

**Emile R. Bussiere
and Richard Ferdinando**

v.

Town of New Boston

Docket No.: 8506-90PT

DECISION

The "Taxpayers" appeal, pursuant to RSA 76:16-a, the "Town's" 1990 assessment of \$237,000 on a vacant, 84-acre lot (the Property). For the reasons stated below, the appeal for abatement is granted.

The Taxpayers have the burden of showing the assessment was disproportionately high or unlawful, resulting in the Taxpayers paying an unfair and disproportionate share of taxes. See RSA 76:16-a; TAX 203.09(a); Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985). We find the Taxpayers carried their burden and proved disproportionality.

The Taxpayers argued the assessment was excessive because:

- (1) in 1990, the Town rezoned the Property so that the only permissible use was a manufactured housing park (MHP);
- (2) the zoning that applies to this Property was so restrictive in setting forth the demands and requirements for development that it was economically unfeasible to construct an MHP;
- (3) the only alternate use for this site available under its zoning was as a single

large building site;

(4) sales of manufactured homes have declined to such an extent that no MHPs are being constructed and as of 1990, no MHPs have been developed in New Hampshire;

(5) the soils on the site are not conducive to septic installation; and

(6) an appraisal performed by Raymond Croteau estimated the value of the Property as of April 1, 1990 to be \$110,000.

The Town argued the assessment was proper because:

(1) the Property was not treated differently because it is in a manufactured home zone and was assessed as a 2-acre home site with the remainder as rear acreage;

(2) the Property was valued consistently with other vacant lots that sold from 1986 through 1990; and

(3) comparable sales support the assessment.

The parties agreed the department of revenue administration's 1990 equalization ratio of 99% represents the Town's general level of assessment.

Board's Rulings

Based on the evidence, we find the correct assessment should be \$175,000.

The board's analysis centers on two general issues:

(1) highest and best use analysis; and

(2) review of market data and value indications.

Highest and Best Use

The key to the estimation of the Property's value is determination of its highest and best use. The evidence supplied by both parties indicates that there are three possible highest and best use scenarios:

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- (1) a MHP;
- (2) a single large residential lot; and
- (3) investment land holding for future residential development.

Highest and best use has been defined "as that use which will most likely produces the highest market value, greatest financial return or the most profit..." Steel v. Town of Allenstown, 124 N.H. 487, 490 (1984). Such use must be legally permissible, physically possible, and financially feasible. Applying these tests to the three possible uses, the board finds that the highest and best use as an MHP is not economically feasible. Mr. Bussiere, one of the owners of the Property, has owned and managed other MHPs in New Hampshire. The board finds his testimony credible that the zoning regulations make the development of the Property economically unfeasible as an MHP. The Taxpayers testified that in March of 1990 the Town amended its zoning ordinance and districts resulting in the Property being the only lot in the MHP zoning district in the southern portion of Town. The Town also enacted a series of MHP requirements that, based on the Taxpayers' testimony (and the board's experience), would prohibit an economically feasible development of the Property as an MHP.

The Taxpayers' appraiser indicated the two remaining scenarios as alternative highest and best uses. However, in his analysis of sales, he relied most heavily on a sale which had no future development potential and had value only as a single residential lot. The board finds that the Property has the potential to return more than a single large residential lot.

The board finds the highest and best use of the Property is for investment land

holding for future residential land development. The board bases its conclusion on weighing a number of factors including the following:

- (1) The Taxpayers testified the land had been purchased and held with residential land development in mind.
- (2) Prior to the zoning change in 1990 and during a more favorable residential market, subdivision was explored with an abutting property.
- (3) The soil types do not preclude development. While there may be some inherent limitations related to the soils, they are not to such an extent to preclude residential development. The Taxpayers and their appraiser only indicated that the soils could be a factor in developing the Property as an MHP under the requirements of the Town ordinance.
- (4) The board is very cognizant that a potential use must be reasonable and not highly speculative, remote or imaginary. In this case a large 84-acre parcel of undeveloped land in 1990 that was zoned exclusively for an MHP may at first glance appear to preclude alternative development possibilities. However, the board finds that a review of the New Hampshire planning statutes and caselaw (in particular Treisman v. Town of Bedford, 132 N.H. 54 (1989) and Bosse v. City of Portsmouth, 107 N.H. 523 (1967)) strongly suggest the Town's zoning of the Property exclusively for an MHP is spot zoning and therefore not legal. The Taxpayers appear to have two alternatives, either attempt to amend the zoning ordinance or to challenge the validity of the zoning in court. While these are factors that must be considered in valuing the Property, the board does not see the issues so speculative as to preclude an alternative development potential in the future.

