John L. Arnold

v.

Town of Francestown

Docket Nos.: 8718-90-PT, 11152-91-PT and 13819-93-PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1990, 1991 and 1993 assessments of Map 21, Lot 3 as follows:

1990: $118,797 (land $114,197; buildings $4,600) with 3.6 acres in current use and .8 acres not in current use.
1991: $85,841 (land $81,241; buildings $4,600) with 4.15 acres in current use and .25 acres not in current use.
1993: $81,980 (land $77,380; buildings $4,600) with 4.15 acres in current use and .25 acres not in current use.

The lot consists of 4.4 acres on Pleasant Pond in Francestown contiguous to additional acreage in the adjoining town of Deering. The parcel is improved with a one room camp (the Property).

The Taxpayer also owns but withdrew his appeals on the following parcels:

$148,716 (land $46,116; buildings $102,600) on Lot 57, a 233.70-acre lot (231.70 acres in current use and 2.0 acres not in current use) with a house. In 1993 the assessment was adjusted to $136,711 (land, $49,811; buildings $86,900);

$2,615 on Lot 56, a vacant, 60-acre lot in current use. In 1993 the assessment was adjusted to $4,428; and

$250 on Lot 56-1, a vacant, 5-acre lot in current use. In 1993 the assessment was adjusted to $435.

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

The Taxpayer has the burden of showing the assessments were disproportionately high or unlawful, resulting in the Taxpayer 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 Taxpayer carried this burden and proved disproportionality.

The Taxpayer argued the assessments were excessive because:

(1) the waterfront is quite shallow and mucky;

(2) the lot is accessed by a right of way, subject to several zoning restrictions and contains some wetland, all of which preclude subdivision;

(3) the Town's assessment of the lot not in current use includes consideration for the privacy and buffering aspect of the adjoining current use land thereby circumventing the intent of the current use statute;

(4) other lots of .8 acre size on Pleasant Pond had a maximum condition factor of 2.00, whereas the Taxpayer's factor is 3.00; and

(5) the Town's assessing Pleasant Lake at a .25 condition factor higher than Scobie Pond has no validity.

The Taxpayer presented extensive written arguments and exhibits in support of his claims of overassessment.

The Taxpayer also requested the board find the Town's methodology resulted in town-wide inequities due to the inconsistent and arbitrary use of condition factors in the land valuation.

The Town argued the assessments were proper because:

(1) the portion of the lot not in current use is enhanced by the privacy and noise protection of the lot's large amount of water frontage; and

(2) however, after review of comparably assessed lots, the Town recommends the condition factor be reduced from 3.00 to 2.50 to reflect the weeds in the shallow frontage.

Board's Rulings

Scope of Decision

This decision relates solely to the issue of disproportionate assessment of the Taxpayer's lot under appeal. The board declines to rule on the Taxpayer's assertion of town-wide inequities for two reasons:

1) no RSA 71-B:16 IV petition was filed alleging town-wide assessment inequities for the board to have jurisdiction to review and rule on; and

2) the board has not found evidence egregious enough in this appeal to warrant asserting jurisdiction under the board's broad authority contained in RSA 71-B:16 II.

Further, the board declines to rule on the appropriateness of ad valorem assessment calculations depicted on the assessment record card that are negated by that portion of the Property being actually assessed and billed under current use. The board finds the Taxpayer is not "aggrieved" by those calculations because 1) they do not affect the final assessment and 2) if at sometime in the future they are the basis for the determination of a land use change tax (RSA 79-A:7), the Taxpayer has a remedy of appeal pursuant to RSA 79-A:10.

Facts

In 1990, the Taxpayer owned 4.4 acres in this parcel of which 3.6 acres had

been applied for and granted current use with .8 acre retained from

current use in the vicinity of the camp. For tax years 1991 and 1993, the Taxpayer had reapplied for current use, reducing the area retained from current use to .25 acre, and increasing the acreage in current use to 4.15 acres. There is no dispute over the value of the land in current use or of the camp. The sole issue for the board to rule on is what is the proper ad valorem value for the portion of the lot not in current use and what factors should be considered in arriving at its value.

