STATE OF MAINE
KENNEBEC, ss

STATE BOARD OF PROPERTY TAX REVIEW
Docket No. 2009-007 & 2010-002

BORALEX SHERMAN, LLC	)	
	)	
	)	
v.	)	DECISION
	)	
	)	
TOWN OF STACYVILLE	)	

INTRODUCTION

This matter came before the State Board of Property Tax Review on appeal of Boralex Sherman, LLC for the tax years April 1, 2008 and April 1, 2009. Boralex Sherman, LLC is the owner of an 18 MW wood fired electric generating facility on a 20.4 acre site in the Town of Stacyville that is the subject of this appeal. The facility was built in 1985-86 and began operating under a 20 year contract with Maine Public Service Company in 1986. The twenty year contract lapsed in 2006. Except for a brief period of time from July 2008 to February 2009, the property has been dormant since March 2007. The assessors have valued the property at $13,446,340 and $13, 357,640 respectively for the relevant tax years.[1] The petitioner asserts that the property should be valued at 3,300,000 as of April 1, 2008 and $3,000,000 as of April 1, 2009.[2]

The Board consolidated the appeals and convened on September 1st and 2nd, 2010 to hear the substance of the appeal. Present on behalf of the Board were Chairperson of the Panel, Charles A. Lane, Esq., John E. Hodgkins, Earl G. Sherwood, and Lowell Sherwood. The petitioner was represented by David P. Silk, Esq. The Town was represented by Alvin Theriault, selectmen/assessor. After the hearing the parties submitted written final arguments. The Board

[1] The Selectmen act as the board of assessors in the Town of Stacyville.

[2] The petitioner also asserts that the assessment is illegal because "Maine law requires that a town conduct a revaluation at least once every 10 years" which, according to the petitioner was not done here. The petitioner withdrew this claim prior to deliberations.

conducted public deliberations on December 20, 2010 and as more fully explained below concluded that the taxpayer had met its burden to prove the property substantially overvalued for both tax years and granted an abatement based on a fair market value of $4,000,000 for each year. Thereafter the petitioner filed a Motion for Reconsideration that was considered by the Board on April 27, 2011. The Board denied the motion. William H. Dale, Esq. appeared on behalf of the Town in connection with the Motion to Reconsider.

JURISDICTION AND BURDEN OF PROOF

The Board's authority to hear and decide property tax disputes is set forth in 36 M.R.S.A. § 271. The property that is the subject matter of this appeal is non-residential property within the meaning of 36 M.R.S.A. § 844(2) and has an equalized valuation greater than $1,000,000. The Board therefore has jurisdiction to hear the appeal.

In proceedings before the Board the assessment is presumed correct and the burden is on the taxpayer to show that the assessors' valuation is unjust, i.e., that the property is substantially overvalued or that the valuation is the result of discrimination, fraud, dishonesty, or is illegal. Sweet v. City of Auburn, 134 Me. 28 (1955). Here in the matter of Boralex Sherman, LLC, the taxpayer asserts that the Town has overvalued the property. It therefore is the taxpayer's burden to persuade the Board that the property is overvalued or it loses the appeal.

With regard to the claim of overvaluation, the taxpayer carries the burden to prove that the subject property is substantially overvalued when it proves that the "assessed value in relation to just value is 'manifestly wrong'". Delta Chemicals, Inc. v. Town of Searsport, 438 A. 2d 483, 484 (Me. 1981).[3] Impeachment of the assessors alone is not enough to prove the taxpayer's case. The taxpayer must affirmatively offer credible evidence of value against which the assessment may be compared to persuade the Board that the assessed value in relation to just

[3] The requirement that the property be assessed according to its just value is set forth in Article IX, Section 8 of the Maine Constitution and further defined at 36 M.R.S.A. § 701-A. Case law has long established that the just value is equivalent to the true or market value. Frank v. Assessors of Skowhegan, 39 A.2d 167, 173 (Me. 1974).

value is "manifestly wrong". City of Waterville v. Waterville Homes, Inc. 655 A.2d 365 (Me. 1995). If the taxpayer meets this burden then, and only then, may the Board engage in an independent determination of value based on the entire record. Town of Southwest Harbor v. Jean Harwood, Trustee, Cranberry Point Realty Trust 763 A.2d 115 (Me. 2000).

