

John and Peggy Gallus

v.

City of Berlin

Docket No.: 14781-93PT

ORDER

This order relates to the City's failure to comply with the board's order. See TAX 201.04 (b). Specifically, the City has not provided the board with a copy of the City's zoning ordinances as ordered at the hearing on August 8, 1996.

The Town shall, within 10 days comply with the board's order, filing a copy of the City's zoning ordinances.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Valerie B. Lanigan, Clerk

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to John and Peggy Gallus, Taxpayers; and Chairman, Board of Assessors, City of Berlin.

Date:

Valerie B. Lanigan, Clerk

John and Peggy Gallus

v.

City of Berlin

Docket No.: 14781-93PT

DECISION

The "Taxpayers" appeal, pursuant to RSA 76:16-a, the "City's" 1993 assessments as follows:

\$101,900 (land \$18,000; building \$83,900) on Lot 124, a .13-acre lot with a retail store (45-53 Main Street);

\$2,700 on Lot 368, a vacant .14-acre lot (Prospect Street);

\$6,000 on Lot 369, a vacant .29-acre lot (Prospect Street);

\$8,000 on Lot 395, a vacant .19-acre lot (Prospect Street);

\$69,300 (land \$10,600; buildings \$58,700) on Lot 396, a .27-acre lot with a duplex (292 Prospect Street); and

\$3,300 on Lot 399, a vacant .12-acre lot (Arthur Street) (the Properties).

For the reasons stated below, the appeal for abatements is granted.

The Taxpayers have the burden of showing the assessments were disproportionately high or unlawful, resulting in the Taxpayers 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 Taxpayers

carried this burden and proved disproportionality.

The Taxpayers argued the assessments were excessive because:

(1) the 45-54 Main Street property is a 3-story commercial building, which is at the end of its useful life and lacks heat, water and sewer on the second and third floors (which have not been occupied for over 16 years), and the

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Dead River Channel runs under the front of the building, which has damaged the basic structure of the building;

(2) 292 Prospect Street is a duplex building with various lots, some of which should be merged and some are below street level, and there is water in the basement caused by springs behind the land;

(3) comparables demonstrated the overassessment of the Properties;

(4) properties are a "hard sell" generally in Berlin due to the downturn in the Berlin economy;

(5) the value of all Prospect Street properties and Arthur Street properties as of April 1993 was between \$55,000 and \$60,000; and

(6) the value of the Main Street property as of April 1993 was \$35,000 to \$40,000.

The City argued the assessments were proper because:

(1) the City's method for valuing properties was the cost approach; the Main Street property was depreciated by 55% based on its remaining economic life, 10% functional for lack of heat/hot water and 20% locational for its lack of parking on Main Street;

(2) the Main Street property appears to be properly valued at \$7.05 per-square foot;

- (3) the Prospect Street property was graded average with 10% economic, 10% structural and 10% functional depreciation applied, and the assessment was supported by comparable sales;
- (4) the Prospect Street and Arthur Street lots each were depreciated for their topography and other restrictions; and
- (5) the City reviewed the sales comparison and income approaches and applied them as a check to the cost approach and found they supported the assessed values of the Properties.

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Board's Rulings

Response to City's Letter

This responds to the City's August 2, 1996 letter concerning the board instructing the board's review appraiser to review individual appeals and to send a copy of his report to the City and to the individual taxpayers.

The review appraiser becomes involved in an appeal when the board concludes the review appraiser can assist the board in reviewing an appealed assessment. In these individual appeals, the board decided to employ the review appraiser to: 1) independently review the appealed assessments thereby providing the board with additional evidence on whether the assessments were correct or not; 2) address the concerns that were raised during the reassessment hearings about whether the City's assessments were correct or not and whether the City was performing an adequate review of the assessments (e.g., April 4, 1995 order at 4; September 29, 1995 order at 2; August 15,

1995 review appraiser's report at 4-6); and 3) provide a basis for resolution without a hearing. The board has used its review appraiser in similar situations, and thus, the City has not been treated differently than other municipalities.