This appeal presents the intriguing and often confusing issue of how to value for tax purposes a portion of parcel not in current use but surrounded by current use land. The principles for such a task is contained in both the statutes and the principles of appraising. Because the .8 acre and .25 acre portions are not in current use, they must be assessed at market value as defined in RSA 75:1 considering all factors that affect market value. Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1975).

General Discussion

First, it would be helpful to discuss what rights and factors are routinely considered in valuing property without any current use considerations.

In valuing property, all real estate rights, tangible and intangible , are assessed.

RSA 21:21 Land; Real Estate.

I. The words "land," "lands" or "real estate" shall include lands, tenements, and hereditaments, and all rights thereto and interests therein. (emphasis added)

While they vary from property to property, these ownership rights are often viewed as a "bundle of rights". "Ownership rights include the right to use real estate, to sell it, to lease it, to enter it, to give it away, or to choose to exercise all or none of these rights. The bundle of rights is often compared to a bundle of sticks, with each stick representing a distinct and separate right or interest." Appraisal Institute, The Appraisal of Real Estate 10th Edition, 6 (1992). When appraising a property that has no restrictions of rights (beyond being subject to taxation, eminent domain, police power and escheat), these rights are normally viewed collectively (as a bundle) and valued after a highest and best use analysis of the entire property.

The highest and best use must be one that is legally permissible, physically possible, and financially feasible. In most properties there are many factors that influence value and contribute to the determination of the highest and best use. Such factors are nearly endless but commonly include influences, both internal and external, to the property such as location, size, utility, access, improvements, topography, view, and zoning. In valuing an unrestricted property, the effect of various value influencing factors are normally viewed collectively. However, in reality, such factors are rarely distributed evenly throughout the property. Some portions of a property may embody certain factors more than other portions. For example, the area of a lot that contains improvements is more valuable than unimproved areas, and the location on a lot from which a view is obtained is generally more valuable than obscured locations.

However, when a property is subject to current use assessment, certain rights and value influencing factors are temporarily veiled and not valued for taxation purposes. N.H. CONST. pt. II, art. 5-B; RSA 75:1; chap. 79-A. These rights and factors still exist and are held by the owner, but they are suppressed or restricted by current use for tax purposes until sometime in the future when the land that embodies those rights or value influencing factors no longer qualifies for current use and is then assessed at market value.

Land not in current use (LNICU) does not have its rights or factors restricted by current use assessment and should be valued at its highest and best use considering the rights and factors directly inherent in the LNICU and any effect the balance of the property has on the LNICU. Here again the factors influencing LNICU are both internal and external to that portion of the property.

Current use is a temporary easement, but in its effect on LNICU, is similar to that of more permanent conservation easements. Conservation easements often have a positive affect on the market value of land nearby not encumbered by the easement. This increase in value due the easement is often referred to as the "enhancement value" or "easement shadow" and must be accounted for in valuing the unencumbered land. See Vicary, Appraising Conservation Easements, The Appraisal Journal 138, (January 1994).

Findings

The board finds no probative evidence submitted by the Taxpayer to modify the pricing relationship between Pleasant Pond and Scobie Pond as determined by the Town. The board is very aware that frequently there is a

dearth of sales necessary to clearly establish the base values used during a reassessment. The Taxpayer did not present any market evidence or reasonable basis to dispute the Town's contention that Pleasant Pond is slightly superior to Scobie Pond. Thus, the board finds the Town's basic land values to be reasonable.

However, the board finds the Town generally attributed more value to the LNICU than those portions actually embody. While some of the rights of enjoyment due to the parcel's size and water frontage are contained in the LNICU, a large portion of those rights of future and more intensive development of the Property are contained in the current use land. The board has weighed the evidence of the various factors affecting value and has reduced the condition factors on the LNICU to a level that, in its judgement, is reasonable and supported by the evidence. "Given all the imponderables in the valuation process, `[j]udgement is the touchstone.´" Public Serv. Co. v. Town of Ashland, 117 N.H. 635, 639 (1977).

The board must make two different findings of value due to the differing size of the LNICU for the three years in question.