SUBJECT PROPERTY

The subject property is comprised of an 18 MW wood fired electric power producing facility situated on 20.4 acres that was built in 1985-86. The facility began operating in 1986 as a qualified non-oil energy producer under The Public Utilities Regulatory Policies Act of 1978 (16 USCA § 24a-3 et seq.) and a 20 year purchase power producing agreement with Maine Public Service Company. The 1978 Act encouraged small qualifying non-oil producers, such as the subject property, to sell power wholesale to regulated utilities, such as Maine Public Service, and was promulgated in response to a nationwide energy crises in the 1970's. Turners Falls Limited Partnership v. Board of Assessors of Montague 767 N.E. 2d 629, 632 (Mass. 2002). The overall purpose of Act - at the time it was enacted - was to reduce "the demand for traditional fossil fuels". Federal Energy Regulatory Commission (FERC) et al. v. Mississippi et al. 456 U.S. 742, 750 (1982). The 20 year purchase power agreement with Maine Public Service ended in 2006 as did a 15 year steam purchase agreement that the facility had with Sherman Lumber Company. Thereafter the facility was purchased in December 2006 by Boralex Sherman, LLC for approximately $3,000,000. At the time of the December 2006 closing on the property the facility was operating and had been operating since July 2006 when the contract to purchase the plant was executed. The original purchase price was approximately $4,000,000 but was reduced to reflect the lost income to the purchaser between July and December 2006. Except for a brief period from July 2008 to February 2009 the property has been dormant since its removal from service in March 2007.

During the hearing Claude Audet, President and Chief Operating Officer for Boralex, Inc. testified - as did Glenn Walker, a Maine certified appraiser - about the history of the property and

the market within which it had operated and potentially might operate going forward. The plant is situated in the northern Maine energy market. The northern Maine energy market is administered by Northern Maine Independent System Administrator (NMISA) and has limited demand for electricity. The northern market is not directly connected with the New England energy market which is administered by Independent System Operator (ISO) -New England. According to Walker, there is limited demand for energy in the northern Maine market that has resulted in the facility being temporarily taken out of service with no near term plans to return to operation unless 1) the northern Maine market is connected to the remainder of the New England market, or 2) there is an increase in demand in the northern market, or 3) the retirement of another generating facility in the region. It may take several years before demand is sufficient in the northern market for the facility to return to operation. If enough time passes without sufficient demand, then the facility will likely be dismantled and liquidated at a maximum value of $3,000,000 - similar to the purchase price paid for the facility in December 2006. The most optimistic circumstance for the facility, according to Walker, would be the construction of a transmission line that connects the facility to the remainder of the New England market and ISO New-England. The earliest this could occur, based on Maine Public Utilities Commission (MPUC) documents reviewed by Walker, would be 2010. Thus it is reasonable to assume that the facility will remain closed with the possibility of returning to operation in 2011 once the transmission line is completed. Based on this analysis, Walker concluded that the highest and best use of the property is the current use as an electric generating facility. However, if there is no commitment to connect to the New England market and the current level of demand persists, then the highest and best use in the future would be to dismantle the property and liquidate the components. SEE appraisals Ex. 4a, page 7 and 4b page 10. This conclusion was not substantively contested by the Town.

In proceeding with the appraisal of the subject property based on a highest and best use as an operating power producing facility, Walker accepted as an extraordinary assumption that the transmission line to the New England market would be completed in 2010 thereby allowing the facility to operate in 2011. He also assumed that the boiler could be modified at a cost of

approximately $10,000,000 to meet emission requirements of certain New England Renewable Portfolio Standards in Massachusetts and/or Connecticut. SEE appraisals Ex. 4a, page 5 and 4b, page 6 - extraordinary assumptions. That is to say that once connected to the greater New England market, the facility- as modified - could qualify for and obtain renewable energy certificates (i.e. RECs issued through ISO-NE) for each MW/hr produced, that in turn could be sold to those suppliers in Massachusetts and/or Connecticut that are subject to state mandated Renewable Energy Portfolio Standards thereby creating additional income to the facility. Furthermore, the facility (as modified) would be eligible for federal renewable electricity production tax credits (PTCs) for the first ten years of operation thereby creating another source of income associated with the facility. The Town did not substantively contest these assumptions.

