ex. C).

On July 30, 2015, Care Capital Properties, LLC ("CCP"), another real estate investment trust, was formed as a result of a corporate split from Ventas. (Pl.'s Ex. 1 at 34). When this corporate split occurred, 355 skilled nursing facilities under Ventas' ownership were transferred to CCP, including the subject facility. (Id.). Subsequently, on August 7, 2015, CCP acquired the property from Ventas. (Id.). The Dover Assessor and the deed's real estate transfer stamp show that CCP acquired the property for $4,308,500, the same amount that the City assessed the property for the 2014 tax year. (Id.).[2]

Dennehy inspected the property and issued a report on May 1, 2016, detailing his conclusion on the property's fair market value as of April 1, 2014, at its highest and best use as a

[1] Prisco testified that the CON approval was not sufficient to complete all of the planned renovations due to a number of unanticipated contingencies.

[2] Ventas argues that this was a paper transaction for balance sheet purposes and the $4,308,500 price does not reflect Ventas' opinion of the value of its own property. As explained more fully below, the court attaches some weight to the designation of value for purposes of the transfer.

skilled nursing facility. (Id. at 43). He utilized the income capitalization approach to determine the property's fair market value, which methodology requires a determination of the net income of the property during the 2014 tax year. To make this determination, Dennehy conducted an analysis of the property's past expenses. First, Dennehy examined the property's occupancy and gross income of 2012, 2013, and the 11 months prior to the date of valuation ("the preceding 11 months"). According to Dennehy, he focused on the preceding 11 months—May 2013 through March 2014—because May 2013 was the date on which NHCA began operating the facility. (Id. at 46). Upon review of this data, Dennehy concluded that the "subject property has experienced a relatively stable census mix and occupancy over the last two plus years." (Id. at 47). He further noted that the property has a lower occupancy rate than four nursing facilities in nearby areas, which include Rochester Manor and Colonial Hill in Rochester and Saint Ann and Riverside Rest Home in Dover.[3] (Id. at 48). He attributes this lower occupancy rate to the facility's worn condition. (Id.). Based on this limited information, Dennehy concluded that the preceding 11 months "provide the most reliable indication of the stabilized census at the subject property" as of April 1, 2014. (Id.). Accordingly, Dennehy designated the gross income over the preceding 11 months—$10,147,068—as the "stabilized estimate" of the gross income that the facility would generate in 2014. (Id. at 49).

Next, to determine operating expenses, Dennehy viewed the property's operating expenses for the preceding 11 months and the "last eight months of 2013," which he annualized, to determine the property's operating expenses for the 2014 tax year. (Id. at 50). He found the operating expenses during these years to be "consistent, ranging from $308.01 to $309.56 per patient day." (Id.). He did not utilize data from 2012 "due to difficulties reconciling the

[3] Though Langdon Place in Dover represents another similar facility, he did not include it in his analysis because it is an assisted living home with only 30 beds. (Pl.'s Ex. 1 at 48).

Medicaid cost report and internal organizational formats," but notes that the operating expenses in 2012 were $301.89 per patient day. (Id.). Based only on the actual income and expenses from May 2013 through March 2014, Dennehy concluded that "the actual operating expenses from the [preceding] 11 months (annualized to represent a full year) provide the most reliable indication of the subject's stabilized operating expenses." (Id.).

In comparing the operating expenses of the subject property during the preceding 11 months and the operating expenses of the four comparable facilities in 2013, Dennehy noted that the subject property has higher operating expenses per patient than the comparables. (Id. at 52; see Pl.'s Ex. 2). He attributes the difference in expenses to the lower occupancy levels at the subject property than the occupancy rate at the comparable properties. (Pl.'s Ex. 1 at 52). According to Dennehy, the lower occupancy rates result in higher expenses per patient. (Id.). He thus concluded that the comparables support his use of the preceding 11 months of expenses as the stabilized operating expenses. He calculated the stabilized operating expenses to be $9,936,601. (Id.).

To reach net operating income, Dennehy deducted operating expenses from the gross income ($10,147,068 minus $9,936,601). He also deducted replacement reserves in the amount of $39,200, and added property taxes in the amount of $120,453. Dennehy concluded that the property's net operating income equaled $291,720. (Id. at 53). Dennehy then reduced the net operating income by 20 percent to account for income allocated to the business, and then applied a capitalization rate of 12.6 percent. He also deducted $150,000 for the depreciated value of personal property. In the end, Dennehy concluded that the fair market value of the property is $1,702,190, which he rounded down to $1,700,000.[4] (Id. at 66).

