

Toabe Corp.

v.

Town of Alton

Docket No.: 8769-90

DECISION

This decision relates to two general issues: (1) whether TOABE Corporation (TOABE) has standing to appeal as a "person aggrieved" under RSA 76:16-a; and (2) the proper assessment.

1. STANDING

The evidence at the hearing raised the issue of whether a proper appeal had been taken. Specifically, if TOABE owned only undivided interests in nine (9) slips and common areas at Minge Cove Marina and all other slips with undivided interest in the common areas were separately deeded, does TOABE have standing to appeal as a "person aggrieved" on behalf of all owners at Minge Cove Marina.

TOABE argued it qualifies as a "person aggrieved" because it is both the taxpayer and the owner of an undivided interest in the Property which was assessed as a whole. The Town assessed and taxed the entire interest in the Property to TOABE and rendered a bill for the entire Property to TOABE, an

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arrangement by which the owners of the undivided interests did not object thus authorizing TOABE as the sole named taxpayer to represent their interest with regard to the taxes.

The Town testified that based upon a request for one tax bill from counsel for TOABE, it confirmed its authority pursuant to RSA 75:2 with the Town's attorney, and the Town and TOABE arrived at an understanding that the Town would send one tax bill to be disbursed to the individual owners.

RSA 75:2 states:

Whenever it shall appear to the selectmen that several persons are owners of distinct interests in the same real estate, or that one person is owner of land and another is the owner of any building, timber, or wood standing thereon, or ores or minerals therein, they may, upon request, appraise such interests and assess the same to the owners thereof separately, except as provided in RSA 75:3.

Based on a liberal interpretation of the statutes, without binding the board in the future, it appears that TOABE has standing in this case. RSA 75:2 seems to imply that the Town can send one bill to a corporation. However, every interest has a value and the board must look at the separate interests because that is how they are structured.

2. ASSESSMENT

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1990 assessment of \$3,094,300 (land \$2,018,700; buildings \$1,075,600) on a 5.47-acre lot known as Minge Cove Marina (the Property). For the reasons stated below, the appeal for abatement is denied.

The Taxpayer has the burden of showing the assessment was disproportionately high or unlawful, resulting in the Taxpayer paying an

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unfair and disproportionate share of taxes. See RSA 76:16-a; Tax 203.09(a);

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Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985). We find the Taxpayer failed to carry this burden and prove disproportionality.

The Taxpayer argued the assessment was excessive because:

- (1) the Property was purchased in 1988 for \$3,125,000 but was not a market sale because of pressures put on the buyers who rented boat slips to access their island properties;
 - (2) the purchase price was arrived at in 1986 and the 1990 assessment is not an accurate method to gauge the value of the Property;
 - (3) the seller forgave \$200,000 of the note in the fall of 1992 which in effect reduced the selling price to \$2,900,000;
 - (4) in 1988, 112 slips had formal approval from the Wetlands Board and in the fall of 1990, the Wetlands Board further grandfathered nine (9) spaces;
 - (5) the market experienced a wholesale transformation from 1986 to 1990; in 1986 and 1987, there was a panic market environment for docks and moorings for access to Lake Winnepesaukee and boat slips experienced an approximate 40% reduction in value by 1990;
 - (6) a comparison of assessments on the West Alton Marina and Parker Marine support the contention that the Property is overassessed;
 - (7) in 1990, the slips would probably sell in the \$15,000 to \$20,000 range;
- and
- (8) in 1990, the fair market value is approximately \$2,200,000.

The Town argued the assessment was proper because:

- (1) the sale of the Property took place in the latter part of 1988 just prior

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to the revaluation, and both buyer and seller verified the sale;

(2) any adjustments to the sale of the Property should be upward adjustments to reflect the amount of money expended by the buyers prior to the purchase, the cash sale v. mortgage equivalency and the fact that 112 slips were purchased and there are now 120;

(3) West Alton Marina and Parker Marine are income producing properties, Toabe slips can be conveyed individually and the value of the Property is in the slips -- comparisons to other marinas owned in fee would require substantial adjustments;

(4) the demand for the slips was evidenced by the sale of the Property and the sales history of the slips demonstrated that the values stabilized and continued to hold their value;

(5) the assessment does not assume that any slips will be added and did not assume the land was subdividable or could be further developed; and

(6) the Property is properly assessed for its ownership rights of individual slips.

Board's Rulings

In arriving at its decision, the board reviewed all of the evidence submitted by the parties, and one board member, to confirm the board's recollection of the testimony, listened to the entire tape recording of the hearing. Based on the evidence, the board finds the Taxpayer failed to prove the Property's assessment was disproportional.

The Taxpayer argued that the 1988 sale for \$3,125,000 was not an arms

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length transaction because:

- 1) the island owners purchased the Property under duress because they relied upon the marina to access their island properties;
 - 2) the price was arrived at in 1986;
 - 3) in 1986 and 1987, there was a panic market environment for docks and moorings for access to Lake Winnepesaukee;
 - 4) the Property was not exposed on the open market;
 - 5) the buyers were not typically motivated;
 - 6) it was not a normal transaction (i.e. no special or creative financing);
- and
- 7) in the fall of 1992, the seller forgave \$200,000 of the original note.

