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)

REPLY BRIEF OF THE APPELLANT – VENTAS REALTY LIMITED PARTNERSHIP

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(15 Minute Oral Argument Requested)

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ARGUMENT

A. Evidence from both appraisers support the request for an abatement.

In determining whether an abatement is appropriate, "all evidence before the court relating to valuation should be considered." Brickman v. City of Manchester, 119 N.H. 919, 920 (1979) (emphasis added). Even if the court deems the taxpayer's appraisal unpersuasive or inadequate, the court is still mandated to consider all relevant factors to property value when rendering a decision. See Demoulas v. Town of Salem, 116 N.H. 775, 780, 782 (1976).

In Demoulas, this Court agreed with the Board of Tax and Land Appeals ("BTLA") that the taxpayer's appraisal was unpersuasive as the appraiser used income from 4 years prior to the date of valuation and applied the capitalization rate incorrectly. Id. Despite agreeing that the BTLA was proper to reject the taxpayer's appraisal, this Court reversed the denial of the abatement. Id. at 782 (remanded for further determination whether the BTLA made the decision in accordance with the law or whether the taxpayer sustained his burden of proving that the assessment on his property was disproportionately greater than that imposed upon other property in the area[1]) (emphasis added).

[1] By remanding the decision back to the BTLA, even though they agreed that BTLA was proper in rejecting the taxpayer's appraisal, Demoulas recognizes that the taxpayer may prove disproportionality from other evidence.

Here, the respondent claims the petitioner's appraiser improperly used actual expenses versus market expenses in calculating the value of the property. See Respondent's Brief at 4, 6. The respondent concludes the trial court was correct to reject entirely the petitioner's opinion. Id. at 6. However, when one carefully examines both reports, it becomes clear that, even if much, if not all, of the petitioner's appraiser's findings are rejected, the evidence in toto still supports an abatement. See Demoulas, 116 N.H. at 780, 782. Moreover, as discussed below, given this unique property, consideration of actual versus market expenses is far more appropriate.

1. Both the petitioner and the respondent's appraisals were largely in agreement.

Both appraisers used the income capitalization approach to value the subject property. Petitioner's Brief at 40. Both appraisers used the same equalization rate. Id. at 39. The respondent concedes on page 6 of its brief that both appraisers "utilized the exact same comparables." The petitioner's calculation of gross income for 2014 of $10,147,068, id. at 34, was only slightly higher than the respondent's opinion of $10,063,865, id. at 36, 41, n. 7. Similarly, the capitalization rate used by the respondent of 13.5%, id. at 37, was more favorable to the petitioner than its own rate of 12.6%, id. at 35. Finally, aside from nursing and other medical expenses, both appraiser's expense calculations were similar, $9,936,601 for the petitioner, id. at 35, and $9,016,402 for the respondent, id. at 37.

2. The respondent's calculation of appropriate nursing expenses for this facility was contrary to its own findings.

The trial court found that the largest area of dispute between the two appraisals was the calculation of nursing and other medical expenses. Petitioner's Brief at 36. The respondent concluded the 2014 nursing expenses were $2,899,095, while the petitioner opined the nursing expenses were $3,471,242. Id. at 36, n. 5. The discrepancy is the result of the petitioner using the facility's actual expenses (11 months of actual data normalized for a year), id. at 35, versus the respondent using three years of actual expenses and then reducing those expenses against the expenses of other facilities, id.; Trans at pg. 223/lines 13-16.

a. The respondent's opinion as to 2014 nursing expenses was contrary to what is typical in the market.

The respondent's appraiser made an important finding that "the ratio of the total revenue that nursing typically represents for a skilled nursing facility – 30 to 45 percent." Petitioner's Brief at 37 and Confidential Appendix at 233. The respondent further conceded that nursing costs continue to increase more than the general rate of inflation, given the nursing shortage and sicker patient populations. See Confidential Appendix at 233.