Mr. Audet went on to testify that prior to the purchase of the subject property in 2006 for approximately $3,000,000, Boralex had purchased two other wood fired generating facilities in the northern Maine energy market in the early 2000's - one in Ashland (36MW), and the other in Fort Fairfield (33MW). According to Audet, when Boralex purchased the Ashland plant, Boralex also purchased the right to use a certain percentage of the capacity of the New Brunswick Power transmission line that connects the Maritimes market to the New England energy market. That capacity is used by the Ashland facility because, unlike the subject property, the Ashland facility has been upgraded to qualify for renewable energy certificates (RECs). One of the requirements of the renewable energy certificate program is to show that the facility producing renewable energy deliver the renewable energy produced to the market where the certificates are purchased. The renewable energy certificates issued to the Ashland facility are purchased from Connecticut suppliers. Thus the energy produced by the Ashland facility must be delivered to Connecticut where customers ultimately pay the premium for renewable energy produced. Pursuant to the rights purchased by Boralex in 2001, the Ashland plant uses the New Brunswick Power transmission line to deliver the applicable renewable energy associated with the certificates to the ISO- New England market - in particular Connecticut. Boralex has no further rights to the remaining capacity in the New Brunswick Power transmission line. In December, 2006, the date

the subject property was purchased by Boralex, there was no excess capacity in the New Brunswick transmission line and that has remained the case as of the dates of valuation.

The assessment

According to submissions filed by the Town, the facility was originally assessed at $42,000,000 in 1986 and after the end of the 20 year contract with Maine Public Service Company, the facility was assessed at $16,716,520 as of April 1, 2007. Thereafter the property was assessed at $13,446,340 as of April 1, 2008 and $13,357,640 as of April 1, 2009. The $88,700 reduction in value in 2008 is associated with machinery and equipment. The Town presented no records to show how it arrived at these values for the relevant tax years. Alvin Theriault, is a selectman for the Town. The selectmen in Stacyville also serve as assessors. Mr. Theriault offered that he is not a certified assessor or licensed appraiser. He testified that the Town hired Bowdoin Associates in 2006 to value the subject facility. Bowdoin Associates, however, was subsequently released by the Town. The assessors did not rely on work performed by Bowdoin Associates in arriving at the assessed value for 2008 and 2009. Nor did the assessors, according to Mr. Theriault, consider any of the three approaches to value in arriving at the fair market value of facility for those tax years. Mr. Theriault testified that they "were trying to come close to a fair valuation but we knew we were not at it... we had to go down. We did not know how to go down".

Section 706 defense

Prior to considering the substance of the appeal the Board first turned its attention to the Town's request that the petition be dismissed because the taxpayer failed to conform to the provisions of section 706 of Title 36 that require taxpayers to respond to a written request from the assessors for a "true and perfect list of all [its] estates". If the taxpayer fails to respond to such a request, then it is barred from pursuing an appeal of the assessment.

In support of its 706 claim the Town offered testimony of Vonilee Sides, the assessors' agent for the Town, and also Alvin Theriault. Ms. Sides testified that for each tax year in question she sent a form to Boralex entitled "Personal Property" similar to that shown in Town Ex. A. Tab 4, page 1; together with a cover letter similar to that shown in Town Ex. A, Tab 4, page 3.[4] The actual exhibits produced, however, are copies of forms sent for the 2007 tax year. The Town did not produce copies of the actual form and cover letter sent to the taxpayer for either the 2008 or 2009 tax years. Ms. Sides testified that for the 2008 tax year she sent a form and cover letter by certified mail to Boralex on March 28, 2008 for the 2008 tax year and that it was received on March 31, 2008. Town Ex. A., Tab 4, page 14. In response the Town received a one page list from Boralex shown as Town Ex. A, Tab 4, page 6. The minutes of the Selectmen's meeting dated April 16, 2008 shown at Town Ex. A, Tab 10, page 26 summarily notes at item #7 that "[t]he Selectmen reviewed the information submitted by Boralex in reference to personal property..." After the meeting Ms. Sides sent a letter to Boralex on behalf of the assessors, shown as Ex. A, Tab 4, page 5, that stated:

> It is the consensus of the Board [assessors] that the information submitted is not the correct information requested by the Assessor's and does not meet the requirements specified in our correspondence dated 03/28/08 [the original notice]. Please submit the information for personal property as specified (see enclosed sheets). Failure to provide this information prior to May 15, 2008 will bar Boralex of their right to make application to the assessor or any appeal there from for any abatement of taxes...