The Taxpayer stated that TOABE was formed as a pass through to purchase the marina as a whole and insulate the individual members against any loss. Approximately \$22,000 was raised as "seed money" to pay legal fees, etc. At the 1988 closing, 103 people were able to raise \$2.6 million (\$25,000 each) with a balance of \$600,000 owed the seller. TOABE then deeded a slip with .0085% undivided interest in the Property to each person and began to market the remaining slips.

At the time of closing, 112 slips had approvals from the Wetlands Board. In the fall of 1989, the Wetlands Board furthered grandfathered nine (9) spaces. For reasons the board has no knowledge of, one (1) space was lost so a total of 120 slips had approvals as of April 1, 1990.

In 1991 and 1992, 12 slips, listed for \$25,000 to \$29,000 each had not sold. The Taxpayer had to reduce the note so slips could be sold for less. Island Marina Association purchased a slip for \$31,000 (used for repair)

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because the association needed money to pay the seller. Two (2) slips were exposed to the market at \$7,500 each in order to pay the seller, who agreed to reduce the note by \$200,000.

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The Taxpayer argued that a comparison can be made between TOABE and Parker Marine and West Alton Marine. The board finds that, as opposed to Parker Marine and West Alton Marine, which are income producing properties, the subject Property consists of separately deeded rights which can be individually conveyed at will. As stated earlier, although the Town assessed the entire interest in the Property to TOABE, in arriving at its decision, the board must look at the Property's separately deeded ownership interests because that is how it is structured.

The board finds that the sales price is some indication of the total worth of the Property because, as opposed to an entity purchasing the Property with the intention of marketing and conveying rights, the buyers had a pre-existing relationship with the seller, which was used to enhance the ability to sell the Property. Approximately \$22,000 was raised as seed money. At the time of closing, 103 people had the necessary funds to "pool" into a pass through corporation for which each would receive a separately deeded interest in the Property. No evidence was submitted as to whether the Taxpayer made any investigations of the marina market before purchasing the Property which is some indication that the parties chose to purchase the subject based on their long standing connection to the marina and/or its accessibility to their island properties.

The board finds the value of the Property is inherent in the slip and each of the 120 slips could be separately deeded at any time. Further, the evidence of arms length sales of slips in Minge Cove Marina is indicative of

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the value for slips as of April 1, 1990.

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The board finds that what is being valued is not the value to the former owner in 1986 based on actual or estimated (pro forma) future cash flow from sales, but rather what the collective market value is of 120 separate owners in 1990. The board finds the assessment of \$3,094,300 or \$25,786 per slip is supported by the evidence. The board is not obligated or empowered to establish a fair market value of the Property. Appeal of Public Service Company of New Hampshire, 120 N.H. 830, 833 (1980). Rather, we must determine whether the assessment has resulted in the Taxpayer paying an unfair share of taxes. See Id. Arriving at a proper assessment is not a science but is a matter of informed judgment and experienced opinion. See Brickman v. City of Manchester, 119 N.H. 919, 921 (1979). This board, as a quasi-judicial body, must weigh the evidence and apply its judgment in deciding upon a proper assessment. Paras v. City of Portsmouth, 115 N.H. 63, 68 (1975); see also Petition of Guimm, ___ N.H. ___ (Dec. 17, 1993) (administrative board may use expertise and experience to evaluate evidence).

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 law. Thus, new evidence

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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

Michele E. LeBrun, Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to John R. Cooper, Director/Owner of Toabe Corp., Taxpayer; and Chairman, Selectmen of Alton.

Dated: April 19, 1994

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Valerie B. Lanigan, Clerk

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ORDER

This order relates to the Taxpayer's rehearing motion. The Taxpayer stated four reasons for the request for rehearing.

- 1) The board violated the intent of RSA 75:2 which allows for the property to be taxed as a unit unless the taxpayer requests division.
- 2) The board erred in encouraging and allowing the valuation of property held in undivided interest at a higher valuation than if it were owned by a simple owner.
- 3) The board improperly found that the assessment should be based on the collective market value of 120 separate owners as opposed to the value of the property as a whole.
- 4) The decision ignored the evidence of a 40% decrease in the value of boat slips between 1986 and 1989.

The board denies the Taxpayer's motion for rehearing. Much of the Taxpayer's arguments were ruled on by the board in its decision; however, for

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the purpose of clarification, the board responds further to the issues raised by the Taxpayer.

The Taxpayer argued that under the provisions of RSA 75:2 property owned in individual interest shall be taxed as one unit unless the taxpayer requests that the interest be separately assessed. In this case the owners had not requested any division, therefore, the Town assessed the Property as one unit.