(5) As of April 1990, there were some initial indications of the decline in the real estate market, such as longer days on the market for listed properties, general reduction in construction starts and a general reduction in sales activity. While these market factors were not specifically testified to in this case the board must apply its collective expertise and experience in evaluating the evidence (See RSA 541-A:18, V(d); See also Petition of Grimm, 138 N.H. 42, 53 (1993)). Therefore, as of April 1, 1990, the market had slowed but the problems clearly evident in 1991 and 1992 were not certain. (6) The Taxpayers have not listed the Property for sale nor have they placed the Property under current use assessment pending outcome of this ad valorem appeal.

Value Indications

Having arrived at a highest and best use conclusion of investment land holding for future residential development, the board reviewed the market evidence submitted by the parties. The board finds the assessment information supplied by the Town to be of little probative value except in a very general fashion. The board finds the sales submitted by the Town were either too dissimilar or of an earlier period to be comparable to the Property as of the assessment date under appeal.

The board has reviewed the sales submitted by the Taxpayers' appraiser and also finds many of the sales are too dissimilar as to draw any direct conclusion of value. The Taxpayers' sales differ in that some included approved subdivisions, views and purchases for assemblage. However, the board finds the Taxpayers' sales most likely bracket the high and low end of any potential value range of the Taxpayers' Property (approximately \$710 per acre to \$3700 per acre). Within this

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range, the board finds a value of approximately \$2100 per acre or \$176,400 is reasonable given the location, physical features and legal status of the Property. While, the board places little weight on any market indications the Town assessment may provide, the board does note an adjustment of the rear acre grade from good to fair (to account for lesser development potential than recognized by the Town) results in a similar value of \$175,500. While it is difficult to determine in a purely technical and analytical fashion the value of the Property due to its speculative nature (regardless of the zoning issue), the board finds \$175,000 ($\$176,400 \times .99$ rounded) assessed valuation results in a more proportionate and reasonable assessment than that placed on it by the Town. "Given all the imponderables in the valuation process, "[j]udgment is the touchstone." Public Service Company v. Town of Ashland, 117, N.H. 635, 639 (1977).

Comments on Town's Assessment Methodology

During this hearing it became evident to the board that differing assessment methodologies were being used by the Town for similar parcels of land. The Town's representative, Steve Allen, attempted to explain the basis for these different methodologies and submitted the revaluation pricing guidelines used during the 1990 revaluation.

Additionally, the board has briefly reviewed the 1990-1993 equalized ratios, coefficients of dispersions and price related differentials as calculated by the department of revenue administration. Particularly, the 1993 coefficient of dispersion of nearly 22% and a price related differential of 1.11 indicate there may be substantial inequities that have occurred within the tax base.

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The board has concerns due to the review of the DRA statistical information and the methodology issues raised during this hearing that there may be a need for a general reassessment or an assessment update. Before the board determines whether to hold a show cause hearing under its RSA 71:B-16 jurisdiction, the board orders the Town to respond as to its plans in the immediate future for any general reassessment or assessment updates. The Town shall respond to the board within 30 days from the clerk's date on this decision relative to their intentions of meeting their obligations under RSA 75:1, RSA 75:8 and the New Hampshire Constitution, Pt. 2, Art. 6th.

If the taxes have been paid, the amount paid on the value in excess of \$175,000 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Pursuant to RSA 76:16-a (Supp. 1991), RSA 76:17-c II, and board rule TAX 203.05, the Town shall also refund any overpayment for 1991, 1992 and 1993. Until the Town undergoes a general reassessment, the Town shall use the ordered assessment for subsequent years with good-faith adjustments under RSA 75:8. RSA 76:17-c I.

A motion for rehearing, reconsideration or clarification (collectively "rehearing motion") of this decision must be filed within twenty (20) days of the clerk's date below, not the date this decision is received. RSA 541:3; TAX 201.37. The rehearing motion must state with specificity all of the reasons supporting the request. RSA 541:4; TAX 201.37(b). A rehearing motion is granted only if the moving party establishes: 1) the decision needs clarification; or 2) based on the evidence and arguments submitted to the board, the board's decision was erroneous in fact or in

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law. Thus, new evidence and new arguments are only allowed in very limited circumstances as stated in board rule TAX 201.37(e). Filing a rehearing motion is a prerequisite for appealing to the supreme court, and the grounds on appeal are limited to those stated in the rehearing motion. RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Member

Michele E. LeBrun, Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Emile R. Bussiere and Richard Ferdinando, Taxpayers; and Chairman, Selectmen of New Boston.

Dated: June 21, 1994

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Valerie B. Lanigan, Clerk