

Laconia Investment Properties, Inc.

v.

City of Laconia

Docket Nos. 4782-88, 7391-89, and 9946-90

South Down Recreation Association

v.

City of Laconia

Docket Nos. 4781-88, 7395-89, and 9940-90

DECISION

Introduction

These consolidated, RSA 76:16-a appeals require the board to decide the taxability of and, if taxable, the proper assessments on certain boatslips and dryberths at South Down Shores (South Down). The board finds: 1) the boatslips and dryberths are taxable realty; 2) however, the 10 slips and 65 berths dedicated to the development as amenities are not separately taxable-- their value being inherent in lot assessments; and 3) the assessments on the slips and berths, which were separately taxable, were proper.

Facts

Before addressing specific facts, it is important to describe South Down. South Down is a multi-layered, condominium development with a potential total of 831 living units composed of condominium units in multi-family dwellings and single-family lots. There is a master condominium that

covers the entire development. Appellant Laconia Investment Properties (LIP) was the condominium declarant, i.e., the owner who submitted the property to the condominium form of ownership. There is a homeowners association, South Down Recreation Association (SDRA), to which all South Down owners must belong. The South Down development is broken down into several subcondominiums, and the subcondominiums are owned by subdevelopers.

South Down includes a boat storage and launching area adjacent to Lake Winnepesaukee. The dryberths are on South Down common land, and the boatslips are adjacent to common land but located on state land. This boating facility consists of 41 boatslips, 30 moorings and 218 dryberths. (The moorings are not at issue here.) LIP purported to commit 10 slips and 65 berths as amenities to South Down through SDRA. "Declaration of Covenants, Restrictions and Easements for South Down Shores," (Declaration) at section 12 and 5(e). Despite this purported commitment, LIP retained all rights to alter this commitment and to deal with the slips and berths as it decided.

In the years under appeal, some of the boating facilities were owned by the developer, LIP, some leased to and taxed to SDRA, some owned by sub-developers of the villages at South Down, and some owned by individual property owners at South Down. There was conflicting testimony concerning how many dry berths LIP owned for each year under appeal, but the numbers filed with the appeal were:

1988 and 1989--69; and

1990--65.

SDRA paid the taxes in the years under appeal, thereby having standing before the board, on the following boatslips:

1988 - slips 1-15 and 22;

1989 - slips 1-15 and 22; and

1990 - slips 1-10, 15 and 22.

ISSUES

Three issues were raised by the parties:

- 1) Are the dryberths real or personal property?;
- 2) Are the boatslips and dryberths, if realty, part of the amenities of the development with their value inherent in the lots and condominiums at South Down Shores and thus not separately taxable?; and
- 3) If separately taxable, what is the proper assessment of the dryberths and boatslips?

BOARD'S RULINGS

- 1) Dryberths - realty or personalty

The appellants argued the dryberths should not have been taxed because the berths are not real estate. We reject this argument, finding the berths taxable under RSA 72:6.

The dryberths consist of a physical structure and certain rights in the land upon which the structure sits. The berth owner, therefore, holds:

- 1) an undivided interest in the boat storage rack itself, which includes the right to place the structure on the land;
- 2) the exclusive right to use one berth; and
- 3) the right to access the lake from the berth.

RSA 72:6 states: "All real estate, whether improved or unimproved, shall be taxed except as otherwise provided." This statute is to be broadly interpreted. King Ridge, Inc. v. Sutton, 115 N.H. 294, 298-99 (1975). "The words 'land,' 'lands' or 'real estate' shall include lands, tenements, and hereditaments, and all rights thereto and interests therein." RSA 21:21 (emphasis added).

In addition to these statutory criteria, the caselaw on fixtures must be examined--fixtures being taxable as realty. As stated in The Saver's Bank v. Anderson, 125 N.H. 193, 195 (1984):
A chattel loses its character as personalty and becomes part of the realty when there exists "an actual or constructive annexation to the realty **with the intention of making it a permanent accession to the freehold**, and an appropriation or adaptation to the use or purpose of that part of the realty with which it is connected." However, if a chattel becomes an intrinsic, inseparable and untraceable part of the realty, it is deemed a fixture regardless of the intent of the parties. (Citations omitted.)