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[4] Dennehy briefly conducted an analysis the sales comparison approach, but asserted that this approach is unreliable due to the few number of comparable sales of nursing homes in New England in recent years. (Pl.'s Ex. 1 at 67).

Melanie Kosich was retained by the City to conduct a fair market value analysis in connection with the instant litigation. She inspected the property on July 25, 2017, and issued a report on October 19, 2017. (Def.'s Ex. F at 10). She agreed that the facility's highest and best use is as a skilled nursing facility. Furthermore, she agreed that the most reliable method for determining the property's fair market value is the income capitalization method, though she also conducted a full analysis under the sales comparison and cost approaches. While the income capitalization approach required Kosich to calculate the property's gross income and operating expenses in 2014, she used a different method to reach these figures than Dennehy.

Kosich analyzed the property's gross income and expenses in 2012, 2013, and 2014. (Id. at 128). However, she did not merely compare these numbers to arrive at estimates for each category. Instead, she adjusted the gross income and expense data for inflation for the "forecasted period and conducted a complex analysis of the market conditions for skilled nursing facilities in the region. She assessed the property's strengths and weaknesses within the market, and compared it to competitors in the region in several categories. The competitors include Colonial Hill, Rochester Manor, Langdon Place, Saint Ann, and Riverside Rest Home. (See Id. at 46–83). Based on this data, she concluded that the forecasted gross income of the facility is $10,063,865. (Id. at 152).

Kosich applied this same market analysis to each category of expenses. (See Id. at 134–52). In forecasting nursing expenses, which constitute the most significant discrepancy between the two experts,[5] Kosich utilized the property's actual nursing expenses in 2013 and 2014 for

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Dennehy noted several sales in the region that ranged between $6.7 million and $4 million. (Id.). He asserted that the subject property's stabilized value under this approach is $2,315,237. (Id.). He further asserted that the value is $5,185,037 if the renovation costs under the CON are included. (Id.).

[5] Kosich estimating nursing expenses at $2,899,095 and Dennehy estimating nursing expenses at $3,471,242. (Def.'s Ex. B).

each category of nursing professional—RN, LPN, CNA, and all other nursing staff—and compared those expenses with the 2013 nursing expenses of the five comparable properties. (Id. at 142). In considering comparable nursing expenses, she analyzed the mean of all of the comparables as well as the expenses of the comparables in the first and third quartiles. (Id.). In addition, she took into consideration the ratio of the total revenue that nursing typically represents for a skilled nursing facility—30 to 45 percent—and also applied a greater inflation rate to nursing expenses due to recent trends in the market that show a higher demand for direct care to patients. (Id. at 140). Based on these figures, she assigned a value that fell within the actual 2013 and 2014 expenses of the subject property, the averages of the comparables, and the constraints of the ratio of nursing expenses to the total revenue. (Id. at 142). She conducted a similar analysis for the other operating expenses in each category. (Id. at 134–52). In conclusion, Kosich estimated that the facility's total forecasted operating expenses is $9,016,402. (Id. at 152).

In deducting the forecasted operating expenses from the forecasted gross income, Kosich reached a net operating income of $1,047,463. (Id.). She then applied a 13.5 percent capitalization rate to eventually arrive at $6,698,000. (Id.). She reduced this number by the value of furniture, fixtures, equipment, and business assets, and arrived at a total fair market value of $4,640,000. (Id. at 179). Kosich then reconciled her conclusion under the income capitalization approach with her conclusion under the cost model—$5,027,000—and arrived at a reconciled fair market value of $4,700,000.[6] (Id.).

According to Thomas Gilmartin, CFO of NHCA, none of the nursing facilities in the region are comparable to the subject property because "every nursing home is operated very

[6] Kosich also conducted an analysis under the sales comparison approach but did not utilize the results in her reconciliation.

differently." For example, Langdon Place significantly differs from the subject property because it is a small assisted living facility that serves thirty residents. Thus, it has a different business model than the subject property. He further testified that Colonial Hill, Rochester Manor, and Saint Ann were not comparable facilities, though he did not elaborate. He based his review of these facilities on Medicare reports.

Ventas now seeks a tax abatement, asserting that the property's fair market value as of April 1, 2014 was only $1,700,000.

