

Leased Fee or Fee Simple - The New Dilemma in Property Taxation -

FALL 2006

In the property tax arena, assessing officials are asserting a new defense to commercial abatement claims. Historically, commercial properties were valued and sold based on the income approach to value. In short, the net operating income is capitalized by a factor to determine an indication of market value. The factor varies depending on the location of the property, the stability of the income and expenses, risk and the rates of return available on competitive investments. Historically, the focus in tax abatement cases was on the proper cap rate and the comparison of actual expenses of operating the property and the expenses for operating comparable properties in the market.

Now, assessing officials are scrutinizing income and making increases in net income amounts when they consider lease rates to be less than market. This process ignores the reality of long term leases and the resulting vacancy that would occur if all leases for a particular property are increased to current market value at the same time. This process is particularly painful for properties with subsidized leases with caps on rents. In the leased fee analysis, the assessing officials ignore the caps and determine value based on market rents for unsubsidized properties. The fact that these properties would not be built without subsidies and rent caps is not taken into consideration. Will the assessing officials reduce net operating income when a property is deemed to have above market income? My guess is that it is not likely.

The statutory standard requires that properties be assessed at market value. The question is whether the valuation of the property determined by actual lease income is tantamount to market value. The Superior Court agreed in the case of Sussex Group v. Town of Newmarket, (Docket # 04-E-473, Rockingham Superior Court, Nov. 15, 2005). Hopefully, the case will be considered by the assessing officials and assessments will be consistent with value determined by the actual lease generated by the property.

ANNOUNCEMENT

After ten years of dedicated service, the firm's financial administrator, Pat Shagoury, has left the firm to pursue other areas of interest. We wish Pat the best of luck with her future endeavors. She will be deeply missed.

We are proud to announce that Mary Ann Lamothe has joined the firm as the new financial administrator. Mary Ann has an extensive background, having worked in the legal field for more than 30 years.

CASE NOTE

In a recent land use case, a developer sought and obtained land use approvals to permit the construction of a gas station in the Town of Hooksett. The development approvals were issued, however, the Conservation Commission challenged the approvals in a Court action. The challenge was decided in favor of the developer on January 23, 2003. While the challenge was pending, the Town amended its zoning ordinance to prohibit gas stations in the area where the developer intended to build. Following the victory against the Conservation Commission, the developer consulted with the building inspector and a member of the planning board to inquire how the zoning amendments would impact his project. The building inspector and the planning board member represented that as long as the developer obtained a building permit within one year and started construction within six months after the permit was issued, the zoning change would not impact his project. On January 25, 2004, the developer obtained a building permit and scheduled construction to start prior to June 30, 2004. On May 27, 2004, the Town revoked the building permit stating the law required construction to begin prior to January 24, 2004. The developer appealed the decision, arguing he relied on the information provided by the building inspector and the planning board member. In a surprising opinion, the Supreme Court supported the revocation, holding that it was unreasonable for the developer to rely on the information provided by the public officials. This is a harsh decision for developers and is a reminder that information provided by a building inspector or land use official regarding permits and approvals is meaningless.

What is a TIF?

The new term of art in urban development is "TIF." A TIF is a tax incremental financing district. Via legislative initiatives, municipalities are employing TIF mechanisms to promote private development.

A TIF is established by local legislators. Once the boundaries are defined, the municipality can employ a variety of funding options, including long term bonds and other initiatives, to assist with construction of public improvements that are necessary or desirable for private development. The goals of a TIF vary and include creating affordable housing, reclaiming and redeveloping areas formally classified as blighted or to attract new development.

In New Hampshire, the statutory process is codified at RSA 162-K:1 et seq. In theory, the incremental tax revenue generated by the improvements is used to pay off bond financing and to establish funds that are specifically dedicated

to the operation and further development of the financing district. The result is property owners can make substantial investment in the district with the comfort that the extra revenue generated from the improved properties, known as the captured assessed value, will be used within the district for necessary public improvements such as roads, utilities and parking garages. The incremental taxes generated by the improved properties in the district are not directed to the general fund for expenditure throughout the community unless there is excess incremental revenue.

