

**Winchester Associates**

**v.**

**Town of Winchester**

**Docket Nos.: 9710-90-PT and 12084-91-PT**

**DECISION**

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1990 and 1991 assessments of:

\$336,250 (land \$32,100; buildings \$304,150) on lots 41-47, a 13.206-acre lot with 7 duplex buildings;

\$146,200 (land \$15,850; buildings \$130,350) on lots 20-22, a 2.110-acre lot with 3 duplex buildings;

\$232,350 (land 23,200; buildings \$209,150) on lots 48-51 and lot 23, a 2.25-acre lot with 5 duplex buildings.

The total assessment was \$714,800 on 15 duplexes (collectively the "Property"). For the reasons stated below, the appeals for abatements are denied.

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 failed to carry this burden and prove disproportionality.

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The Taxpayer argued the assessments were excessive because:

- (1) the total property consists of 15 duplex apartment buildings for low- income housing under the FmHA Section 8 program, which provides that tenants pay 30% of their income in rent and HUD pays the remainder;
- (2) there is a limited return of 8% to its owner on the Property's original investment;
- (3) the road is private and is maintained by the Taxpayer;
- (4) the income approach reflects the Property's highest and best use as affordable rental housing;
- (5) the indicated fair market value of the Property was \$1,200,000 as of April 1, 1990, and \$1,300,000 as of April 1, 1991; and
- (6) assessments of \$468,000 as of April 1, 1990 and \$650,000 as of April 1, 1991 would be appropriate.

The Town argued the assessments were proper because:

- (1) the Property is located in a residential area and blends in well with the rest of the neighborhood;
- (2) the three lots are contiguous, legally subdivided lots and have been discounted for contiguous frontage;
- (3) the department of revenue administration's (DRA's) equalization ratio of 39% for 1990 was not accurate, a more accurate ratio would be 42%;
- (4) there are discrepancies in the Taxpayer's income statements;
- (5) an income analysis based on adjusted figures and a capitalization rate of .116

indicates \$636,159 assessment at a 42% equalization ratio which is within 11% of the 1990 actual assessment; and

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(6) based on the 1991 income, the capitalized income value, when equalized, exceeds the Town's 1991 assessment.

#### Board's Rulings

Based on the evidence and the board's extensive review of it, the board denies these appeals, finding the Taxpayer failed to carry its burden of proof.

In deciding whether a property has been overassessed, the board must look at all factors that are relevant to valuing the real property interests. See Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1975). This valuation "is to be based not on `artificial rules` but a consideration of all `relevant facts`." Royal Gardens Company v. City of Concord, 114 N.H. 68, 671 (1974). In Royal Gardens, the court held that federal regulations of subsidized housing must be considered to the extent they are relevant. Id. at 671-72. In Steele v. Town of Allenstown, 124 N.H. 487, 490-92 (1984), the court discussed the methodology to be employed when valuing subsidized housing. Under that methodology, the board is required to value the property at its highest and best use, considering all of the rights that are held by the owner and are transferrable with the Property. The discussion in Steele is very pertinent to this appeal, and that discussion leads the board to conclude: a) the highest and best use of the Property is as subsidized housing; and b) the effects, both positive and negative, of the federal regulations must be considered in valuing the Property. We also find the Taxpayer's analysis failed to fully do this, and therefore, we deny the appeal.

The board, having heard numerous subsidized housing cases, is aware that subsidized housing has certain benefits and detriments that are transferable to subsequent purchasers. Certainly, any prospective purchaser would consider these benefits and detriments, and therefore, these benefits and detriments must be considered in valuing the Property. It is, however, the Taxpayer's burden to present and analyze these factors.

The board finds the Property, as with other subsidized property, can accrue benefits to the owner other than simply the potential income, including:

- 1) the ability to sell the Property free of government control in the future;
- 2) the higher management fee;
- 3) the accelerated depreciation;
- 4) the low risk given the federal subsidies and, thus, low vacancy and collections;
- 5) the guaranteed rate of return; and
- 6) the rents in excess of market rents.

