

Oakshire Development LLC

v.

Town of Merrimack

Docket Nos.: 15410-94PT and 16127-95PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the following 1994 and 1995 assessments.

Tax Year 1994

In 1994 the property under appeal consisted of 15 completed condominium units and 27 undeveloped condominium sites with only foundations (the Property). The Property is part of a development known as The Birches Condominiums which is comprised of 97.5 acres with common amenities of a clubhouse, tennis courts and a swimming pool. The 1994 assessed valuations are as follows:

Location	Map/Lot	Assessment
*1 Adams Ave	4C/286-A01	\$33,800
2 Adams Ave	4C/286-A02	\$86,700
*3 Adams Ave	4C/286-A03	\$33,300
4 Adams Ave	4C/286-A04	\$82,500
*5 Adams Ave	4C/286-A05	\$33,300
6 Adams Ave	4C/286-A06	\$82,500
*7 Adams Ave	4C/286-A07	\$33,800
8 Adams Ave	4C/286-A08	\$86,700
11 Adams Ave	4C/286-A11	\$82,500

12 Adams Ave	4C/286-A12	\$82,500
15 Adams Ave	4C/286-A15	\$82,500
*2 Burberry Ct	4C/286-B02	\$33,800
*4 Burberry Ct	4C/286-B04	\$33,300
*6 Burberry Ct	4C/286-B06	\$33,300
*8 Burberry Ct	4C/286-B08	\$33,800
*10 Burberry Ct	4C/286-B10	\$33,800
*12 Burberry Ct	4C/286-B12	\$33,300
*14 Burberry Ct	4C/286-B14	\$33,800
22 Jonston Dr	4C/286-J22	\$83,900
*1 Lynn Dr	4C/286-L01	\$33,800

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*2 Lynn Dr	4C/286-L02	\$33,800
*3 Lynn Dr	4C/286-L03	\$33,300
*4 Lynn Dr	4C/286-L04	\$33,300
*5 Lynn Dr	4C/286-L05	\$33,300
*6 Lynn Dr	4C/286-L06	\$34,700
*7 Lynn Dr	4C/286-L07	\$33,800
*8 Lynn Dr	4C/286-L08	\$32,400
*9 Lynn Dr	4C/286-L09	\$32,400
*10 Lynn Dr	4C/286-L10	\$33,800
*11 Lynn Dr	4C/286-L11	\$34,700
*12 Lynn Dr	4C/286-L12	\$33,300

(\* denotes undeveloped condominium sites with foundation.)

At the hearing the parties reached settlement on the 15 completed condominiums. The parties stipulated the assessments are to be based on the 1995 assessed valuation of \$62,200 for an interior unit and \$62,700 for an end unit equalized by the Town's 1994 ratio of .95. Therefore, the board's decision for the 1994 tax year relates to the remaining 27 undeveloped condominium sites with foundations.

#### Tax Year 1995

In 1995 the Taxpayer appealed only the assessments on the 27 undeveloped condominium sites with foundations. Each site is valued at \$10,300 with \$5,000 allocated to the land and \$5,300 to the concrete foundations. The total appealed assessment is \$278,100.

The Taxpayer has the burden of showing the assessments were

disproportionately high or were unlawful, resulting in the Taxpayer paying a disproportionate share of taxes. See RSA 76:16-a; TAX 203.09(a); Appeal of City of Nashua, 138 N.H. 261, 265 (1994). To establish disproportionality, the Taxpayer must show that the Property's assessments were higher than the general level of assessment in the municipality. Id. For the reasons stated below, the 1994 appeals for abatement are granted and the 1995 appeals are denied.

The Taxpayer argued the assessments were excessive because:

- (1) two comparable sales indicate a value for the sites of approximately \$2,000 to \$5,000 including all property rights and components of value;
- (2) a typical buyer would consider the pads to contribute nominal if any value due to the timing in the real estate marketplace;

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- (3) no builders were willing to finalize any offers due to the 55 year age occupancy requirement for the majority of units;
- (4) currently there is an offer of \$148,000 for the 27 pads;
- (5) the Taxpayer as the successor declarant has an undetermined liability for unfinished infrastructure ranging from \$50,000 to \$100,000; and
- (6) the last 27 sites are in the least desirable location in the development.

