

Kenneth Donaghey

v.

Town of Newbury

Docket No. 13940-93PT

ORDER

After reviewing the parties' original and supplemental material, the board has decided a hearing is required to resolve this issue. The hearing will review the main issue of whether the appealed property should have been assessed or whether the benefited lots should have been assessed the added value for the lake access. To resolve this issue, the board must look at issues beyond the appealed property.

The board will need the following additional information from the "Town":

- 1) an explanation of how the Town assessed the lots with access to the appealed right-of-way, including the "Taxpayer's" other lots that have or may have such benefit;
- 2) the assessment cards for the Taxpayer's other lots;
- 3) the assessment cards for the other lots that have access to the right-of-way; and
- 4) a copy of the tax maps.

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The board will need the following information from the Taxpayer:

- 1) sample copies of deeds that granted the use of the right-of-way.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Ignatius MacLellan, Esq., Member

CERTIFICATION

I hereby certify that a copy of the foregoing has been mailed this date, postage prepaid, to Kenneth Donaghey, Taxpayer; and Chairman, Board of Selectmen of Newbury.

Date:

Valerie B. Lanigan, Clerk

Kenneth Donaghey

v.

Town of Newbury

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ORDER

The board, having reviewed the parties' submittals, needs additional information to decide this appeal. The board has been unable to fully understand the "Property" under appeal. The file does not include sufficient information to allow the board to review the "Taxpayer's" arguments.

Therefore, the Taxpayer shall, within twenty days of the clerk's date below, submit the following to the board, sending a copy to the Town:

1. a more detailed description of the Property, including a larger map such as the tax map (The Taxpayer sent a copy of a plan that showed a "Tract I" and a "Tract II." Does the Property include both tracts or only one?);
2. an explanation of the 1986 annexation with a copy of the approved plan and a copy of all planning board or zoning board votes on the annexation (The board could not decipher whether the annexation plan combined Tract I and II or whether other lots were also involved.);
3. a map showing all properties that have easements over the Property (include for each lot: size and whether presently developed);
4. an explanation of whether the Property can be used for any other purposes, e.g., building lot or creation of additional rights in other properties either owned by the Taxpayer or others; and

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5. a plan that shows the Property and all other properties owned by the Taxpayer in the "Town," including information about each lot's present use and potential use in connection with the Property (This would include whether Taxpayer's other properties are presently, or potentially could be, benefitted by use of the Property and whether the Taxpayer's other properties could be subdivided with a right to use the Property.).

The Town shall have 10 days upon receipt of the Taxpayer's information to

file any response to the Taxpayer's submittal. This response should include the

Town's position about the Property's potential uses, existing uses, and taxability.

Once the board has the information, the board will review it with the entire file and issue a decision. If the Taxpayer cannot adequately explain these matters to the board, the board may either deny the appeal or schedule a hearing.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Ignatius MacLellan, Esq., Member

CERTIFICATION

I hereby certify that a copy of the foregoing has been mailed this date, postage prepaid, to Kenneth Donaghey, Taxpayer; and Chairman, Selectmen of Newbury.

Date:

Valerie B. Lanigan, Clerk

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DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1993 assessment of \$21,450 on a small parcel of waterfront land that includes a dock but is subject to several rights-of-way (the Property). The board originally assumed the Taxpayer owned additional property in the Town, requiring the board to look at the Taxpayer's other properties to determine whether the Taxpayer's entire estate was overassessed. During our deliberations, the board discovered the Property is owned solely by the Taxpayer, and the other properties in which the Taxpayer has an interest are owned by the Taxpayer and his wife. Thus, for purposes of determining the proportionality of the Taxpayer's entire estate, the board need only consider the Property because it is the only property solely owned by the Taxpayer. For the reasons stated below, the appeal for abatement is granted.

The Taxpayer has the burden of showing the assessment was 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.

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The Taxpayer argued the assessment was excessive because:

- (1) the waterfront is restricted and a building cannot be constructed on the Property;
- (2) the Property's only use is to provide lake access to 15 properties and vehicle access to five properties;
- (3) the right-of-way was made in 1903 and was never taxed prior to 1993 and the Town provided no notice of the change in tax status;
- (4) the Town assessed the Property at \$750 per-front-foot, which is the same rate as a buildable lot;
- (5) the parties benefitting from the right-of-way should be taxed and not the Taxpayer;
- (6) the water depth off the boat slip is only 3 feet and not worth \$30,000; and
- (7) there were errors on the assessment-record card, i.e., incorrect measurements.