Analysis

RSA 75:1 requires municipalities to assess real property "at its market value." RSA 75:1 (Supp. 2016). Fair market value is "the price which in all probability would have been arrived at by fair negotiations . . . taking into account all considerations that fairly might be brought forward and reasonably given substantial weight in such bargaining." Society Hill at Merrimack Condo. Ass'n v. Town of Merrimack, 139 N.H. 253, 255 (1994) (quoting Opinion of the Justices, 131 N.H. 504, 510 (1989)). If the city "neglect[s] or refuse[s]" to grant a tax abatement upon written request from the taxpayer, the taxpayer may petition to superior court, which "shall make such order thereon as justice requires." RSA 76:17 (Supp. 2016).

In tax abatement proceedings, "[t]he superior court is bound by principles of equity." Ansara v. City of Nashua, 118 N.H. 879, 880 (1978) (citation omitted). The superior court's "jurisdiction in an abatement proceeding is appellate, and it has the power to review the municipality's decision to determine if an abatement is warranted." LSP Ass'n v. Town of Gilford, 142 N.H. 369, 374 (1997). While RSA 76:17 "confers broad discretion and equitable powers upon the superior court to abate taxes," the court "will abate only so much of a taxpayer's tax as in equity the taxpayer ought not to pay." Porter v. Town of Sanbornton, 150

N.H. 363, 368 (2003) (citation omitted). Thus, to succeed in a tax abatement proceeding, the taxpayer has "the burden of proving by a preponderance of the evidence that [it is] paying more than [its] proportional share of taxes." Society Hill, 139 N.H. at 254 (quotation omitted). In other words, the plaintiff must show that its "assessment was disproportionately higher in relation to [the property's] true value than was the case as to the other property" in the city. Id. at 254–55 (quotation omitted).

Because a taxpayer's right to an abatement depends on whether the taxpayer is paying a disproportionate sum in taxes, "[d]isproportionality, and not methodology, is the linchpin in establishing entitlement to a petition for abatement." The LLK Tr. v. Town of Wolfeboro, 159 N.H. 734, 739 (2010) (quotation and citation omitted). While there is broad leeway in demonstrating a property's fair market value, "[t]here are three generally-accepted methods of valuing real estate: the replacement cost approach, the comparable sales method, and the capitalization of income approach." Town of Croydon v. Current Use Advisory Bd., 121 N.H. 442, 446 (1981) (citations omitted). "While it is possible that a flawed methodology may lead to a disproportionate tax burden, the flawed methodology does not, in and of itself, prove the disproportionate result." LLK Tr., 159 N.H. at 739 (quotation and brackets omitted). Thus, the choice of which method to utilize "is left to the individual or the governmental body responsible for valuing the property," and the court will therefore "not overturn that decision if there is a reasonable basis for using the valuation method chosen." Town of Croydon, 121 N.H. at 446. (citations omitted).

The parties have stipulated that in 2014 the City used an equalization ratio of 95.1 percent, indicating that the properties were assessed at near fair market value. Appeal of Andrews, 136 N.H. 61, 63 (1992) (In order to achieve proportionality across districts, cities

apply an equalization ratio, which, "when multiplied by current fair market values, will produce an assessment in line with existing assessments of other property."). Furthermore, the parties agree that the income capitalization approach is the most appropriate method to determine the property's fair market value, though the City also provides analysis using the sales comparison approach and cost approach to provide additional support for its findings.

The income capitalization method "is an established and well-accepted method for determining the value of income-producing property." Brickman v. City of Manchester, 119 N.H. 919, 921 (1979) (quotations omitted). This skilled nursing facility constitutes income-producing property that is comparable to very few properties in the area. On the facts of this case, the court agrees with the parties that the income capitalization approach is the most appropriate method to evaluate the property's value. Therefore, the court analyzes the value of the property based on the parties' conclusions under the income capitalization approach.

Under the income capitalization approach, "[t]he word 'value' . . . means the price which the property will bring in a fair market after reasonable efforts have been made to find a purchaser who will give the highest price for it." Brickman, 119 N.H. at 921 (quotations omitted). Thus, "[t]he income capitalization approach measures the present value of property on the basis of the future net income the property could produce for the owner." Rollsworth Tri-City Tr. v. City of Somersworth, 126 N.H. 333, 335 (1985). The future net income is the income "the property would generate on the open market, less the normal and usual costs of operation." Id. Once an assessor has determined the future net income, that figure "is then capitalized to determine present worth." Id. Thus, the income-producing ability of the property at the time of the valuation—in other words, the property's ability to generate income for that tax year—constitutes the property's fair market value under the income capitalization approach.