We expect municipalities will establish more TIF districts in the ongoing effort to attract successful development. In recent years, the City of Keene has created TIF Districts to create the Black Brook Industrial Park and the downtown parking garage. In the Black Brook Industrial Park, the City agreed to issue bonds for the construction of roads, sewer and water service to

the park. The bonds were not issued until sufficient leases were secured to generate the incremental revenue to service the bonds. The park is now 75% occupied and the incremental tax revenue of \$20 million exceeds the \$9 million cost to service the bonds. When fully occupied, the incremental tax generated will be near \$30 million. In this case, the excess revenue will return to the general fund and the TIF will be abolished when the bonds are retired.

The Black Brook "TIF" success story was repeated in the City of Keene in connection with the construction of the downtown parking garage. Other communities are now looking at the creation of "TIF" districts to spur private development. If you are considering a private development that will require construction of public infrastructure that will benefit other properties, talk with your municipal planning department or economic development agency about a TIF.

Uninsured/Under-Insured Motorist Assessment

In the past few months, we have been consulted on two collision cases involving serious personal injury. In both cases, the negligent parties did not maintain auto liability insurance coverage. Like the negligent driver, the injured parties did not maintain automobile liability coverage either. Unfortunately, any recovery for these seriously injured parties is unlikely.

If you are injured by an uninsured/under-insured driver, you may seek compensation for coverage from your own policy. For example, if you maintain coverage of \$250,000 per person and are injured by a driver with coverage of only \$25,000 per person (an under-insured driver), you may recover the \$25,000 from the negligent driver's policy and then claim up to \$225,000 under your own policy. In this scenario, you have up to \$250,000 of coverage regardless of the insurance limits of the negligent driver.

In summary, please do not take to the roads without adequate insurance coverage. Contact your agent or carrier immediately and discuss uninsured/under-insured motorist coverage. While you are on the phone, consider an umbrella liability policy, a great value for a nominal cost. We extend our best wishes for a safe, enjoyable and collision-free holiday season.

Facts On Trial Verdicts

From the American Trial Lawyers Association magazine, here are some statistics compiled on tort litigation and jury awards:

In the Federal Courts, 512,000 civil cases were disposed of in 2002-2003; only 1,647 (2%) went to trial; plaintiffs prevailed in less than half of all cases, and only 37% of medical malpractice cases, and 34% of product liability cases. The median award was \$201,000.

In state Courts, plaintiffs prevailed in 52% of tort trials in 2002, a rate that has been relatively constant since 1992. The median award to plaintiffs was \$27,000 fewer than 20% received \$250,000 or more.

Source: *Trial* magazine, July 2006.

Homeowners v. Residential Contractors

Effective January 1, 2006, RSA 359-G governs disputes between homeowners and contractors with regard to residential construction defects. This statute requires that homeowners provide 60 days' notice to a contractor before initiating any Court action. The statute lays out alternative courses of action for the parties to try to resolve their dispute without resorting to the Courts. The statute also permits the parties to alter this dispute resolution procedure in writing at the time of contracting if they wish. Contractors wishing to exercise the procedures under the statute must first advise the homeowner in conspicuous writing of the statute's requirements. The statute provides recommended wording for this notice.

Time and time again, clients come to us with stories of problems with work performed on their

homes. In two separate cases, the dollar value of the damage inflicted on the home by the contractor was ten times the dollar value of the underlying contract. Construction workers have the remedy of applying a mechanic's lien to the property they improved should the homeowner not pay them. Homeowners, however, may have difficulty finding assets to satisfy any claim they might have against negligent contractors. Therefore, we recommend homeowners take the following precautions:

- Contact references for all contractors (one \$500 job turned into a \$10,000 repair!).
- Check the New Hampshire Better Business Bureau and Consumer Protection Agency for complaints.
- Require a copy of the contractor's liability insurance and work-

ers compensation insurance and confirm its existence.

