Lawrence Doty

v.

Town of Hollis

Docket No.: 15627-94PT

and

James L. Tebbetts

v.

Town of Hollis

Docket No.: 15637-94PT

DECISION

The taxpayer "Doty" appeals, pursuant to RSA 76:16-a, the "Town's" 1994 assessment of $228,000 on a 2.8-acre lot with a house (the Doty Property).

The taxpayer "Tebbetts" appeals, pursuant to RSA 76:16-a, the "Town's" 1994 assessment of $282,300 on a 4.04-acre lot with a house (the Tebbetts Property). (The taxpayers and their properties collectively called "the Taxpayers" and "the Properties.") These appeals were consolidated for hearing. For the reasons stated below, the appeals for abatement are granted by reducing the assessment by 5%.

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 their burden and proved disproportionality.

The Taxpayers argued the assessments were excessive because:

(1) the Properties are located in a residential neighborhood on a scenic road; (2) a nearby property was running an illegal dog-breeding business (the "Offending Property");

(3) a local real estate agent stated the Properties were devalued due to unsafe and potentially dangerous neighborhood conditions, i.e., the dog business; and

(4) the Properties were devalued by 40%-50% because of the ongoing danger, noise and health problems created by the operation of the dog business on the Offending Property.

The Town argued the assessments were proper because:

(1) the Taxpayers had not demonstrated any proof of a change in value associated with the Offending Property;

(2) the first time the matter was brought to the selectmen's attention was just before a May 16, 1994 meeting, and most of the early complaints were of barking dogs (not biting dogs);

(3) there was an active real estate market in the Properties' area, a subdivision was approved prior to April 1994, and homes sold in 1994 and 1995;

(4) given the evidence, the board is not entitled to abate the Taxpayers' taxes.

The board's review appraiser visited the Properties and the Offending Property, taking photographs and pacing the distance from the house on the Offending Property to the houses on the Properties. After Mr. Bartlett, the review appraiser, viewed the Properties, the board also asked him if the board were to decide to grant an abatement would he be able to calculate the appropriate adjustment. Mr. Bartlett stated that he could certainly perform some investigation and analysis, but he thought it would be difficult to find any data, leaving his conclusion to be based on judgement rather than on any available empirical data and analysis.

Board's Rulings

Initially, the board must decide the Town's motions to dismiss, which were made after the Taxpayers' presentations. The board denies these motions.

The board finds the assessments should be reduced by 5% to reflect the Offending Property's negative impact. This reduction results in the following assessments.

Doty Property	$216,600
Tebbetts Property	$268,185

Assessments must be based on market value. See RSA 75:1. In arriving at the proper assessment, municipalities must look at all relevant factors that affect market value. Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1975). 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. at 68; see also Petition of Grimm, 138 N.H. 42, 53 (1993) (administrative board may use expertise and experience to evaluate evidence).

These appeals boil down to the following question: Is an abatement warranted where a nearby property is running a nonconforming commercial dog-breeding business that entails numerous noisy dogs on chains and where the business poses a perceived threat to the safety of those living nearby? The board admits this case was a close call because of the lack of solid market data. Nevertheless, the board concludes the Offending Property's breeding operation adversely affected the Properties' values on April 1, 1994.

As of April 1, 1994, the assessment date, the Offending Property's dog operation was in full swing. The Taxpayers testified that as of April 1, 1994, there were approximately twelve dogs at the Offending Property. The Offending Property is a 2.03-acre lot, but the dogs were chained close to Plain Road, i.e., the operation was visible from the Properties. The Taxpayers testified the dogs were so loud at times, the dog owner shot a shotgun into the air to quiet the dogs. The Taxpayers testified the dogs' presence, including situations where dogs got loose, threatened their families' health and safety to the extent that the Taxpayers did not allow their children to ride the school bus. One taxpayer testified he decided the children could not safely wait for the school bus because a loose dog had chased the school bus. One taxpayer also stated his family could not go for walks in the neighborhood because of the fear that the dogs (advertised as Pitbulls, but testimony indicated the dogs were Pitbulls and Akitas) would get loose and attack.

The tension created by the Offending Property and the Taxpayers' response to the Offending Property was so substantial that the Town's police chief testified he was concerned about violence or arson between the property owners. The Taxpayers submitted police records for 1994, concerning complaints (generally made by the Taxpayers themselves). The police chief testified that he was aware of the dog problem and that his department did all it could to investigate complaints and to prosecute if possible. Criminal action was taken after there were nine different civil orders of abatements.