"In determining matters before it, the board may institute its own investigation, or hold hearings, or take such other action as it shall deem necessary." RSA 71-B:5 I. To this end, the board's staff includes a review appraiser "who shall be competent to review the value of property for tax purposes." The individual appeals that the review inspector reviewed were filed under RSA 76:16-a, which requires the board to make "inquiry and investigation ***." The board, therefore, has the discretion, and in some cases the duty, to employ the review appraiser to review an assessment and to then file a report with the board. Appeal of Sokolow, 137 N.H. 642 (1993) (the board's denial of a tax abatement was reversed and remanded because board did not have board appraiser review assessment).

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Once the review appraiser's report is completed and filed with the board, the board is required by RSA 541-A:31 IV, VI (h) and RSA 541-A:33 VI to provide the report to the parties and to provide the parties with an opportunity to comment on the report. See also Appeal of Sokolow, 137 N.H. at 643 (court presumes that after a report is prepared the parties will have an opportunity to rebut the report). Providing the report to the parties before the hearing enables the parties to comment on the report at the hearing itself rather than leaving the record open for later comment.

The report, however, does not establish the proper assessment. It does

not, as the City asserted, automatically have the board's "imprimatur." Rather, the board reviews the report and treats the report as it would other evidence, giving the report the weight it deserves. Thus, the board may accept or reject the review appraiser's recommendation. Mr. Bartlett's report (see the report's introduction) explicitly informed the parties about the extent of his investigation and analysis, and he stated the report was not conclusive but was only part of the evidence.

Given the above discussion, the board concludes it was appropriate to seek the review appraiser's input on this case and to then provide his report to the parties before the hearing. This procedure allows the parties to use the hearing to present their original evidence and to respond to the report.

Valuation Findings

On September 16, 1996, the board viewed the Property from the exterior at the same time it viewed the other 1993 appealed properties in Berlin. The view was done without either the City or the taxpayers being present. The view enabled the board to be more familiar with the appealed properties and the various neighborhoods and value influencing factors within Berlin.

Based on the evidence, the board finds the following assessments:

45-53 Main Street (Lot 124) = \$71,000;

292 Prospect Street, combining Lots 395, 396 and 399 = \$70,000; and

Prospect Street (Lots 368 and 369) = \$4,500.

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Concerning the 45-53 Main Street property, the equalized assessment was \$104,000, and the board's appraiser estimated a value range of \$88,800 to \$89,100. The board reviewed the board appraiser's analysis and concluded an additional -20% was required due to the property's poor condition and quality

(\$88,800 x .8 = \$71,040). Additionally, the City asserted the property was worth \$7.05 per-square foot, but the City applied that figure to the entire property (14,448 sf). The board concluded the third floor was basically useless space. Taking the \$7.05/square foot times 10,148 (first and second floor) equals \$71,550 (rounded). This property, unlike many downtown properties that are brick, is a wood-frame building that is very close to the end of its useful life. While the assessment card included substantial depreciation, the depreciation was still inadequate to reflect the building's value.

The City did not provide sufficient information on the comparables for the board to determine how the comparables related to the property. For example, the City did not provide the board with photographs of the comparables and did not submit a comparison grid. Rather, the City used the sales only to show gross comparisons, and the board finds this approach inadequate.

The Taxpayers supplied the board with a sale at 56 Mason, which sold for \$57,500. The board heard about the Mason Street property in another appeal, and that property was similarly in poor shape, albeit a brick building. The Mason Street property also had apartments on the second floor. The apartments were, however, in outdated shape, but they were usable with heat and utilities nonetheless.

Concerning the Prospect Street properties and the Arthur Street lots, the board reviewed the zoning ordinance to determine the status of the nonconforming contiguous lots. Under Section 1504 I. A., to the extent the lots abutted each other, they merged for all practical purposes. The zoning ordinance allows smaller nonconforming lots to be built upon unless "two or

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more such lots were adjoining, and in the same ownership on the effective date of the ordinance ***, " in which case the lot was not buildable but must be merged with the adjoining non-conforming lot. In addition to the merger issue, the board agrees with the Taxpayers that any prospective purchaser would view many of the lots as one property. Therefore, the board concludes that the proper way to assess these properties is to assess Lots 395, 396 and 399 as one property and to assess Lots 368 and 369 as another lot.