The Taxpayer's analysis considered the higher rents and lower vacancy rates at the Property, as was appropriate, but that analysis did not include the quantifiable benefits for: 1) the accelerated depreciation deduction;

2) the higher-than-market management fees; and 3) the residual account, i.e., the account for all net income in excess of the 8% return.

#### Accelerated Depreciation Deduction

Under federal regulations, the Taxpayer, or any subsequent owner of the Property, is entitled to accelerated depreciation. This accelerated depreciation provides a tangible and quantifiable benefit to the owners to the extent the accelerated appreciation deduction exceeds the depreciation that is normally allowed on nonsubsidized multi-family property. While this benefit does not result in a direct payment to the owners, it certainly is a financial factor that would be considered by any prospective purchaser. Furthermore, it is easily quantifiable. The Taxpayer's accountant stated the 1993 depreciation deduction was \$52,189. However, we were not told how that depreciation deduction compared with the depreciation deduction that would have been allowed on a nonsubsidized property.

#### Residual Account

The property owners are restricted to an 8% rate of return on their investment in the Property. However, if any excess net income is derived from the Property, it goes into a residual account. Presumably, this residual account is available to the owners to insure their yearly cash payment. The board, however, was not told how this account was handled, the balance of that account, its transferability, and what happens to the account upon sale or expiration of the government subsidy. These issues would be a factor, even if minor, that any prospective purchaser would presumably consider. The Taxpayer, however, failed to provide any analysis on this issue.

### Management Fee

The other issue that was inadequately addressed was the management fee. Based on the Taxpayers submittal, the 1990 management fee was \$26,750 or 10.4% of the effective gross income. In 1991, the management fee was \$25,450 or 9.4% of the effective gross income. These management fees raise two issues. First, the 10.4% and the 9.4% fees are in excess of the board's experience concerning multi-family properties. Second, in the income analysis, the actual management fee is an expense that is higher than normally would be collected, and this reduces the net operating income.

Management fees are typically 5-6%. In addition to the percentage being highered, the effective gross income is higher for this Property because the rents exceed market rents. The Taxpayer would presumably argue that subsidized housing always has a higher management fee because of the additional work. No information was provided on this point, and thus, the board wonders whether the higher fee is because of the additional work or is simply because of the federal regulations allowing a higher fee, i.e., governmental largess. Either way, the income that can, in essence, be spun off to the owners is in excess of the market management fee.

### Detriments

The Taxpayer also provided information concerning the detriments of the subsidy program. These issues are much more difficult to quantify, and in some ways are much more speculative than the quantifiable and certainty of the benefits discussed above. Specifically, the Taxpayer stated one of the detriments was that the federal subsidy would run up in 2001, which could

decrease the Property's value. However, there was insufficient information to show that the termination of the subsidy would in fact be a detriment. In summary, while the detriments may have an effect on value, the Taxpayer did not provide sufficient information to support a finding.

### Conclusion

In conclusion, the board simply finds the Taxpayer did not provide sufficient information and analysis to show overassessment. The board understands the information requested by the board may, at times, be difficult to obtain and calculate. Nonetheless, any prudent purchaser of the Property, and coincidentally any prudent seller of the Property, would certainly consider the factors discussed above before buying or selling the Property.

### Requests

The board rules as follows, on the Town's requests for findings of fact and rulings of law:

#### Findings of Fact

1. Granted.
2. Granted.
3. Granted.
4. Granted.
5. Granted.
6. Granted.
7. Neither Granted nor Denied.
8. Granted.
9. Granted.
10. Granted.
11. Granted.
12. Neither Granted nor Denied.
13. Granted.
14. Granted.
15. Neither Granted nor Denied.
16. Granted.