Black's Law Dictionary defines "fixture," in part, as "an article in the nature of personal property which has been so annexed to the realty that it is regarded as a part of the land. . . . Goods are fixtures when they become so related to particular real estate that an interest in them arises under real estate law."

The berths are fixtures exhibiting all the elements of real estate, and the rights appurtenant to the berths make the berths taxable.

A) While one could argue the metal frames alone of the dryberths may be personalty, the berths lose that nature and acquire all the rights and interests of real estate by being affixed with bolts to the concrete footings.

B) Each berth has a distinct fixed location, as does all real estate. By the mere affixing of the racks to the concrete footings, the berths acquire the transferable real estate right of storing a boat at that distinct location. This right has caused the berths to be sold for \$6,500 to \$9,000 more than the approximate \$1,000 cost of construction for each berth.

C) The berths and their use are "intimately intertwined" with the primary recreational use of the boat launching area and the boatslips and surrounding real estate, making the berths taxable for similar reasons that the ski lifts were found to be taxable in Kings Ridge, Inc. v. Town of Sutton, 115 N.H. 294, 299 (1975). If this land did not have lake access, the berths would not be located on this land.

D) The land was physically adapted to accommodate the racks. The land was kept clear, and holes were dug for the footings. Gravel was placed to provide a firm travel surface for shuttling the boats between the berths and the slips. Landscaping was provided to visually screen the facility.

E) Finally, the approximately 2-acre site for the berths was brought to its highest and best use by the improvements that were done or affixed to it, allowing 235 boats lake access and rack storage.

2) Amenities

The appellants argued the slips and berths, if taxable realty, should not have been taxed because the slips and berths were amenities for South Downs, and thus the amenity value would have been taxed in the lots. The City disagreed, arguing the slips and berths were not available to all in South Down and when used by South Down residents, the cost for such use was equal to private boat storage costs.

For the tax years in question, 10 boatslips and 65 dryberths were general amenities of South Down and should not have been taxed separately. Any slips and dryberths owned and used or taxed to either LIP or SDRA, above those committed as amenities, should be taxed separately.

In arriving at this decision, the board would note that much of the ambiguity on this issue results from a number of factors:

- a) the development scheme of funneling 218 boats through 41 boatslips while South Down has 800 plus lots or units;
- b) the sometimes conflicting language in the covenants and restrictions dealing with the boatslips and dryberths;
- c) the swapping of some dryberths between LIP and private owners;
- d) the sometimes confusing transfers of slips and berths between LIP, SDRA, South Down Shores Management Services, Inc. (the management corporation affiliated with LIP) and South Down Boat Club (formerly known as "South Down Yacht Club"); and
- e) LIP's retention of ownership of the common boatslips beyond the time stated in the public offering statement (Offering (4b) and the Declaration Section 7(b)).

However, it is clear from the Offering at (4b) and the Declaration at Section 12 (second paragraph and (L)) that 10 boatslips and 65 dryberths were to be committed to SDRA. At least those numbers of facilities have been used each year under appeal as common property of SDRA.

The City's arguments that the slips and berths were not available for the use of all property owners and the annual fee for their maintenance at times was similar to commercial rental rates for similar facilities, do not

detract from the common slips' and berths' general enhancement of value of all units and lots at South Down. The fees that the users of these facilities paid to the South Down Boat Club were simply a practical method of allocating the boat facilities' maintenance costs. This arrangement in no way obviated their general enhancement value. These slips and berths were not available to the general public. Only property owners at South Down could use these facilities. While one could argue that during down economic times the inherent value of these amenities in the lots and units would be diminished, there would still be a distinct privilege of boating access that could be marketed with the owners' property as South Down. Owners of property outside South Down that rent similar boating facilities do not have any transferable privileges of access to boating facilities.

The City, when assessing all the property contained in South Down, based its values on sales of property within the development. Those sales included consideration for the land and improvements and all rights and interests that accrued to them. The right of the option to use, albeit for a fee, the boating facilities was a portion of the consideration paid for the properties. Thus, to assess separately these 10 slips and 65 berths, which in the Offering and in their use were committed to an association common to all property--SDRA, would lead to double taxation as their value was already accounted for in the lot and condominium assessments.