Attached to this correspondence was a blank "Personal Property" form and two blank forms for listing property. These forms are shown as filled out by Boralex and dated April 30, 2008 - well before the May 15th deadline established by the assessors. Town Ex. A, Tab 4, pages 8, 9 and 10. The taxpayer lists at pages 9 and 10 are clearly more detailed than the list first submitted by Boralex for the 2008 tax year. The assessors did not ask for any additional information from Boralex for that year.

[4] The pages in Town Ex. A are not numbered. In Ex. A Tab 4, the first page was designated a "cover" page during the hearing by Mr. Theriault. Mr. Theriault numbered the pages during the hearing in Tab 4 beginning with page 1 after the cover page.

For the tax year 2009, Ms. Sides amended the "Personal Property" form by adding - "if you have no changes in personal property you may sign and return indicating 'same as 2008'". Town Ex. A, Tab 4, page 17. Ms. Sides testified that in response to this amended "Personal Property" form that was sent to Boralex on April 10, 2009 by certified mail, the Town received back the amended form signed by the taxpayer dated April 21, 2009, together with a cover letter signed by the taxpayer indicating that "[t]here were no additions or deletions for the period of 4/1/08 to 3/31/09". Town Ex. A, Tab 4, page 16. The assessors did not request any additional information for that tax year.

Mr. Theriault testified that he was not satisfied with what Boralex provided for both tax years but could not articulate the reason for his dissatisfaction. He claimed that the response "was not adequate with what we expected to work with".

The Board notes that even if it were to conclude that the Town had met its burden to prove that it had provided adequate notice to the taxpayer to submit a list of its estates, (though no copy of the actual notice was entered as evidence for either tax year), the taxpayer, in any event, did provide a detailed list of its estates for 2008 and responded that the same list applies for 2009. Neither Ms. Sides nor Mr. Theriault could articulate what it was that the assessors wanted beyond that provided by Boralex that appears consistent with what is required of the taxpayer under section 706. It seems that the assessors were frustrated because they did not receive a stated value in connection with the personal property that was consistent with a range of values that they thought they could "work with". Although the assessors may disagree with the values set forth by the taxpayer when providing a list of property, the taxpayer's obligation is to provide a list of the physical property which it did. If the assessors were not satisfied with the completeness of the list, then they had to make a request for additional information that set forth what it was that the assessors wanted beyond that which had already been provided. The assessors did not make such a request after having timely received the more detailed list in 2008 and a timely letter from the taxpayer in 2009 indicating that there were no additions or deletions to the property for that tax year. Based on the foregoing the Board concludes by its vote of 4-0

that the taxpayer has met the requirements of section 706 of Title 36 and denies the assessors' request to dismiss the appeal.

Petitioner's evidence of value

As previously noted, Glenn Walker testified in support of appraisals for both tax years that he had prepared on behalf of George E. Sansoucy, P.E., LLC with which he is associated. SEE Petitioner's Ex. No. 4a and 4b. Mr. Walker is a Maine licensed commercial general appraiser associated with the LLC. He developed an opinion of value of the subject property for both tax years based on a highest and best use of the property being the current use as an electric generating facility. In so doing Walker considered and applied all three approaches to value. In applying the cost approach Walker employed a "comparative-unit method" by utilizing a wood fired energy producing facility as a replacement model taking into consideration newer technology than that of the subject property. Walker then deducted for physical depreciation and also economic obsolescence from the gross cost of replacement of the facility. With regard to economic obsolescence in particular, Walker took the mean between the income and sales approach and deducted that amount as economic obsolescence after having deducted for physical depreciation and then added the value of the land to arrive at a cost approach value of $4,000,000 for both tax years. He employed this method because buyers obviously look to potential income to determine whether that income can indeed support the capital investment required to purchase a similar property at cost to build less depreciation. The income approach and/or sales approach, according to Walker, is the best indicator of that potential income. If potential income cannot support the necessary investment to purchase similar property, then that is indicative of economic obsolescence and must be considered in developing value based on the cost approach. Ultimately Walker rendered little weight to the cost approach because of the excessive amount of economic obsolescence.