The selectmen stated they did all they could to address the situation. The selectmen acknowledged a commercial breeding operation was an illegal use of the Offending Property.

In October 1994, the dog breeder moved his operations out of the neighborhood.

The Town asserted, among other things, that the board could not grant an abatement because: 1) the Taxpayers had a remedy through a private nuisance action; and 2) the Town was doing all it could do to address the problem at the Offending Property. The board knows this is a tax abatement case and is not a private nuisance case. The Taxpayers certainly could have brought a private or public nuisance action. While it is not for the board to decide whether a private or public nuisance existed as a matter of law, it is interesting to note: "A private nuisance exists when an activity substantially and unreasonably interferes with the use and enjoyment of another's property. *** To constitute a nuisance the [offending party's] activity must cause harm that exceeds _the customary interference a land owner suffers in an organized society,_ ***." Dunlop v. Daigle, 122 N.H. 295, 298 (1982) citations omitted

(supreme court reversed a lower court denial of plaintiff's claim and held, without remanding the case, that the defendant's operation of a 38-dog kennel substantially interfered with the abutting property owner's rights).

Based on the standard for a private nuisance, the Taxpayers probably had a valid claim against the Offending Property owner. In such an action, one of the issues would have been how the Offending Property adversely affected the Properties' values.

The board concludes the Offending Property adversely affected the Properties' values, but the board admits the evidence concerning the extent of this diminution was scant. However, as indicated by our board inspector obtaining empirical market data could well be impossible. No matter which valuation approach was chosen this case would come down to judgement. For example, if the board were to adopt a diminution in rental value, the board would be required to review rents and then make an adjustment for rent loss attributable to the Offending Property. Such an adjustment would be based solely on judgement. The board could have performed a present value analysis. To achieve maximum value, the breeder would have to be shut down. One would assume the dog breeding operation could be closed either by private action or by Town action within twelve months, and then the Properties sold. Thus, one could figure out the present value of selling the Properties in a year. However, this number would have to be adjusted for the rental value that the Properties could generate during the holding period. Such a decision would be based on judgement.

We strongly disagree with the Taxpayers' assertion that the Properties' values declined by 40% to 50%. One must assume reasonableness, and a reasonable investor would have gladly paid more than that for the Properties, realizing the offending dog-breeding business would be gone in a year or so.

We also find the Town's evidence of sales in the subdivision that abuts the Offending Property do not demonstrate lack of diminution in the Properties' values. First, only three of those sales occurred between April 1, 1994, and October, 1994 (when the kennel operation ceased). These few sales occurred as new construction in a different subdivision. The breeding operation occurred very close to the Offending Property's boundary line, and thus there was a buffer between the subdivision and the Offending Property. In addition, the Offending Property did not share road access with Colburn Lane in the new subdivision. The Taxpayers' Properties were impacted by the Offending Property whereas the subdivision parcels apparently were not or the purchasers were unaware of the dog problem.

We also reject the Town's argument that no adjustment is warranted because the problem was being addressed and was resolved by October. In New Hampshire, property must be valued as of April 1 of the tax year. As of April 1, 1994, the dog problem existed and would have affected the marketability of the Properties.

When all is said and done, this case comes down to judgement, and the board, using its judgement, decides a -5% adjustment for only 1994 is appropriate to address the factor of the Offending Property. To the extent the Taxpayers assert the adjustment should have been more substantial, it was their burden to show a more appropriate adjustment, and they failed to do so.

To the extent the Town objects to the board's making any adjustment, the board reminds the Town of its, and the board's obligation, to consider all factors in

assessing all properties. See also Appeal of Sokolow, 137 N.H 642 (1993) (in certain circumstances the board, consistent with RSA Chapter 71-B and RSA 76:16-a, must grant an abatement where the facts demonstrate an abatement is warranted).

If the 1994 taxes have been paid, the amount paid on the value in excess of $216,600 for the Doty Property and $268,185 for the Tebbetts Property shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. This decision only applies to 1994.

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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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 Lawrence Doty, Taxpayer; William R. Drescher, Esq., Counsel for the Town of Hollis; and Chairman, Selectmen of Hollis; and James L. Tebbetts, Taxpayer.

Date: October 31, 1996

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Valerie B. Lanigan, Clerk

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