However, any boatslips or dryberths owned by or taxed to either LIP or SDRA in excess of these committed facilities were not amenities and were thus separately taxable. No evidence was submitted to show the excess facilities could not be sold to any individual or group of South Down's

residents. In fact, there were several specific statements as to the unrestricted nature of these excess facilities mentioned in the Declaration: Declarant (LIP) reserves the right to convey to owners, for consideration, Declarant's boat docks or dry berths. (Page 22, Section 5(e)).

Declarant reserves the right to sell the remaining boatslips or dedicate their exclusive use to specific members of the 'Boat Club'

The Declarant . . . reserves the right to sell these facilities to owners at South Down, only, at a profit. (Page 21, Section 12)

The record is replete with sales of the remaining slips and dryberths. Further, mere use as common facilities by SDRA of some of the remaining slips and berths (specifically slips 11-15 and 22 and 4 berths in 1988 and 1989) did not make them a common amenity because they were still freely transferable. No amendment to the Declaration was ever made committing these additional facilities. In fact, testimony was given that those additional slips were used as collateral by LIP and one was foreclosed upon for payment of a legal debt, thereby indicating that slips had a separate value and were not part of the common property.

3. Value

Boatslips

The Taxpayers submitted eleven individual sales of slips at South Down and the sales of 24 slips to subdevelopers of villages at South Down in 1986 and 1987. Six of the eleven sales occurred in 1991 and the other five occurred in 1988 and 1990. The six that occurred in 1991 ranged in value from \$20,000 to \$20,150, three of which were auction-foreclosure sales. Of the five that occurred in 1988 and 1990 only one sale was for less than \$30,00

0.

The City submitted eight sales of boatslips. Five were of slips at South Down

in 1988 and 1990. The other three sales were of comparable slips in the developments of Four Seasons and Long Bay in 1987 and 1988. The mean and median of these sales were \$32,295 and \$32,500, respectively.

The preponderance of the evidence of sales that occurred during the three years under appeal indicates the City's assessment of \$30,000 is reasonable and proportionate. The sales to subdevelopers in 1986 and 1987 and resales in 1991, all for around \$20,000, are all indications of the slips' wholesale value while the project was being built up, and later, of their distressed value due to the general declining real-estate market and foreclosure sales. These factors, however, have limited bearing on the market value of slips for the years under appeal.

Dryberths

The Taxpayers submitted a list of 48 sales with 46 of them occurring in 1986 and 1987 and two in 1988. Forty-four of the sales were for \$7,500 and four were for \$9,000. They argued that the preponderance of the sales were for \$7,500, indicating the City's assessment of \$10,000 per berth was excessive. They further testified that the berths were presently selling for \$3,000 to \$6,000 each.

In support of its assessment, the City submitted two sales in 1987 and seven in 1988, with three of them selling for \$10,000 and the balance from \$9,000 to \$9,640. Five sales in 1989 were submitted, three at \$10,000 and the other two at \$9,000 and \$9,500. Three sales in 1990 were submitted, all for \$10,000.

The board rules the Taxpayers fell short of their burden of proof. Their sales may establish that the market value of the berths in 1987 was

\$7,500 but that is not conclusive evidence of their value for the years under appeal. The City's evidence indicated the market value of the berths peaked in 1988 - 1990 at \$9,500 to \$10,000. The limited testimony, given that sales prices dropped in 1991 again, may have bearing on determining market value for 1991 but has limited bearing on establishing value for 1989-90.

Since RSA 75:8 requires the assessors to review assessments on an annual basis, the board rules the most probative evidence of determining market value is the sales that occur in the respective tax year. Therefore, the board rules that the \$10,000 assessment was a reasonable estimate of value for determining the Taxpayers' proportionate share of the tax burden.

Summary

The City shall abate the assessments for 1988-90 by \$650,000 for the 65 berths and \$300,000 for the 10 slips. If taxes have been paid on the abated assessments, the taxes shall be refunded with 6 percent interest from the date paid to the refund date.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Member

Ignatius MacLellan, Esq., Member

Michele E. LeBrun, Member

I certify that copies of the within decision have been mailed this date, postage prepaid, to Kevin R. McCormick, representing the Taxpayers, and to the Chairman, Board of Assessors, City of Laconia.

May 6, 1992

Valerie B. Lanigan, Clerk

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