The Town argued the assessments were proper because:

- (1) the issues of "successor liability" and "elderly" restriction should not be allowed because they were not detailed in the Taxpayer's appeal arguments to the board of tax and land appeals;
- (2) the allocation of value between buildings and land (site and amenities) is proper because it is consistent and based on market value;

(3) \$10,300 is not unreasonable for the rights and amenities associated with the sites; and

(4) the Taxpayer's two transactions from which the site values were derived were either bank or party-related transactions.

#### **Board's Rulings**

Based on the evidence, the board finds the proper 1994 assessment to be \$10,100 for all 27 sites with a total assessed valuation of \$272,700. This is based on finding the 1995 assessed valuation of \$10,300 is reasonable and equalizing the 1995 indicated market value to the 1994 level of assessment of 95%. (The department of revenue administration determined that Merrimack's 1994 and 1995 equalization ratios were 95% and 97% respectively. The mathematics is as follows:  $\$10,300 \div .97 = \$10,619 \times .95 = \$10,100$  rounded). For 1995 we find the assessment of \$10,300 per site to be proper.

#### **Preliminary Issues**

During the hearing, the Town argued two of the Taxpayer's arguments - the Taxpayer's liabilities as the successor declarant and the requirement that certain percentage of the units be sold to "elderly" owners - were not issues noted on the appeal to the board as required by TAX 202.02(d).

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First, the board rules the Taxpayer's argument of successor declarant liability was not properly raised in the appeal to the board and thus, cannot be argued at the hearing. TAX 202.02 (d). Mr. Wenger, the Taxpayer's attorney, stated this issue did not develop until 1996, and as of the hearing date the extent of the Taxpayer's liability for unfinished or deficient infrastructure and earlier developed units was still in litigation. The

Town's first notice of this issue was contained in an affidavit of Russell Wilkinson in Taxpayer's Exhibit 2.

Even if the board were to allow this argument, we find that because the potential and magnitude of the Taxpayer's successor declarant liability was not known until 1996, it would not have been a significant factor affecting the Property's value in 1994 and 1995.

Second, the board finds the elderly restrictions issue was adequately referenced by the two appraisals submitted as a basis for the appeal. While the elderly restriction issue was not separately noted in the appeal, the appraisals submitted to support the appeal contain significant discussion of the elderly occupancy requirement.

#### Market Value Analysis

The board agrees with the Town that the Taxpayer's evidence alone was not sufficient to show the assessments were disproportionate. The two transactions from which both Taxpayer's appraisers drew their conclusions of minimal site value were either bank-related or a sale between related parties.

Further, the allocations of value to the unfinished site in these two transactions were derived from speaking with the owners and were not directly market extracted or analyzed. The board recognizes valuing this type of property is difficult due to the lack of good market data. However, reliance on bank or party-related sales and their opinion of contributory value does not meet the requirements of RSA 75:1 in determining arm's-length market value.

Having reached this conclusion, the Town then asked the board to find

the Taxpayer had not fulfilled its burden of proof and thus, the burden of persuasion of defending the assessment had not moved to the Town. Normally, the board might agree with such an argument if the assessments for both years were reasonable and had some relationship to market value. However, in this case, it is difficult to have confidence in the 1994 assessment for a couple of reasons. First, the 1994 and 1995 assessments vary approximately 300% while the levels of assessment are nearly identical (1994: 95% and 1995: 97%).

Second, the parties stipulated that the constructed units had a market value of approximately \$62,000 for 1994. Comparing the 1993 \$33,300 assessment for an unfinished site to this finished unit value results in approximately a one-to-one land-to-building ratio. While certainly land-to-building value ratios vary for residential properties depending on location and total value, it is the board's experience that such ratios are normally in the one-to-three to one-to-four range (i.e. land being 25% or 20% of total market value).

Consequently, the board finds that at least for 1994 the burden of persuasion moved to the Town. Further, because the \$33,300 assessed value could not be justified in the 1994 market context and because of its general unreasonableness discussed above, the board finds some abatement is warranted for the 1994 tax year.