In 1990, .8 of an acre was not in current use. The board finds this .8 acre embodies the following factors that influence its value:

1) it is minimally improved with a camp used primarily as a changing shed and as a consequence does not have the development components found in a more fully developed residential site and inherent in the base unit assessment price;

2) the .8 acre site contains a significant, but not the total, area of land that would be needed to more intensely develop the property with a seasonal or year-round dwelling;

3) it is accessed by a private right of way;

4) a powerline easement runs along the frontage back approximately 25 feet from the shore;

5) it has access to Pleasant Pond and enjoys the privacy afforded by 580 feet of frontage on the pond and as part of a much larger parcel in both Francestown and Deering; and

6) the water frontage is generally shallow and contains weeds particularly near the inlet portion of the lot.

Based on these factors, the board finds the condition factor in 1990 should be reduced to 1.75, which results in a value for the LNICU of $66,500.

In 1991 and 1993, .25 acre was not in current use. The board finds this .25 acre embodies the following factors that influence its value:

1) it is minimally improved with a camp used primarily as a changing shed and as a consequence does not have the development components found in a more fully developed residential site and inherent in the base unit assessment price;

2) the .25 acre site contains only a small portion of the land that would be needed to more intensely develop the property with a seasonal or year-round dwelling; conversely, however, because the owner has the right to, at any time, add adjoining current use land to the site for more intensive uses (albeit, subject to a land use change tax and zoning restrictions), part of

the value of that right is contained in the .25 acre site; consequently, the site has more value than just an access point to the pond;

3) it is accessed by a private right of way;

4) a powerline easement runs along the frontage back approximately 25 feet from the shore;

5) it has access to Pleasant Pond and enjoys the privacy afforded by 580 feet of frontage on the pond and as part of a much larger parcel in both Francestown and Deering; and

6) the water frontage is generally shallow and contains weeds particularly near the inlet portion of the lot.

Based on these factors, the board finds the condition factor in 1991 and 1993 should be reduced to 1.50, which results in a value for the LNICU of $38,550.

In summary, the board finds the assessed values for 1990, 1991 and 1993 are:

1990

.8 acre site	$66,500		
3.6 acres in current use		$ 197	
cabin		$ 4,600	
	Total		$71,297

1991

.25 acre site	$38,500		
4.15 acres in current use		$ 241	
cabin		$ 4,600	
	Total		$43,341

1993

.25 acre site	$38,500		
4.15 acres in current use		$ 280	

cabin	$ 4,600	
	Total	$43,380

If the taxes have been paid, the amount paid on the value in excess of the values listed above shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Pursuant to RSA 76:17-c II, and board rule TAX 203.05, the Town shall also refund any overpayment for 1992 based on the 1991 ad valorem value of the LNICU and the appropriate current use value. 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.

Lastly, the Taxpayer requested the board consider whether the Town acted in good faith. The finding of bad faith on behalf of a municipality has been discussed in Harkeem v. Adams et al, 117 N.H. 67 (1977). In Harkeem, the court stated that, "where an individual is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention, an award of counsel fees on the basis of bad faith is appropriate." The court further states that bad faith is shown where the party in question has acted vexatiously, wantonly, obdurately or obstinately. The board finds that such severe actions did not occur in this case and, thus, there is no finding of bad faith. While the board found in favor of the Taxpayer, the shortcomings of the Town's assessments were not the result of any wanton disregard on the part of the Town of the Taxpayer's rights.

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 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

_____
George Twigg, III, Chairman

_____
Paul B. Franklin, Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to John L. Arnold, Taxpayer; and the Chairman, Selectmen of Francestown.

Dated: December 8, 1994

_____
Valerie B. Lanigan, Clerk

John L. Arnold

v.

Town of Francestown

Docket No.: 8718-90PT, 11152-91PT & 13819-93PT

ORDER

This order pertains to both parties' motions for rehearing and reconsideration. The board responds in detail to the respective requests below; however, in short the board denies the "Taxpayer's" motion for rehearing and grants the "Town's" request for clarification and amends its December 8, 1994 decision (Decision).