17. Neither Granted nor Denied.
18. Granted.
19. Denied.
20. Granted.
21. Neither Granted nor Denied.
22. Neither Granted nor Denied.
23. Neither Granted nor Denied.
24. Neither Granted nor Denied.
25. Neither Granted nor Denied.
26. Neither Granted nor Denied.
27. Neither Granted nor Denied.
28. Neither Granted nor Denied.
29. Neither Granted nor Denied.
30. Neither Granted nor Denied.

#### Rulings of Law

31. Granted.
32. Granted.
33. Granted.
34. Granted.
35. Granted.
36. Granted.
37. Granted.

#### Rehearing and Appeal

A motion for rehearing, reconsideration or clarification (collectively "rehearing motion") of this decision must be filed within thirty (30) 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 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

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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

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Ignatius MacLellan, Esq., Member

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Michele E. LeBrun, Member

#### CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to John M. O'Connor, Agent for Winchester Associates, Taxpayer; and Beth George-Kane, Esq., Counsel for the Town of Winchester.

Dated: January 25, 1994

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Valerie B. Lanigan, Clerk

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**ORDER**

This order relates to the "Taxpayer's" rehearing motion. The motion is denied for failing to state any "good reason" to grant the motion. See 541:3.

The major basis of the motion appears to be the Taxpayer's complaints about the board not providing the Taxpayer with sufficient specificity about issues that the board wanted addressed. The Taxpayer stated: "The disturbing aspect of this decision is that the Board asked for information in order to rule on the case and then interpreted the information as insufficient on three points which were not specifically requested."

In tax abatement appeals, the taxpayer has the burden to show overassessment. This is normally done by the taxpayer proving the property's value on the assessment date and then comparing that value with the general level of assessment in the town. In this case, the Taxpayer attempted to prove the property's value by using the income approach. At the hearing, however, the board

expressed reservations about whether the Taxpayer's income analysis adequately addressed the benefits and detriments of subsidized housing. Because of the board's concerns about the Taxpayer's analysis and because of the board's

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heightened awareness that a straight income analysis might not reflect the true value of subsidized housing, the board, at the hearing, provided the parties with a copy of Jaconetty, Valuation of Federally Subsidized Housing: The Judicial Response [Revisited]" (1994), presented at the Legal Seminar of the International Association of Assessing Officers. (A copy of this article has been placed in the file.) This article presented a review of subsidized housing cases and the trend toward reviewing the value of the benefits and detriments of subsidized housing. The board then granted the Taxpayer an opportunity to explain the detriments and benefits of this particular subsidized property and to include that information in an analysis of the property's value. Thus, while the Taxpayer is crying foul on the board's part, the board made an effort to provide the Taxpayer, both by discussing it at the hearing and by providing the article, the board's thinking on this topic and to provide the Taxpayer with an opportunity after the hearing to consider the benefits and detriments and to include that in a revised analysis. Unfortunately for the Taxpayer, the information provided both at the hearing and after the hearing was not sufficient to allay the board's concerns about whether the Taxpayer had properly valued the Property.

The board understands that requiring a taxpayer who owns subsidized housing to consider the detriments and benefits of owning the property will complicate the valuation of subsidized housing. However, any prospective purchaser of the property would certainly consider the benefits and detriments, and therefore, because assessments must be based on market value, these matters must be considered.

While the rehearing motion attempts to isolate certain factors that were specifically addressed in the board's decision, the primary basis of the board's decision was the lack of information from the Taxpayer in both the first instance (at the hearing) and in the second instance (in the post-hearing submission).

For the reasons stated above, the rehearing motion is denied. Under RSA 541:6, the Taxpayer may appeal this matter to the supreme court within thirty (30) days of the clerk's date below.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

\_\_\_\_\_  
George Twigg, III, Chairman

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Ignatius MacLellan, Esq., Member

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Michele E. LeBrun, Member

**Certification**

I hereby certify that a copy of the foregoing order has been mailed this date, postage prepaid, to John M. O'Connor, representative for the Taxpayer; Beth George-Kane, Esq., counsel for the Town of Winchester; and, Chairman, Selectmen of Winchester.

Date: March 28, 1995

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Valerie B. Lanigan, Clerk