The next question then becomes what is the proper assessment. We find that, lacking credible market evidence, the 1995 assessments of \$10,300 are reasonable and should be equalized and applied to 1994. As stated earlier the board finds the Taxpayer's market evidence to be so flawed as to give it no weight. The Town however, submitted an appraisal by Charles R. Haven which estimates by the development approach the market value of the sites at \$7,300 each. The board finds Mr. Haven's methodology to be appropriate when market value exceeds the cost to construct such a unit. However, the board is

suspect of several of his assumptions including the price per square foot and the typical size of a unit. Because the margin between Mr. Haven's total

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market value of \$65,000 and a unit construction cost is so slight (\$7,300), any slight modification of the unit size or price per square foot would significantly affect the residual value remaining to the undeveloped site. In short, while the board finds his methodology to be appropriate in a better market time, we find it not reliable when the cost to construct a unit matches or exceeds its final market value.

In such a situation where cost exceeds value, the Taxpayer argued the site has zero or nominal value. The Town on the contrary argued that the development's infrastructure, amenities, right to build, and existing foundations all exist and have value. We tend to agree more with the Town than the Taxpayer. It is clear from the market evidence that the value of these sites is not in immediately developing them, but rather holding them for future development when the market improves. Neither party, however, presented any evidence on valuing these sites by this concept. In reviewing the reasonableness of the 1995 assessments, the board notes they equate to approximately a one-to-five land-to-building ratio ( $\$10,300 \div \$62,000 = .17$  or 1/6th). As the board stated earlier land-to-building ratios for residential properties are commonly in the one-to-three to one-to-four range. These sites' one-to-five ratios seem reasonable given the fact the sites need to be held for a period of time until the market improves.

In conclusion, the board finds the 1995 assessments are reasonable and the 1994 assessments should be based on the equalized 1995 assessment.

### Refund

For both 1994 and 1995 if the taxes have been paid on the 15 completed units, that amount paid in excess of the value stipulated to by the parties shall be refunded with interest at six percent from date paid to refund date.

If in 1994 the taxes have been paid on the 27 sites, the amount paid in excess of \$272,700 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

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For 1995 the board finds no abatement is warranted for the 27 sites.

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.

### 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

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Paul B. Franklin, Chairman

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Douglas S. Ricard, Member

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**Certification**

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Peter D. Wenger, Esq., Counsel for Oakshire Development LLC, Taxpayer; Jay L. Hodes, Esq., Counsel for the Town of Merrimack; and Chairman, Board of Assessors, Town of Merrimack.

Date: December 20, 1996

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Valerie B. Lanigan, Clerk

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ORDER

On January 14, 1997, the Taxpayer filed a motion for clarification (Motion) stating the board's December 20, 1996 decision (Decision) did not identify seven of the 15 completed units under appeal for 1994 and four of the 27 foundations under appeal for both 1994 and 1995.

The board grants the Taxpayer's motion.

However, the board notes the Decision is not substantively changed by granting the clarification because:

1) the parties reached a settlement for the 15 completed units (page 2 of Decision); and

2) the board's finding relative to the 27 foundations is on their total value (page 3 of Decision).

However, to properly identify the Property and to remove any uncertainty, the board amends pages 1 and 2 of the Decision as follows:

"Tax Year 1994

In 1994 the property under appeal consisted of 15 completed condominium

units and 27 undeveloped condominium sites with only foundations (the Property). The Property is part of a development known as The Birches

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Condominiums which is comprised of 97.5 acres with common amenities of a clubhouse, tennis courts and a swimming pool. The 1994 assessed valuations are as follows:

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*12 Lynn Dr	4C/286-L12	\$33,300
*14 Lynn Dr	4C/286-L14	\$34,700
*15 Lynn Dr	4C/286-L15	\$33,300
*16 Lynn Dr	4C/286-L16	\$32,400
*17 Lynn Dr	4C/286-L17	\$33,800
6 Rollins Ct	4C/286-R06	\$82,500
3 Wellington Cir	4C/286-W03	\$82,500
4 Wellington Cir	4C/286-W04	\$82,500
5 Wellington Cir	4C/286-W05	\$82,500
6 Wellington Cir	4C/286-W06	\$82,500
7 Wellington Cir	4C/286-W07	\$86,700
8 Wellington Cir	4C/286-W08	\$86,700

(\* denotes undeveloped condominium sites with foundation.)"

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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**Certification**

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Peter D. Wenger, Esq., Counsel for Oakshire Development LLC, Taxpayer; Jay L. Hodes, Esq., Counsel for the Town of Merrimack; and Chairman, Board of Assessors, Town of Merrimack.

Date: January 27, 1997

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Valerie B. Lanigan, Clerk

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