When applying the 30-45% ratio to the respondent's calculations, it becomes apparent that its numbers should be doubted. Specifically, the respondent's appraiser believed the correct 2014 annual nursing expenses should be $2,889,095 and, with her calculated 2014 gross revenue of $10,063,865, the resulting ratio is 28.7%. This is almost 1.5% below the lowest end of the ratio she found was typical in the nursing home industry.

The respondent essentially opined that the petitioner's actual nursing expenses should be properly reduced to a level below what is accepted in the market. In other words, the respondent believes it is appropriate for a facility, which is already deemed to be short staffed by Medicare, see Trans at pg. 106/lines 13-17, and which treats patients with more serious medical needs than other comparable nursing homes, see Petitioner's Brief at 32[2], to spend less in nursing care than what is typical in the market. As there is simply no credible basis for this conclusion, and the trial court's adoption of the respondent's opinion was in error, as the decision ignores that the actual expenses are consistent with market expenses. See Rollsworth Tri-City Trust v. City of Sommersworth, 126 N.H. 333, 337 (1985) ("we find that the master's ruling that the actual rents of the property were equivalent to market rents was proper").

b. The Petitioner's actual nursing expenses are consistent with the market.[3]

In contrast, the petitioner's calculation of the actual 2013-14 nursing expenses was $3,471,242, and against a gross revenue of $10,147,068, results in a ratio 34.2%. Petitioner's Brief at 36, n. 5. This, by the respondent's opinion, is consistent with market expenses. Confidential Appendix at 233. The respondent also calculated that, in 2013, the petitioner was spending 41.4% of its annual gross revenue in nursing expenses. Id. at 222. Again, this is in line with industry norms.

[2] Which, the respondent's appraiser agreed, would typically increase the nursing expenses. Trans. at pg. 195/lines 17-25.

[3] Petitioner's expert used the nursing expenses for the final eight months in 2013 and the first three months in 2014 then annualized the data to represent a full year. Confidential Appendix at 53. He reviewed the data for all of 2014, but properly rejected using the entire year as the valuation date is April 1, 2014. Id.

In sum, the respondent's expert established several things, which establishes the petitioner's case even if the superior court rejected the petitioner's opinions.[4]

(a). The acceptable ratio in the nursing home industry of nursing expenses to gross revenue is 30-45%.

(b). Nursing expenses are increasing year over year due to a nursing shortage and sicker patient populations.

(c). The petitioner's 2013 data shows its nursing expense to gross revenue ratio was 34.2%, within the expected range in the nursing home industry.[5]

(d). The actual nursing expenses used by the petitioner's appraiser, is precisely in-line with market expenses and industry averages[6].

3. The court erred in reducing ancillary and social services expenses.

Ancillary expenses include speech, physical and occupational therapy, respiratory therapy, and certain supplies and drugs. Confidential Appendix at 236. Despite admitting these "expenses vary greatly depending on . . . acuity levels" and that "comparable data provides analytical benefit", the respondent reduced ancillary expenses based on other facilities. Id. The subject facility is known for respiratory therapy and is the only facility in the area with a full-time respiratory therapist. Brief at 7-8. Exhibit 2 established that petitioner spends significantly more on ancillary

[4] When adjusted for reductions to nursing, social services and ancillary expenses, the city's value is $1,554,366, which is significantly lower the taxpayer's value. Appendix at 12-14.
[5] In table DE-1, the respondent's appraiser calculated the subject nursing expenses, as follows: 2012- $3,895,266; 2013- $4,166,794 and 2014- $4,028,167. Confidential Appendix at 222. Each of which were higher than petitioner used in its calculation.
[6] If the actual nursing expenses of $3,471,242 are placed against the respondent's calculation of gross profits in 2014 of $10,063,865, the ratio is 34.5%.

expense than other facilities. Confidential Appendix at 329-30; Appendix at 10. Accordingly, it is inappropriate to reduce the actual ancillary expenses.

Social Service expenses includes wages of a social worker, activities, medical records and central supply staff. Confidential Appendix at 233. Given the petitioner had significantly more admissions and discharges than other facility, it stands to reason it social services expenses would be greater. Confidential Appendix at 329-30; Appendix at 10-11. Accordingly, it is inappropriate to reduce these expenses.

