

City of Keene

v.

Town of Roxbury

Docket Nos.: 8635-90 and 11368-91PT

DECISION

"Keene" owns numerous parcels in "Roxbury" that are part of Keene's water supply. Keene appeals, pursuant to RSA 72:11 and RSA 76:16-a, Roxbury's 1990 and 1991 assessments on the following parcels (the Properties).

<u>Map/Lot</u>	<u>Assessment</u>	<u>Description</u>
5-70	\$ 83,200	vacant, 23.9-acre lot
3-73	\$ 126,650	vacant, 73-acre lot
3-72	\$ 40,700	vacant, 16-acre lot
8-71	\$ 28,800	vacant, 12-acre lot
4-80	\$ 192,450	vacant, 172.2-acre lot
2-75	\$ 157,750	vacant, 106-acre lot
3-77	\$ 280,050	vacant, 220.8-acre lot
8-78	\$ 259,200	vacant, 225.7-acre lot
4-74	\$ 228,950	vacant, 284.8-acre lot
8-176	\$ 170,150	vacant, 116.7-acre lot
4-183	\$ 80,950	vacant, 46-acre lot
4-172	\$ 60,500	vacant, 30.7-acre lot

8-C	\$ 68,800	vacant, 34.4-acre lot
<u>Map/Lot</u>	<u>Assessment</u>	<u>Description</u>
4-K	\$ 247,800	vacant, 123.9-acre lot
4-175	\$ 204,500	vacant, 220.5 acre lot
3-168	\$ 51,000	vacant, 20-acre lot
4-181	\$ 193,200	vacant, 132.9-acre lot
4-173	\$ 105,900	vacant, 68.9-acre lot
3-174	\$ 209,900	vacant, 111-acre lot
8-177	\$ 392,700	440-acre lot with a chlorine shed and corrosion shed
Total 1990	\$3,183,150	

In addition for 1991:

3-65	\$4,400	vacant, 1 acre lot
7-157	\$1,600	vacant, .80 acre lot
Total 1991	\$3,189,150	

For the reasons stated below, the appeals for abatement are denied.

Keene has the burden of showing the assessments were disproportionately high or unlawful, resulting in Keene 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 Keene failed to carry its burden.

Keene made two preliminary arguments for abatement:

1) Roxbury taxed Keene rather than billing Keene for a payment in lieu of taxes as required by RSA 72:11 and thus no payment was due from Keene for 1990 and 1991; and

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2) the RSA 72:11 payment in lieu of taxes should have only been based on the town portion of the tax rate, yet Roxbury included the town, school and county rates.

Keene also argued the assessments were excessive because:

(1) the average assessment of \$1,285 per acre was excessive for rural upland acreage accessed by one class V road and three class VI roads;

(2) as outlined in Keene's exhibit 1, sales of large rural properties with limited access similar to the subject Properties, indicated a per-acre value of approximately \$400; and

(3) the land assessment for payment in lieu of taxes should be reduced to \$400 per acre.

Roxbury argued the assessments were proper because:

(1) Keene's comparable #11 was dissimilar to the Properties because sale #11 was in current use, was possibly an estate sale, has no water frontage and has more limited access than the Properties and Keene made no adjustments for these differences;

(2) the Properties have varied access -- some of the Properties front on Middle Town Road, a town-maintained road, and were assessed for road frontage and the better access; some of the Properties are accessed by Woodward Pond Road, a seasonal class V road;

(3) some of the waterfront Properties were underassessed and some of the nonwaterfront Properties were over assessed, but when viewed in total, Keene's total estate was properly assessed;

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(4) if not needed for water supply purposes, the highest and best use of the Properties would be for private retreat type development or conservation purposes;

(5) land adjacent to the Properties has seen high-priced development in the past several years;

(6) Keene's land adjacent to the developable roads has moderate topography and has significant development potential;

(7) sales of similar property in New Hampshire supported the overall per-acre value of Keene's property; and

(8) similar sized and located properties in Roxbury were assessed comparably.

Board's Rulings

Facts

Between 1886 and 1952, Keene acquired approximately 2,481 acres in Roxbury for Keene's water supply. The acquisition included two water bodies - Babbidge Reservoir and Woodward Pond (previously known as Echo Lake). Keene built two dams on these water bodies so that Babbidge Reservoir is now approximately 34.4 acres and Woodward Pond is now approximately 123.9 acres. The Properties are all undeveloped, except for the dams and other waterworks improvements. The Properties are all contiguous but they are not homogeneous.

Some of the Properties have year round class V frontage, some have seasonal class V frontage, some have class VI frontage and some do not have any town road frontage. Additionally, some of the parcels are located on the two water bodies. In 1990, Roxbury underwent a revaluation, and sent Keene tax bills

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for 1990 and 1991 based on the new assessments. Keene then filed

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these appeals, raising the issues stated above. The board will begin by discussing Keene's legal arguments and then the assessment arguments will be discussed.

Background

The following is background to frame the legal arguments. Generally, real estate is subject to property tax unless specifically exempted. RSA 72:6. However, real estate owned by a municipality, even if that real estate is located in another municipality, is not taxable unless a statute specifically provides for its taxation. Canaan v. Enfield Village Fire District, 74 N.H. 517, 527-29 (1908). Following the Canaan decision, in 1911 the legislature enacted RSA 72:11, which in essence abolishes the common-law nontaxability of municipal waterworks located in other municipalities. The statute only applies to the land; the buildings remain nontaxable. Under RSA 72:11 and a related statute RSA 72:11-a, the municipality that owns the land must make a payment in lieu of taxes to the municipality in which the land is located. The payment is based on "value proportional with the assessed value of other property in the town which is subject to taxation, so that such payment will not exceed its proportion of the public charge in that year." Under RSA 72:11, Roxbury sent Keene tax bills for 1990 and 1991. In 1992, Roxbury realized the appropriate bill to be sent was a bill for payment in lieu of taxes.

