

N A K Associates

v.

City of Laconia

Docket Nos. 4834-88 and 7394-89

Colonial Hills Estate Corp.

v.

City of Laconia

Docket No. 4837-88

Ken Nutter Construction, Inc.

v.

City of Laconia

Docket No. 4836-88

South Down Highlands Limited Partnership

v.

City of Laconia

Docket No. 4838-88

DECISION

Introduction

These cases were consolidated for hearing purposes and, due to the similar issues, are consolidated for the purpose of this order.

These four taxpayers (collectively referred to as "taxpayers") were "subdevelopers" of village areas of the development known as South Down Shores, located on Paugus Bay.

A summary of the appealed property is as follows.

N A K Associates

2 boatslips - 25-24 and 25-35, assessed at \$30,000 each
2 dryberths - 25-14 and 25-16, assessed at \$10,000 each

Colonial Hills Estate Corp.

1 boatslip - 25-33, assessed at \$30,000

Ken Nutter Construction, Inc.

1 boatslip - 25-16, assessed at \$30,000
1 dryberth - 25-39, assessed at \$10,000

South Down Highlands Limited Partnership

3 boatslips - 25-38 through 25-40, assessed at \$30,000 each
10 dryberths - 25-31 through 25-40, assessed at \$10,000 each

11.87 acres of land on Davidson Drive assessed for \$2,320,500 (a separate decision on this property was issued by the board on October 21, 1991)

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. 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.)

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.

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 "villages" and thus not separately taxable?
- 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 Taxpayers argued a restriction in the deed required these slips and berths that were purchased by the subdevelopers from the developer, Laconia Investment Properties, Inc., to be used as amenities for the separate villages. While this is part of the restriction, further provisions allow the subdevelopers, if the village associations decline to acquire the boating facilities, to resell them to LIP, and if LIP declines to repurchase, to then

offer to sell "to owners or a condominium association at South Down Shores" The wording and intent of this restriction is ambiguous. However, the actual effect of this restriction on the subsequent transfers is not ambiguous.

From the evidence, it appears that the subdevelopers, at some stage in the development of the villages, acquired various boating facilities from LIP. The subdevelopers would then offer, at a price, these facilities to the associations formed in the separate villages. It appears that only one village, Daw Village, exercised this option to acquire the boating facilities.

This village, however, as did many of the subdevelopers, resold their boating facilities in 1990 and 1991 to individual owners after having offered them to LIP's successor of the repurchase option, South Down Recreation Association, and to other village associations.

It is clear from this chain of events that the boating facilities owned by the taxpayers were never amenities of their respective villages. The village association, by the deed restriction, only had first option to purchase the facilities. Once declined, the subdevelopers were free, after offer to SDRA and other village associations, to offer the facilities to individual owners at market value.

Therefore, the board concludes the taxpayers' facilities are not amenities and are separately taxable.

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 \$30,000. 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 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 year(s) 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 Board rules the taxpayers failed to prove their assessments were excessive and that they were bearing a disproportionate share of the tax burden.

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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