The central dispute here lies within the experts' conclusions on the property's forecasted net income for the 2014 tax year. Within the net income, the major discrepancy between the reports is the experts' findings on the forecasted expenses.[7] After deducting the experts' gross income estimates from their respective operating expenses estimates, Kosich arrives at a net income of $1,047,463, (Def.'s Ex. 152), while Dennehy arrives at a net income of only $291,720, (Pl.'s Ex. 1 at 66).

The City argues that Dennehy's entire methodology is flawed because he did not conduct the necessary analysis to project the property's future net income during the 2014 tax year. Instead, according to the City, he merely used the facility's performance during the preceding 11 months to represent the facility's projected earnings in 2014. This stands in stark contrast to Kosich's methodology, where she utilized data from 2012 and 2013, the entire year of 2014, and market projections, which she determined by drawing on a wide array of data including comparable skilled nursing facilities in the region. As such, the City argues Kosich's methodology presents the more reliable conclusion of the two experts. (Def.'s Mem. at 2).

The income capitalization method requires an assessor to determine the property's going concern value, or its ability to produce income on the open market. Rollsworth, 126 N.H. at 335; see also Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 175 F.3d 18, 25 n.4 (1st Cir. 1999) ("going-concern value is what a willing buyer given all available information would have paid a willing seller," which ordinarily would be the same as "anticipated future profits, capitalized and discounted to the present and also discounted for future risk" (quotations omitted)). Thus, while actual income from prior years may constitute one factor among many in

[7] Kosich estimates the property's gross income to be $10,063,865, only $83,203 less than Dennehy's estimate of $10,147,068. (Def.'s Ex. F at 152; Pl.'s Ex. 1 at 66). However, Kosich estimates the property's expenses to be $9,016,402, while Dennehy estimates the expenses to be $9,936,601, a difference of approximately $920,000. (Pl.'s Ex. I at 66).

determining a property's forecasted net income, a property's actual performance alone does not constitute its value. The New Hampshire Supreme Court has rejected assessments under the income capitalization approach that are based on the property's actual performance rather than the net income it would generate on the open market during that tax year, even where the actual net income generated by the property was lower than the forecasted market income. See Coliseum Vickerry Realty Co. Tr. V. City of Nashua, 126 N.H. 368, 369 (1985) (master properly used the property's market value, not its actual rental income, to determine the income amount to be capitalized). Thus, in order to determine an income-producing property's fair market value using the income capitalization method, an assessor must utilize market projections in addition to a property's actual income and expenses to forecast a property's future net income.[8]

In reaching her conclusions, Kosich utilized the property's actual income and expenses and made adjustments based on market projections, such as her estimate of forecasted nursing expenses discussed above. The court finds this analysis the more appropriate method to determine a property's forecasted net income based on actual income and comparable properties.

Dennehy did not conduct a similar analysis to forecast the property's income and expenses. Rather, Dennehy merely applied the property's actual income and expenses from May 2013 through March 2014 ("the preceding 11 months") to the property's income and expenses

[8] As the City notes, the New Hampshire Board of Tax and Land Appeals ("BTLA") agrees with this position in several of its decisions. See Godfrey Road Holdings, LLC v. City of Lebanon, No. 27954-14PT (BTLA Feb. 9, 2017) (finding the City's appraisal to accurately reflect fair market value under the income capitalization approach where it "estimates market value and expenses and arrives at a stabilized net operating income, rather than relying upon the Property's historical figures . . . "); Cropsey & Mitchell Co., Inc. v. Town of Tilton, No. 26862-12PT (MTLA May 28, 2015) ("In order to result in a credible opinion of market value, a GIM [gross income multiplier] must be applied to a stabilized gross income, not the Property's actual income from any specific year" (emphasis in original)); Varsity Durham, LLC v. Town of Durham, Nos. 24680-08PT, 25378-09PT (BTLA Mar. 9, 2012) ("[The taxpayer's expert] placed exclusive reliance on the actual financial results for one year for the portfolio purchased by the Taxpayer, rather than estimating stabilized market rental income and the expenses on the Property, which would have resulted in a credible estimate of market value using the income approach."); Belmar/PAG Ltd. P'ship v. City of Nashua, Nos. 21029-04PT, 2248-05PT (Mar. 6, 2008) (finding the City's methodology "more reflective of what a prospective purchaser would likely do to estimate the value" where the City projected a trended income based on five years of past income while the taxpayer only accepted the previous year's actual income or increased it by 2 percent, which was "apt to be impacted by any abnormal fluctuations in the prior year actuals").

for the 2014 tax year without conducting any analysis to determine how the property would perform on the open market during that tax year.[9] While Dennehy refers to data from the preceding 11 months as the "Stabilized Estimate," he provides only conclusory assertions to explain how he came to his conclusion.