In connection with the sales approach, Walker considered the sale of the subject property in December 2006 and other sales of similar "stoker-fired" facilities. See Petitioner Ex. # 6.

With regard to the subject property listed as property #5, Walker testified that the Wheelabrator Sherman Energy Company, the seller of the subject property, is a knowledgeable and solid market participant and based on discussions with Boralex, Inc., the purchaser, he concluded that the sale was not a distressed sale and was arms-length. With regard to the other facilities, Walker noted that each property had originally been built as a qualified plant under PURPA and was initially subject to a long term energy contract that had either been bought out or had expired by the time of sale. Walker explained that property #1 was not operating when sold in 2000 prior to the REC program and thus the lower sale price per KW than that of the subject property. Property #6, unlike the subject, had access rights to New Brunswick Canada and thus the higher price per KW. Property # 2, (two facilities including Ashland), unlike the subject, had some access to ISO-New England but neither had the ability to sell RECs at the time. Also unlike the subject, Property #3 was indeed operating in the northern Maine market at the time of sale. On the other hand, property #4 was not operating at the time of sale but was purchased in anticipation of making the necessary modifications to sell RECs as was the subject property. Its sale price per KW is more similar - $156/KW - to that of the subject property at $170/KW (or approximately $3,000,0000) than the other sales. This led Walker to conclude that the sale price of the subject property, as corroborated in the market, supports a sales approach value of $3,000,000 for both tax years. Walker opined that the sales approach, and in particular the sale price of the subject property, is a good indicator of value and gave it considerable weight when reconciling the values derived from all three approaches to valuation.

In connection with the income approach, Walker developed an after-tax analysis that properly included income from energy produced, income from RECs, and income from Production Tax Credits (PTCs). He then deducted expenses for, among other things, income taxes and property taxes and applied an after-tax discount rate to arrive at an income approach to value of $5,000,000 for April 1, 2008 and $4,000,000 for April 1, 2009. In support of this analysis Walker cited Platts - a global provider of price assessments in energy markets; and Evolution Markets - a company that specializes in the sale of RECs and other environmental commodities. The Town did not substantively contest these sources of information for energy

prices. Prior to the hearing Walker supplemented his after-tax analysis with a pre-tax analysis in which he excluded expense deductions for income and property taxes from operating income and loaded the applicable property tax rate to the discount rate to reflect what he concluded was proper consideration for property taxes. See petitioner's Ex. 4c. As a result of these pre-tax changes Walker concluded a reduced income approach value of $4,100,000 for April 1, 2008 and $3,200,000 for April 1, 2009 to reflect a pre-tax value as compared to the after-tax value shown in the original appraisals. He did not include in the supplemental report an amended reconciliation of value for each tax year as compared to the reconciliation of value shown in the original appraisals at Ex. 4a, page 21 and 4b page 25. That is to say that Walker's amended report did not specifically alter his original conclusion of value shown in Ex. 4a and 4b.[5] The apparent purpose of this exercise set forth in Ex. 4c was to conform to the propositions that 1) income taxes be excluded from the development of stabilized net operating income when the value of the subject property is being appraised for property tax purposes because income taxes are an expense of ownership and not of operating income; and 2) that property taxes be excluded as an expense from operating income when the subject property is being appraised for property tax purposes because if property taxes are expensed from operating income and the property taxes for the subject property are ultimately determined as too high, then the fair market value as indicated by the appraiser would in fact be too low and vice versa. Thus, when the value of the subject property is being appraised for property tax purposes, the applicable property tax rate is loaded into the capitalization rate. Distortion of the ultimate determination of value is therefore avoided as it is assumed that all properties within the municipality are assessed at a uniform percentage of value. Maine Public Service Company v. City of Caribou, SBPTR, Docket No. 97-108, June 3, 1999 and Northeast Empire Limited Partnership #2 v. Town of Ashland, SBPTR, Docket No. 99-015 and 99-027, May 30, 2001.