- Get a home or business address and phone number for the contractor. On many occasions, clients only have a business card with a cell phone number on it.
- Remember, litigation is very expensive. Pursuing a \$10,000 claim may not make economic sense. This is especially true because, under our Court System, each party generally pays its own legal fees and costs, even if the party prevails in Court. Take the cost of litigation into account when resolving any dispute with a contractor.
- Carefully review any contracts you are negotiating and try to plan for the worse.

We are happy to review any contract that you are contemplating entering into.

Land Use Approvals—A Team Approach

Until recently, the procedural practice when seeking zoning relief was informal. In the majority of cases, the property owners or developer would attend the hearing and make a brief presentation about the merits of the case. Usually, the project engineer would testify about the plans and engineering details about the project. However, the hearing before the municipal board rarely included value and traffic evidence. Similarly, little consideration was given to development of the municipal record in the event an appeal was necessary.

In zoning cases, a statutory appeal to the Superior Court is available to an aggrieved party. An aggrieved party may be the owner, developer or an abutter. The Superior Court review on appeal of a zoning case is very limited. The Superior Court does not generally accept new evidence and the case is decided based on the evidence presented at the municipal hearing. The Superior Court will not overturn a decision of a land use board unless the decision is based on an error of law or no reasonable person could come to the same decision on the same evidence. If you are an appealing party, the standard is very difficult.

In an effort to prevail at the municipal level, we are advising our clients to treat the municipal hearings more seriously and consider submitting additional evidence in the record. In almost all zoning cases, impacts to surrounding properties are usually a serious issue. Abutting property owners are often emotional about changes in the neighborhood and complain, without any evidentiary support, that zoning relief will impair surrounding property values. This is usually not the case and it is important to offer objective proof at the municipal hearing. Although an added expense, an appraisal is often a critical element of proof that must be offered to combat valuation claims. Likewise, traffic is often cited by abutters as a reason not to grant zoning relief. Like an appraisal, a report from a traffic engineer can rebut traffic complaints.

Whether seeking site plan approval, a variance or special exception, plan for the municipal hearing and give serious thought to including an appraiser, traffic engineer or planning consultant on your team.

CRONIN & BISSON, P.C.

Attorneys at Law

722 Chestnut Street

Manchester, NH 03104

Telephone: (603) 624-4333

Facsimile: (603) 623-5626

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the needs of business, association, and individual clients.**

John G. Cronin

is licensed to practice law in both the State of New Hampshire and the Commonwealth of Massachusetts. He received his Law Degree from Franklin Pierce Law Center in 1989 and also holds a Bachelor of Science Degree and a Master's Degree in Business Administration. Mr. Cronin is a member of the NH, Manchester, MA, and American Bar Associations and the NH Trial Lawyers Association. Before beginning his legal career, Mr. Cronin was an insurance claims adjuster.

jcronin@croninbisson.com

John F. Bisson

is licensed to practice law in the States of New Hampshire and Maine. He received his Law Degree from the University of Maine School of Law in 1993 and holds a Bachelor of Science Degree in Business Administration. Mr. Bisson is a member of the NH, Manchester, ME, and American Bar Associations, the American Trial Lawyers Association, and the NH Trial Lawyers Association. Mr. Bisson worked as a Superior Court law clerk prior to joining the firm.

jbisson@croninbisson.com

Elizabeth F. O'Boyle

is licensed to practice law in the States of New Hampshire and Massachusetts. She received her Law Degree from Franklin Pierce Law Center in 2005 and also holds a Bachelor of Arts Degree in Economics and a Master's Degree in Business Administration. Ms. O'Boyle is a member of the New Hampshire, Massachusetts and American Bar Associations, and the American Trial Lawyers Association. Ms. O'Boyle worked in corporate finance before joining the firm.

eoboyle@croninbisson.com