For example, in describing his reasoning for utilizing the expenses from the preceding 11 months as the forecasted expenses in 2014, he states that the operating expenses in "the last eight months of 2013" and the preceding 11 months "was consistent, ranging from $308.01 to $309.56 per patient per day." (Pl.'s Ex. 1 at 50). However, these two categories—"the last eight months of 2013" and the preceding 11 months—cover largely the same period of time: the last eight months of 2013 includes May through December 2013 and the preceding 11 months include May 2013 through March 2014. Thus, the similarities between these two figures are not a result of nearly identical expenses in two consecutive years, which might provide some support that the income and expenses of the following year will closely track the income and expenses of prior consecutive years. Rather, these figures are likely similar because they are derived from eight months of the same year (May 2013 through December 2013). Moreover, Dennehy acknowledged that he deliberately did not compare 2012 expenses. (Id.). Thus, even if Dennehy could accurately project market expenses for the 2014 tax year based only on actual income over a period of prior years—which the court doubts—his analysis compares two figures from roughly the same period of time rather than figures from separate consecutive years. This is insufficient to accurately forecast accurately the net income the property would earn in 2014.

Furthermore, while Dennehy does not completely ignore the income and expenses of comparable properties, he does not utilize the comparable properties as evidence of market

[9] Furthermore, though Dennehy identified the individual categories of expenses as Kosich did, he did not conduct analysis for each individual category, unlike Kosich.

projections, as required under the income capitalization approach. Rather, he merely explains why the actual income and expenses of the comparable properties are different from the actual income and expenses of the subject property. (See Pl.'s Ex. 1 at 48 (explaining why the property has a lower occupancy rate than other nursing facilities rather than utilizing the occupancy rates at comparable properties as evidence of market trends); see also Pl.'s Ex. 1 at 50 (explaining why the property has higher operating expenses than the comparable properties)). While these explanations may provide justification for adjusting a market-based income and expenses to reflect the specific features of the subject property that would contribute to its inability to obtain market level income, Dennehy does not establish or consider those necessary market figures. For these reasons, the court finds that Dennehy's report does not provide sufficiently reliable evidence of the property's future net income.

Ventas argues that Kosich's methodology is flawed because she utilized data that did not currently exist at the time the City conducted the valuation on April 1, 2014. (Pl.'s Mem. at 7). In other words, Kosich utilized data from April to December 2014, which is information the City could not have known on April 1, 2014, because those months had not yet occurred. (Id.). The court agrees that the consideration of the facility's actual income and expenses incurred after April 1, 2014, is not a proper method to determine the property's future net income because this data would not have been available to the City on the date of valuation. However, Kosich's conclusions were not drawn from the income and expenses from 2014 alone. Rather, in addition to the data from 2014, she analyzed the property's actual income in 2012 and 2013, its actual expenses in 2013, the actual income and expenses of comparable properties in 2013, the typical portion of the revenue of a skilled nursing facility that each category of expenses occupies, and other trends that could affect the market, such as a recent increase in the need for direct nursing

care. Thus, while relying on income and expenses incurred after April 1, 2014, alone would not accurately reflect "the future net income the property could produce for the owner," Rollsworth, 126 N.H. at 335, Kosich relied on several other valid factors to reach her conclusions.

Ventas next argues that Kosich inappropriately reduced nursing and other medical professionals' salaries without considering the actual individual health care needs of each patient. (Pl.'s Mem. at 7). Ventas asserts that the absence of any consideration of this evidence resulted in a significantly lower assessment of necessary nursing expenses which if applied would force the facility to reduce its operating costs at the risk of its patients' health. (Id.). Therefore, Ventas argues that Kosich's reduction in nursing expenses "is inappropriate and should be discarded." (Id. at 9).