Taxpayer's Motion

The Taxpayer's motion is too lengthy to reiterate in full. However, the board denies the rehearing motion for two general reasons:

1) Many of the issues raised in the motion for rehearing were raised during the hearing and addressed in the board's Decision; and

2) The Taxpayer desired to present further evidence about the pricing relationship between Scobie Pond and Pleasant Pond; this is contrary to the board's rule TAX 201.37(e) which was specifically intended to require parties to present all evidence at the initial hearing and not to continually allow a "second bite of the apple" see O'Loughlin v. New Hampshire Personnel Comm'n., 117 N.H. 999, 1004 (1977) (when the petition fails to adequately explain why new

evidence it wishes to submit on rehearing could not have been presented at the original hearing, the agency may deny the rehearing motion).

However, for clarification purposes the board responds further on several points.

The Decision does not contain specific findings of fact relative to Avitar's (the Town's assessment company) methodology because the Decision focused on the statutory requirements of determining proper assessments regardless of the specific methodology employed by the Town. Consequently, the Decision simply focuses on determining fair market value of the land not in current use (LNICU) as required by RSA 75:1. The board found that with LNICU there are both internal and external factors that exert pressure on its determination of value. The board found the LNICU embodied some but not all of the rights that the full parcel contained. On one extreme the Town's assessment placed most of the future developments rights and privacy on the LNICU. The board found this was not appropriate because many of those factors were also contained in the land that was placed in current use and would reveal themselves during the determination of market value in a future land use change tax. On the other extreme the Taxpayer argued that the LNICU only had value similar to a right-of-way access to the pond. The board did not accept this extreme because the LNICU value is enhanced by its unity of ownership with the larger parcel and by some of the future development and privacy the larger parcel provides to the LNICU.

Further, the Taxpayer argued that because the Town's methodology applied the same base acre rate to building sites regardless of whether they were surrounded by current use land or not, the board's finding which considered privacy produced a discriminatory assessment. Not so. While the Town's

beginning site value was the same, the Town inherently varied the final building site value by both a neighborhood factor and a site specific factor for all building sites in Town. Neighborhood factors varied to reflect the relative desirability of neighborhoods and were a macro-review of external factors that would affect the specific property being appraised. Additionally condition factors were applied to each property which were site specific adjustments for numerous possible factors influencing value such as access, view, water-frontage, topography, amount of frontage, subdivision potential, etc. While it is not possible from the evidence submitted to conclusively state that the Town did not assess any other property for privacy and noise protection, the methodology exists for assessors to appropriately value LNICU and reflect the general and site specific factors impacting value.

In summary, it was clear that both parties wished the board to arrive at a more mathematical determination of value for LNICU. While as desirable as that may be, the board found many factors must be considered in determining market value especially for LNICU and that in doing so "judgement is the touchstone." Southern New Hampshire Water Co., Inc. v. Town of Hudson, N.H., slip. op. @ 2 (November 7, 1994).

Town's Motion for Clarification

The Town submitted revised assessments based on the board's Decision for the applicable years. The board finds the Decision inadvertently used the wrong year assessment card for the 1991 ordered abatement. Therefore, the board amends its Decision on page 9, last paragraph to read:

"In summary, the board finds the assessed values for 1990, 1991 and 1993 are:

1990

.8 acre site $66,500
3.6 acres in current use..... 197
cabin 4,600
Total $71,297

1991

.25 acre site $40,500
4.15 acres in current use..... 241
cabin..... 4,600
Total $45,341

1993

.25 acre site $38,500
4.15 acres in current use..... 280
cabin 4,600

Total $43,380"

The board declines to amend its 1993 finding of value as the only difference between the board's finding and the Town's calculations is due to a $50 rounding of assessment.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

_____
George Twigg, III, Chairman

_____
Paul B. Franklin, Member

Certification

I hereby certify that a copy of the foregoing order was mailed this date, postage prepaid, to John L. Arnold, Taxpayer; and Chairman, Selectmen of Francestown.

Dated:February 7, 1995

_____
Valerie B. Lanigan, Clerk