4. Using actual expenses versus market rate expenses was far more appropriate for this facility.

The superior court was critical of the petitioner's appraiser for using actual expenses versus market data in his calculations. See e.g. Petitioner's Brief at 42-44. As explained in the petitioner's brief, this Court has not held that actual expenses cannot be used in determining the property's value under an income capitalization method. Id. at 13-14. When the evidence supports that the subject property differs from other properties in the market, it is appropriate to use actual versus market income and expenses. See e.g. Royal Gardens Co. v. City of Concord, 114 N.H. 668, 671 (1974) (trial court should consider impact of federal rent caps in determining value of the property); see also City of St. Louis v. Union Quarry & Constr. Co., 394 S.W.2d. 300, 305-6 (Mo. 1965) (actual expenses used for capitalization of income in valuing an abandoned quarry now used as a dump was correct because no other comparable property exists); Appeal of V.V.P. Partnership, 647 A.2d 990, 993-4 (Pa Comm. 1994) (actual data to value racquetball club under capitalization of income approach was correct because property was on a uniquely shaped piece of land, was a non-conforming use, and high investment risk). Further, when it is shown that

actual expenses are consistent with what is prevalent in the market, there is no error in using actual numbers. See Rollsworth, 126 N.H. at 337 (1985).

As shown above, the ratio of actual nursing expenses in 2013 compared to the facility's actual gross profit was consistent with industry norms. Moreover, the facility's actual nursing expenses in 2014, compared against either the petitioner's or the respondent's calculation of gross profit for that year was also consistent with industry norms. Therefore, under Rollsworth the superior court's rejection of the petitioner's appraisal due to its use of actual numbers was misplaced because those numbers demonstrated that its expense to profit ratio was consistent with the market.

Moreover, the trial court specifically acknowledged that the petitioner's property was unique, writing "this skilled nursing facility constitutes income-producing property that is comparable to very few properties in the area." Petitioner's Brief at 40. The evidence introduced a trial showed such things as,

(a) The petitioner's facility had a much higher patient turnover than any other comparable nursing home facility. Id. at 14-15.

(b) The petitioner's facility provides short term rehabilitation services to patients who would eventually transition home, instead of providing long term patient housing. Id. at 14.

(c) The petitioner's facility needed a greater number of nursing and medical specialists than the other comparable facilities. Id.

(d) The petitioner's facility used a far greater number of intravenous medications than other comparable facilities. Id. at 15.

The petitioner's situation is more akin to Royal Gardens, which approved the use of actual data, versus Coliseum Vickery (Realty Co v. City of Nashua, 126 N.H. 368, 370 (1985)), which the respondent cites on page 11 of its brief. In Royal Gardens, the property owner had no choice in what it could charge for rent based on federal law. 114 N.H. at 669-70. This evidence, the Court found, was relevant in determining the overall value of the property. Id. at 670. Similarly, in New England Power Co. v. Town of Littleton, 114 N.H. 594, 603-4 (1974), the trial court correctly found the impact of mandatory federal licensure requirements on the taxpayers' property should be taken into account in the valuation process.

In contrast, Coliseum Vickery involved a situation where the property owner was free to set the rates for commercial tenants based upon what it believed the economic situation dictated. 126 N.H. at 369-70. If the property owner made a business decision to enter long-term leases that were ultimately below market value, that was a decision it was free to make, the market rate should be the measuring stick. However, if the property owner is compelled to pay certain amounts of expenses for nursing in order to comply with state regulations (designed to insure only properly credentialed providers perform certain tasks), then the trial court should consider actual expenses versus market expenses.

The respondent's appraisal essentially sticks a square peg into a round hole. It lumps the petitioner's facility into the same category of other nursing homes without taking into account the many differences in the petitioner's facility. If such an opinion is correct, then the Royal Gardens holding is meaningless. What difference does it make that the petitioner is limited to the amount of rent it can charge by federal law if

its property value will be based upon what non-regulated apartment units can charge? What difference does it make if the petitioner must comply with regulations concerning staffing and nursing tasks because its' facility is designed to treat short term residents with complex and acute problems, if these expenses will be compared to facilities which house long term, less medically complex residents? Accordingly, the trial court's rejection of actual data in this particular case was in error.