Turning to Lots 395, 396 and 399, the board finds an assessment of \$70,000. This value is consistent with Mr. Bartlett's \$71,200 conclusion. The board arrived at this figure, in addition to relying on Mr. Bartlett's report, by combining the three lot assessments with appropriate adjustments for topography and shape ($\$15,000 \times .58 \times .85 = \$7,400$ for the basic lot) plus adjustments for frontage (186 feet \times \$25/foot \times .75 adjustment = \$3,490 plus 50 feet \times \$12/front foot \times 50% adjustment = \$300). This calculation reduced the total land assessment from \$21,900 to \$11,190, resulting in a revised total assessment of \$69,000 (\$11,900 land; \$58,700 building).

The board also reviewed the Taxpayers' sales at 173 Church Street, 186 Church Street, 286 Church Street, 166 Prospect Street, and 299 Hillside Avenue. These sales were all single-family sales (except 173 Church, which was a single family with a basement apartment), and the sales indicated a per-square-foot price for a similar quality property of approximately \$35/square foot (dividing the sales price by the basic size of the house). The board assumes a true duplex was worth at least 15% more than a single family, which equates to approximately \$40.29/square foot multiplied by 1,753 square feet = \$70,600.

Concerning Lots 368 and 369, the board recalculated the assessments consistent with the Taxpayers' information concerning topography and development problems. The board used the following calculation: $\$15,000 \times .66 \times .30 = \$2,970$ plus 150 feet $\times \$20/\text{front foot} \times .5$ condition factor = $\$1,500$ added to the $\$2,970$ rounds to approximately $\$4,500$.

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Refund

If the taxes have been paid, the amount paid on the value in excess of $\$145,500$ for all the properties 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, unless the City has undergone a general reassessment, the City shall also refund any overpayment for 1994, 1995 and 1996. Until the City undergoes a general reassessment, the City shall use the ordered assessment for subsequent years with good-faith adjustments under RSA 75:8. RSA 76:17-c I.

Rehearing

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 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. 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.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Ignatius MacLellan, Esq., Member

Michele E. LeBrun, Member

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Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to John and Peggy Gallus, Taxpayers; and Chairman, Board of Assessors, City of Berlin.

Date: January 10, 1997

Valerie B. Lanigan, Clerk

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John and Peggy Gallus

v.

City of Berlin

Docket No.: 14781-93PT

ORDER

This order responds to the "City's" clarification motion, which is granted. The City raised three issues:

- 1) the proper assessment and calculation for Lots 395, 396 and 399;
 - 2) the proper lot size and assessment calculation for Lots 368 and 369;
- and
- 3) whether the tax lots can remain as shown on the tax maps.

Lots 395, 396 and 399

The board confirms the assessment on Lots 395, 396 and 399 as \$70,000. The board corrects two errors on page 6. Page 6, paragraph 1 is revised to read: "This calculation reduced the total land assessment from \$21,900 to \$11,190, resulting in a revised total assessment estimate of \$69,890 (\$11,190 land; \$58,700 building)." Please note: the \$70,000 ordered assessment was a rounded figure.

Lots 368 - 369

The City questioned the board's use of .66 acres when the Lots 368 and 369 are only .43 acres. The board's notes indicate that under the City's assessment methodology .43 acres equates to a .66 adjustment to the basic-lot value. The .66 is from a land-size adjustment chart and does not reflect actual acreage. If the board is incorrect, the City may recalculate using .43 instead of .66.

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Revision to Tax Maps

The City is not obligated to merge the lots for planning or tax mapping purposes. All the City must do is use the board's ordered assessment. The City should allocate the ordered assessment to the lots as it sees fit. As the board stated, decision page 5-6, the lots are merged for "all practical purposes[,] " and the lots would be viewed by the market as one lot. The board did not order a merger on the tax maps.

Rehearing Motion

Because this order corrects and clarifies the board's decision, the parties shall have 30 days from the clerk's date below to file an RSA 541:3 rehearing motion before appealing to the supreme court.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Ignatius MacLellan, Esq., Member

Michele E. LeBrun, Member

Certification

I hereby certify that copies of the foregoing order have this date been mailed, postage prepaid, to John and Peggy Gallus, Taxpayers; and Chairman, Board of Assessors, City of Berlin.

Date: February 13, 1997

Valerie B. Lanigan, Clerk

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