This argument fails for the same reason discussed above—Ventas has not met its burden to demonstrate that its actual expenses, including its actual nursing expenses, constitute the expenses the facility would incur on the open market. Again, the New Hampshire Supreme Court has been clear that a property's assessment for the purposes of taxation must be based on its fair market value; it is not based on the actual income generated by the property where the actual income does not represent the fair market value. Rollsworth, 126 N.H. at 335. Even where the actual income generated by a property is significantly lower than its fair market value, the Court has upheld assessments based on the income the property was capable of generating on the open market rather than its actual income where the actual income did not reflect the market income. See Coliseum, 126 N.H. at 370 ("Since market rents in the instant case were higher than the actual rental income, the master appropriately used these rents in valuing the property."). Though an assessor should consider characteristics of the property that reduce its ability to generate net income at the market rate, the taxpayer cannot merely point to its actual income and

expenses to prove that it cannot generate market level net income. Rather, the taxpayer must demonstrate that the property's specific characteristics—in this case, its services—render its ability to generate income at the market level unlikely. See, e.g., Appeal of Net Realty Holding Tr., 128 N.H. 795, 800 (1986) (the BTLA properly inferred from the lack of evidence of comparable properties that the subject property's lower actual income was the result of long-term leases that had become disadvantageous to the taxpayer, not its inability to generate income at the market level).

Ventas cites to several reasons why its expenses are significantly higher than Kosich's assessment: the acuity levels of the patients are significantly greater than the acuity levels of regional competitors; the facility expends significantly more on radiology treatment, laboratory expenses, and intravenous drugs than its competitors; and the facility has significantly more admissions and discharges than its competitors. (Pl.'s Mem. at 8; Pl.'s Ex. 2). The court recognizes that the facility's specialized services may make some of its expenses higher than that of competitors which do not offer those services. However, Ventas has not established the market value of these services or the demand for those services in 2014 compared to its competitors. Instead, Ventas merely points to the specific services and the increased output of typical services to explain why its actual expenses from prior years differ from the actual expenses of its competitors. As discussed above, Ventas is not entitled to a tax abatement merely because it can distinguish its services and occupancy from other comparable properties; rather, it must show that it has been assessed above its fair market value compared to other properties. Dennehy's report only contrasts prior data; it does not establish the fair market value of the nursing services that the facility would provide in 2014.

Similarly, even though the facility may experience higher costs as a result of higher levels of admissions and discharges, higher usage of intravenous drugs, and higher levels of laboratory work, Dennehy does not explain how these characteristics would impact the facility's expenses on the open market in 2014 when compared with other facilities. Rather, Dennehy merely identifies these characteristics to explain why this facility's actual expenses are different from the comparable facilities' actual expenses. Without forecasting the cost and demand for these services on the open market in 2014, the taxpayer provides no way to determine whether the facility would incur the same expenses in 2014 as it did in the prior year.

Finally, the argument that Kosich must analyze the actual medical needs of the individual patients to forecast properly the expenses to 2014 is contrary to established law. Again, under the income capitalization approach, the analysis must center on the net income that a property would produce on the open market in the particular tax year. In a facility that provides temporary residential care to patients, there is no guarantee that the facility will have the same patients with the same needs in 2014 as it did in 2013. This constant shift in number and types of patients in any given year is supported by Ventas' assertion that the facility has a higher rate of admissions and discharges than other facilities. Thus, it would be inappropriate to base the facility's forecasted expenses for 2014 only on the needs of the patients it served in a prior year given the shift in individual patients throughout the year. Accordingly, the court disagrees with Ventas' assertion that it should discount Kosich's findings on nursing expenses.[10]

During trial, Ventas emphasized the importance of the property's receipt of the CON to the property's fair market value. To the extent that Ventas asserts that the assessment should have considered the net income Ventas would spend on implementing the changes under the

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[10] The court notes that even if it found Kosich's methodology in forecasting nursing expenses to be flawed, Ventas has not met its burden to show that its own forecasted nursing expenses are accurate because it did not conduct any market analysis.

CON, the court finds the CON irrelevant because the taxpayer did not apply for it until after the date of valuation and did not receive the CON until the following year. To the extent that the CON constitutes evidence of the facility's worn condition at the time of valuation, the court considers this evidence to the extent that it is relevant to its market value. However, Ventas has not demonstrated how the condition and age of the facility impacts its market value. Though Ventas asserts that the building's condition impacts the facility's ability to attract patients whose insurers allow them to choose facilities, it does not provide evidence of the condition of comparable properties nor does it provide market analysis to show that building conditions do in fact impact patients' choices in facilities. As such, the CON provides little to assist Ventas in meeting its burden.