Keene's First Argument -- No Liability Due to Incorrect Billing for 1990 and 1991

Keene argued it should not be required to pay anything to Roxbury

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because Roxbury did not follow RSA 72:11 when Roxbury sent Keene a tax bill rather than a bill for a payment in lieu of taxes. The board finds this argument meritless because it asks the board to follow form over substance. The board is only authorized by RSA 76:16-a to make orders "as justice requires ***." Certainly, justice does not require that Keene be excused from its statutory obligation to pay Roxbury simply because Roxbury incorrectly captioned the bill. Keene is unable to show how such an error harmed it in any way, and therefore, we reject Keene's argument.

Keene's Second Argument -- Payment Should Have Only Included The Town Tax Rate

Keene next argued Roxbury erred by calculating the payment based on the town, school district, and county tax rates. Keene asserts it should only pay based on the town tax rate. The board rejects this argument for four basic reasons:

- (1) there is nothing in RSA: 72:11 that explicitly supports Keene's position;
- (2) RSA 72:11 uses the term "public charge," which the board reads to include taxes other than the town tax;
- (3) RSA 72:11-a, a related statute, uses the term "taxes," which the board interprets to include the town, school district, and county taxes; and
- (4) the legislature could have specifically stated that the payment in lieu of taxes would only be based on the town tax rate as they have in other statutes, e.g., RSA 72:23-K. Based on the above, the board finds there is no support for Keene's position that it was only liable to pay based on the town

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tax rate.

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Proportionality of Assessments

Based on the evidence, the board finds Keene did not carry its burden and did not show the Properties were disproportionately assessed. This conclusion is based on two elements:

- 1) Keene's failure to present sufficient evidence that the Properties were overassessed; and
- 2) Roxbury's evidence that, when adjusted, the assessments were proportional to other assessments in the town.

The major flaw in Keene's case was its request for a \$400 per-acre value for all of the Properties. As asserted by Roxbury, an across-the-board value is not appropriate because the Properties are not homogeneous but rather have individual attributes that must be addressed such as road frontage and water frontage. Keene did not present any evidence concerning adjustments for these factors, which is normally how properties are valued. Additionally, Roxbury raised sufficient questions about Keene's comparables so that the board was unable to draw any conclusions from them. Taken together, the board was unable to find that Keene had carried its burden.

This decision is based on Keene's failure to carry its burden. However, the board has some comments concerning Roxbury's evidence and some other issues.

First, in preparation for the hearing, Roxbury's assessor reviewed all of the Properties' assessments, and she determined that 18 out of the 22 parcels required assessment adjustments both (increases and decreases). Keene

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argued this demonstrated the inherent problems with Roxbury's assessments on the Properties. The board disagrees, finding Roxbury's review and proposed revised assessments were based on a more appropriate methodology. Certainly, waterfront property should have been valued higher than nonwaterfront property, and this was not done when Roxbury initially assessed the Properties. Roxbury's adjustments due to the differing road frontages was also appropriate.

Based on Roxbury's evidence, we find Keene's entire estate within Roxbury was not overassessed even though Roxbury's own evidence demonstrated the individual assessments required adjustments. As stated in Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985):

When a taxpayer challenges an assessment on a given parcel of land, the board must consider assessments on any other of the taxpayer's properties, for a taxpayer is not entitled to an abatement on any given parcel unless the aggregate valuation placed on all of his property is unfavorably disproportionate to the assessment of property generally in the town.

Second, Keene argued Roxbury should not have separately assessed Woodward Pond because even before Keene erected the dam, Woodward Pond was a great pond -- a pond greater than 10-acres in size, and thus the lake bed was actually owned by the State of New Hampshire. It appears that Keene's position is supported, but its position does not warrant an abatement because Keene has not shown the aggregate assessment, even with this apparent error,

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was disproportional. Specifically, even if the assessments attributable to Woodward Pond is deducted from either the assessments or the revised assessments, Keene's aggregate assessment was not disproportional in 1990 and 1991.

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Conclusion

Based on the above discussion and analysis, the board finds Keene has not shown its aggregate assessments resulted in disproportional taxation, and therefore, the board denies this appeal.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Member

Ignatius MacLellan, Esq., Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Laurence Shaffer, City Assessor for City of Keene, Taxpayer; and Mary E. Pinkham-Lager of DRA, Agent for Town of Roxbury.

Dated: December 7, 1993

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ORDER

On December 22, 1993 the board of tax and land appeals (board) received a motion to withdraw the "City" assessor's appearance and a motion for rehearing from the City.

The board grants the withdrawal of appearance motion and denies the rehearing motion.

The City stated in its rehearing motion that the board "overlooked or misapprehended" various issues raised by the City. Not so. The board's decision of December 7, 1993 addressed all the issues raised by the City at the hearing. Further, the City did not elaborate in its rehearing motion what specifically the board overlooked or misapprehended. Therefore the motion is denied.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Ignatius MacLellan, Esq., Member

CERTIFICATION

I hereby certify that the foregoing order has been sent postage prepaid to Laurence Shaffer, City Assessor for the City of Keene, Taxpayer; and Mary E. Pinkham-Lager of DRA, Agent for the Town of Roxbury.

Dated: January 7, 1994

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Valerie B. Lanigan, Clerk