The Town argued the assessment was proper because:

- (1) the Property was assessed the same as other lots on the lake;
- (2) boatslips sell for \$30,000 and the Property has more value than a boatslip;
- (3) the right-of-way was addressed when assessing the Property; and
- (4) the Taxpayer was assessed as a fee owner with a right-of-way on the Property -- rights-of-way are not taxed to owners in the Town.

Based on the evidence, the board finds the proper assessment should be \$13,535 (land \$12,660; dock \$275; paving \$600). As explained below, the board finds the Property to be taxable to the Taxpayer.

The board's assessment was arrived at by recalculating the assessment-record card using a 50% undeveloped factor due to the unbuildability of the lot and by adding value for the paving and the dock. The recalculated land is as follows.

<u>Basic Value</u>	<u>Topo</u>	<u>Excess</u> <u>Frontage</u>	<u>Undev</u>		
\$ 12,240	.8	1.25	.5	=	\$ 6,120
\$ 13,080	.8	1.25	.5	=	<u>\$ 6,540</u>
					\$12,660

The board was not provided with any valuation information. The board concludes, based on its judgment, that the \$39,000 equalized value on the Property (\$21,450 assessment ÷ .55 revenue department ratio) was excessive. The revised equalized assessment is \$24,610, which is more in line with the board's value judgment.

The board arrived at the ordered assessment by using the Town's assessment methodology but making a correction due to the Property's unbuildability. This same adjustment was made in the 1994 reassessment.

This decision's main point is that the Property is taxable to the Taxpayer. The Town's historical failure to tax the Property does not have any bearing on the Property's taxability or the board's decision. Rather, decisions concerning taxability require an analysis of the interest at issue and whether that interest is taxable under our laws.

The Taxpayer has substantial rights in the Property, including:

- 1) fee ownership of the Property, admittedly subject to the easements held by others;
- 2) the fee ownership provides access to the lake for recreational activities;
- 3) the fee ownership includes the sole right to own and use the dock;
- 4) the fee ownership may include the right to grant others access over the Property; and
- 5) the fee ownership allows the Taxpayer to sell the fee ownership with all of its inherent rights.

The board also notes that if the Taxpayer actually thinks the Property lacks value, he is free to either allow the Property to go to tax sale or to deed undivided interests to the easement holders.

RSA 72:6 states: "All real estate, whether improved or unimproved, shall be taxed except as otherwise provided." RSA 21:21 I states: "The words 'land,' 'lands' or 'real estate' shall include lands, tenements, hereditaments, and all rights thereto and interests therein." The Taxpayer's ownership rights in the Property constitute real estate under RSA 21:21 I, and therefore, the Property must be taxed under RSA 72:6.

In valuing the Property, the Town is required to consider all factors affecting value, including the existence of all attributes, e.g., exclusive use of the dock, and all detriments, e.g., the existence of several easements over the Property. See Paras v. City Portsmouth, 115 N.H. 63, 68 (1975). The Taxpayer correctly stated the Town should have included the value of the easement rights in the value of properties that hold the easements. However, the Town's failure to do so does not mean that the Property was overassessed.

If the taxes have been paid, the amount paid on the value in excess of \$13,535 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. The decision does not apply to any subsequent years, see RSA 76:17-c, because the Town underwent a complete revaluation in 1994. Additionally, the board's decision here was based on methodology that was applied in the 1993 assessment.

A motion for rehearing, reconsideration or clarification (collectively "reconsideration 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 reconsideration motion must state with specificity all of the reasons supporting the request. RSA 541:4; TAX 201.37(b). A reconsideration 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 reconsideration motion is a prerequisite for appealing to the supreme court, and the grounds on appeal are limited to those stated in the reconsideration motion. RSA 541:6. Generally, if the board denies the rehearing motion, an appeal to the supreme court must be filed within thirty (30) days of the date on the board's denial.

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Ignatius MacLellan, Esq., Member

Michele E. LeBrun, Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Kenneth Donaghey, Taxpayer; and Chairman, Selectmen of Newbury.

Dated: December 20, 1995

Valerie B. Lanigan, Clerk

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