In connection with Ex. 4c, Walker was asked during the hearing to delete reference to a function performed to the discount rate in connection with the "Property Tax Adder " on Table 2

[5] During his testimony, Walker was asked by the Board whether his reconciliation of value for each tax year based on the three approaches to value would change as a result of the pre-tax changes to the income approach set forth in his supplemental report. So pressed Walker simply testified without elaboration that his reconciliation of value based on those changes would be $3,500,000 for April 1, 2008 and 3,100,000 for April 1, 2009.

that seemingly related to income taxes so as to conform to prior Board decisions. Performance of this particular request, according to Walker, would result in a different overall conclusion of value of $3,300,000 for April 1, 2008 and $3,000,000 for April 1, 2009. Petitioner's Ex. #15.

DISCUSSION

The Board finds that although the Town may have made an earnest effort to value the property for the relevant tax years, it ultimately lacked the skills to process the information associated with the property that was made available by Boralex and also Bowdoin Associates - the entity that it had originally engaged to value the subject property. Indeed the Town admitted through Mr. Theriault that the assessors/selectmen - he being one of them - did not apply any of three standard approaches to determining the fair market value of the property. Ultimately Mr. Theriault conceded that "we [the assessors] had to go down [in valuing the property], we did not know how to go down". For these reasons the Board concludes that the assessors' conclusion of value, although presumed correct, has been impeached by testimony it presented during the hearing. In these proceedings however, the taxpayer shoulders the burden of proof. To meet this burden it must not only impeach the credibility of the assessors but must also produce credible evidence of value that when compared to the assessment shows that the property has been substantially overvalued. The Board finds that Boralex has met its burden to produce credible evidence of value through testimony and submissions of Mr. Audet, President and Chief Operating Officer, Boralex, Inc. and Glenn Walker who appraised the property. Mr. Audet testified that as President of Boralex, Inc. he oversees the operation of several plants owned by Boralex that are located within the northern Maine market, including the subject property and similar facilities situated in Ashland and Livermore Falls. The Board finds that his testimony was credible, informed and helpful. He answered each question thoughtfully and thoroughly and readily shared information about the history of the subject property and the market within which it has historically operated and the economic circumstances that affected the Stacyville facility as of the relevant valuation dates. Mr. Walker is a licensed commercial general appraiser who is experienced in valuing energy producing facilities and who presented as an informed and

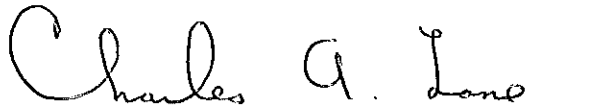
advantages associated directly with the property such as he did in his original appraisal. For these reasons, the Board concludes by its vote of 3-1 that the fair market value of the subject property for both tax years is $4,000,000 which - based on the entire record - is within a range of values that the Board considers reasonable.[6]

CONCLUSION

Based on the foregoing and by a vote of three to one the Board finds that the petitioner met its burden to prove the assessment manifestly wrong as of April 1, 2008 and April 1, 2009 and that the fair market value of the subject property for those tax years is $4,000,000.

Any party wishing to appeal this decision must file a petition for review in Superior Court within 30 days of receipt of the written decision pursuant to 5 M.R.S.A. §§ 11001-11008. If the decision is not appealed, it will become binding on the parties at the end of the thirty day period.

Dated: 07/25/11



Charles A. Lane, Esq.
Chairperson Panel C
State Board of Property Tax Review

[6] The petitioner filed a Motion to Reconsider based on what it claimed was the Board's failure to conform its decision to prior Board decisions with regard to treatment of income taxes and property taxes in connection with the income approach for purposes of determining valuation for property tax purposes.. The Board convened on April 27, 2011 and heard oral argument from both parties on the motion. The Town, at that time was represented by William Dale, Esq. Boralex continued to be represented by David Silk, Esq. The Board heard oral argument and deliberated. By vote of 3-1 it denied the motion resting on its reasoning in support of its original decision.