B. The public policy argument was preserved.

Finally, the petitioner preserved its public policy argument with the trial court. Transcript at page 228/lines 3-19 (city's appraiser agreed it would be morally problematic to turn away patients if they need a high level of care[7]). While the petitioner further developed the position in its motion to reconsider, it also raised the issue at trial and in its trial memorandum[8]. Id. at page 226/line 19 through p.228/line 16. Even so, an issue raised for the first time in a motion to reconsider is preserved if the trial court had an adequate ability to address same. See In re: Kelly, 170 N.H. 42, 46 (2017).

Here, the petitioner argued at trial, in its trial memorandum and its motion to reconsider that the reduction of nursing expenses would comprise patient care and that neither appraiser had sufficient medical training to opine that the nursing level were beyond the medical needs of patients. The petitioner presented this evidence to the superior court in both expert reports and testimony. No new evidence was

[7] The respondent's appraiser took it a step further, saying the decision whether to accept a patient is a nursing decision. Transcript p.228/lines 3-7.

[8] On page 7 of its trial memorandum, the petitioner specifically argued that a reduction of the nursing expenses in this case was both legally and morally flawed given the services petitioner provides to the public. On page 9, petitioner explained that reducing the expenses further places the facility at risk of closure. Appendix at 11.

needed or argued and this Court has already established the public's interest in the operation of hospitals. See Bricker v. Sceva Speare Mem. Hosp., 111 N.H. 276, 279 (1971); see also Leeds v. BAE Systems, 165 N.H. 376, 379 (2013) (existence of public policy, if clearly established, is a question of law). Therefore, the issue was preserved for appellate review.

Here, the facility provides care to some of the most financially and medically at risk patients in the Dover, New Hampshire area. See Petitioner's Brief at 23 (60% of the facility's revenue is from Medicaid). It must also comply with federal and state regulations as to what it can charge patients, how much nursing staffing it must maintain and to what duties must be performed by nurses versus other medical providers. See Id. at 15-16. Simply put, if it cannot appropriately staff the facility, the petitioner will, at best, lose patient referrals and, at worse, compromise patient care and/or be forced to close.

The petitioner submits (and the respondent's appraiser agrees) courts should not be determining appropriate staff levels for medical facilities and certainly should not be adopting property valuation opinions that are based upon nursing staff levels that are below what is the industry norm. Transcript at page 227/line24 to page228/line 2. This is further true when the person who is calculating the "appropriate" nursing expenses is not a trained medical provider. Id. at page 227/lines 6-9. A court most certainly should not be adopting property valuations that assume the property owner must further reduce its nursing staff in the face of Medicare rating that shows the facility is already understaffed. Petitioner's Brief at 19.

Accordingly, the superior court's adoption of an opinion, which was based upon a nursing staff reduction, given these facts, was contrary to public policy.

CONCLUSION

The trial court erred in adopting the respondent's appraiser's calculation of nursing expenses because: (1) it normalized 2014 nursing expense to gross profit ratio was below what she opined was accepted for the industry; (2) the petitioner's actual 2013 nursing expense to actual gross profit ratio was within the range of industry norm; (3) the petitioner's actual 2014 nursing expenses, when compared against either the petitioner's or respondent's calculation of the 2014 gross profits was within industry norm, and (4) adopting an opinion, which would require the petitioner to reduce its' expenses from current levels violated public policy. For the reasons set forth above and set forth in the petitioner's brief, the superior court's denial of the abatement request should be reversed and the matter remanded for a further hearing to determine the property's fair market value as of April 1, 2014.

Respectfully submitted
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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 2835.

Date: August 1, 2019

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

CERTIFICATE OF SERVICE

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

Date: August 1, 2019

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