Finally, Ventas argues that Kosich's income analysis arrives at a lower fair market value than Ventas' estimate when adjusted for errors. (Pl.'s Mem. at 10). Because Ventas has not determined the market income and expenses to achieve a future net income, Ventas has failed to show that Kosich's figures contain errors nor has it established the adjustment that should be implemented.

To support its own assessment, the City points to Ventas' representation to the Dover Assessor of the property's value as being $4,308,5000, the same value at which the City assessed the property. Ventas used this value for transfer tax purposes when the property was conveyed to CCP. Though this fact alone is not dispositive, the court agrees with the City that Ventas' representation of the property's value casts further doubt on its position that it is paying a disproportionate amount of taxes. See Thermo-Fischer Scientific, Inc. v. Town of Hampton, Nos. 22992-06PT, 23519-07PT (BTLA Mar. 1, 2011) ("[T]he price stated by the Taxpayer in its filings with the [Department of Revenue Administration] provide some corroboration for the

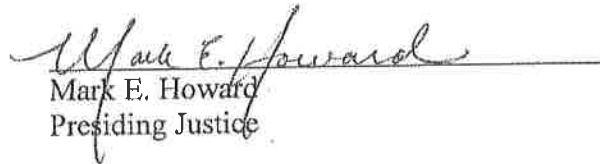
Town's own estimate of market value and casts doubt on the Taxpayer's much lower estimate.").
The court acknowledges Ventas' representation that CCP did not actually pay that amount since the property transfer occurred as a result of a corporate split. Nevertheless, given that Ventas asserts here that the City over-assessed the property's value in excess of 2.6 million dollars, it is not credible that Ventas would utilize the City's assessment of the property's fair market value in any official filing if it did not believe it represented the property's value. Thus, the court finds Ventas' representations to the Dover Assessor to constitute corroboration of the City's assessment.

Conclusion

In sum, Dennehy's approach on behalf of Ventas does not accurately reflect the overall value of the property based on a forecasted net income the property would have generated on the open market in 2014. Therefore, the court finds that Ventas has not sufficiently proved the property's fair market value under the income capitalization approach, and accordingly has not met its burden of proof to show that it is entitled to an abatement for the 2014 tax year.[11]

SO ORDERED.

Date: September 29, 2018



Mark E. Howard
Presiding Justice

[11] The taxpayer further criticizes Kosich's analysis under the sales comparison approach and cost approach which, if accurate, tend to support her conclusion under the income capitalization approach. However, the court need not address these approaches because the taxpayer, which has the burden of proof, has not conducted a full analysis under either of these approaches and does not rely on them to meet its burden.

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Strafford Superior Court
259 County Farm Road, Suite 301
Dover NH 03820

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

FILE COPY

Case Name: **Ventas Realty Limited Partnership v City of Dover**
Case Number: **219-2015-CV-00333**

Please be advised that on November 15, 2018 Judge Howard made the following order relative to:

Motion for Reconsideration; "See written order dated 11/15/18."

Order on Motion for Reconsideration; See attached

November 27, 2018

Kimberly T. Myers
Clerk of Court

(277)
C: Kevin P. Rauseo, ESQ; Walter L. Mitchell, ESQ; Judith E. Whitelaw, ESQ; Keriann Roman, ESQ

NHJB-2501-S (07/01/2011)

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS. SUPERIOR COURT

Ventas Realty Limited Partnership

v.

City of Dover

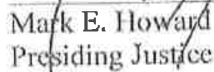
Docket No. 219-2015-CV-00333

ORDER ON MOTION FOR RECONSIDERATION

The plaintiff Ventas Realty Limited Partnership seeks reconsideration of the court's order of September 29, 2018, denying its request for a property tax abatement for the 2104 tax year. The City objects. The court has reviewed the motion, the order, the salient portions of the record, and the City's objection. The court is convinced that it did not overlook or misapprehend material points of fact or law. In addition, in denying reconsideration, the court adopts the reasoning set forth in paragraphs 3, 5, 6 and 7 of the City's objection.

SO ORDERED.

Date: November 15, 2018



Mark E. Howard
Presiding Justice

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