The board rules in its decision that based on a liberal interpretation of the statutes that TOABE had standing to file the appeal in this case for all of the owners of undivided interests in the Property. However, in determining its market value the board must look to how the Property's ownership is structured and determine its highest and best use. Highest and best use has been defined "as that _ use which will likely produce 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.

The board finds that there is a distinction between:

- 1) a property owned jointly by a number of people without physical distinct interests that could not be separately conveyed (example: a piece of land owned by five people each having 1/5 interest in the land without physical distinct interests. None of the owners could sell the property separately but could sell their 1/5 interest in the property.); and
- 2) the subject Property which enjoys a unique use of a boatslip to access another estate owned by an individual and which can be separately conveyed.

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The warranty deed granted a specific boat slip along with a .0080 interest in common in and to Lot/on Echo Shores Road in Alton. Further, although a copy of the Declaration of Covenants and Restrictions was not provided to the board, the testimony was that because of the concern of retaining access to island properties, should an owner wish to sell the Property, it must either be sold back to the association or sold along with the owner's island property.

The board, based on the physical and legal description of the Property finds that the highest and best use is as separately deeded slip ownership with undivided interest in the common property. To assess the Property under RSA 75:2 would violate the provisions of RSA 75:1 which states the property shall be appraised "at its full and time value in money as they would appraise the same in payment of a just debt due from a solvent debtor, and shall receive and consider all evidence that may be submitted to them relative to the value of the property, the value of which cannot be determined by personal examination."

As of April 1, 1990, the undivided interests are so unique because the physical division of the Property allows each owner to fully enjoy the rights, interest and benefits of the Property and to individually convey these separately deeded rights at will.

Therefore, the property to be appraised is the separately transferable entities, not a marine as is the case for Parker Marine and West Alton Marine, both income producing properties.

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Having arrived at a highest and best use conclusion, the board reviewed the market evidence submitted by the parties. The Taxpayer stated in its rehearing motion that the board ignored the 40% decrease in value of boat slips in general which occurred between 1986 and 1990 and suggested that the board should apply that decrease to the purchase price of the subject, Exhibit TP4 which was introduced by the Taxpayer at the hearing. This exhibit showed an approximate 40% drop in average price of Mountain View boat slips. The witness testified that this evidence was being introduced to show a trend; however, no evidence of sales of slips in any other marinas on Lake Winnepesaukee were introduced. The board finds that in order to show a trend, sales of slips in other marinas must also be reviewed.

The Town submitted evidence (Exhibit TNA) of arms-length sales of slips in Minge Cove Marina (the subject Property) from March, 1989 through April 1992 which indicated that an assessment of \$25,786 was proper. The Taxpayer's argument that the 1986 sale price should be decreased by 40% had no basis for the reasons outline above.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Michele E. LeBrun, Member

CERTIFICATION

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I certify that the foregoing order has been mailed, postage prepaid, to John R. Cooper, Director/Owner of Toabe Corp., Taxpayer; and Chairman, Selectmen of Alton.

Dated:

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Valerie B. Lanigan, Clerk

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Order

This order relates to the need to clarify whether Toabe Corp. (Toabe) has properly filed an appeal. Toabe has appealed the taxes assessed against it for all property at Minge Cove Marina. The testimony at the hearing indicated that although Toabe owned some of the property as of April 1, 1990, that undivided interests had been deeded to various owners as of that date. Therefore, although the Town assessed only Toabe for 5.47 acres of land, 112 slips and various buildings at Minge Cove Marina, approximately 103 slips with undivided interest in the common areas had been separately deeded.

The filing of proper abatement applications with the municipality and then with this board are prerequisites for this board to have jurisdiction. See RSA 76:16-a. To file an appeal, the applicant must be a "person aggrieved" under RSA 76:16-a. The term "person aggrieved" means the owner or

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someone else directly affected by the assessment. Appeal of Plymouth, 125 N.H. 141, 144-45 (1984); Langford v. Town of Newton, 119 N.H. 470, 472 (1979).

Additionally, each aggrieved person must file a separate appeal with a \$65.00 filing fee. RSA 76:16-a.

The evidence at the hearing raises the issue of whether a proper appeal has been taken. Specifically, if Toabe owns only undivided interests in 9 slips and common areas, then those interests owned by Toabe are the only matters properly before this board, and the other matters would be dismissed because Toabe cannot appeal for the individual owners. Rather, those individuals would have had to have filed their own appeals.

To clarify this issue, Toabe shall, within 10 days of the Clerk's date below, file with the board (with a copy to the Town) a written statement with supporting documentation demonstrating Toabe's standing to bring this appeal on behalf of the other owners to this board. The Town shall have 10 days to respond after Toabe files its statement to file a response.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Michele E. LeBrun, Member

CERTIFICATION

I hereby certify that a copy of the foregoing order has been sent, postage prepaid, to John H. Cooper, Taxpayer; and Chairman, Board of Selectmen, Town of Alton.

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Dated: December 21, 1993

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Valerie B. Lanigan, Clerk