

Granliden Community Association

v.

Town of Sunapee

Docket No.: 15811-94PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1994 assessment of \$165,000 on 33 boat slips valued at \$5,000 each (the Boat Slips). (The Taxpayer will also be called "the Association." The Association owns the Boat Slips, other common land and land that may have development potential for additional units. This collection of the Association's property shall be called "the Association's Property.") For the reasons stated below, the appeal for abatement is granted.

The Taxpayer has the burden of showing the assessment was 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). The Taxpayer carried this burden.

The Taxpayer argued the assessment was excessive because:

- (1) as a matter of law, the Boat Slips are not taxable;
- (2) the value of the Boat Slips was captured in the values of the individual living units;
- (3) the total assessments of individual units in Granliden demonstrated the

Town overassessed the units, capturing any residual value of the Boat Slips;  
and

(4) the Boat Slips, if taxable, should be assessed to unit owners that have long-term leases to the slips.

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The Town argued the assessment was proper because:

(1) thirteen sales occurred in Granliden between 1993 and 1995, and the ratio for the Town was 102% with a coefficient of dispersion of 9;

(2) the Boat Slips were not captured in the amenity value included with the unit assessments because they are not available to all members equally and are not transferable;

(3) the amenity value refers to all common interests that everyone has equal access to; and

(4) other slips in Town were valued at \$15,000 each; the Taxpayer's assessment of \$5,000 per slip was generous to the Taxpayer; and \$15,000 per slip would be more appropriate.

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

Based on the evidence, the board finds the Boat Slips should not have been assessed at \$165,000, but rather should be assessed a nominal \$100. The nominal assessment will allow the Town to keep this Property on the master inventory list.

The underlying facts are clearly presented in the October 31, 1996 Joseph A. DiBrigida Jr. letter (DiBrigida Letter)<sup>1</sup> and are supported by the

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<sup>1</sup> The board compliments Attorney DiBrigida on his research and his clear explanation of the legal structure for the Granliden development. In drafting this decision, one of the board member's came across a

documents attached to that letter. The board, therefore, adopts the facts as presented in the DiBrigida Letter. Based on these facts, the Boat Slips are so encumbered by the rights held by individual homeowners that the Boat Slips have only nominal remaining value. The facts in this appeal are almost identical to the facts in Locke Lake

Colony Association, Inc. v. Town of Barnstead, 126 N.H. 136 (1985) and Waterville Estates Association v. Town of Campton, 122 N.H. 506 (1982).

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The documents that created: 1) the overall development; 2) the Association Property; and 3) the homeowners' interests are inartfully drafted. A review of those documents, however, leads to only one conclusion -- the homeowners' interests in the Taxpayer's Property are akin to easements appurtenant that, in essence, control and limit the use and transferability of the Boat Slips.

Specifically, the board finds: 1) the homeowners' interests were created in the written documents; 2) the Association Property, including the Boat Slips, was developed for the homeowners' benefit; 3) the homeowners are entitled to use and control the Association Property; 4) the homeowners' interests are not revocable at the Association's will but rather would require that the homeowners themselves (by two-thirds majority vote) alter the use of the Association Property; and 5) the homeowners' rights to use and control the Association Property was

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board member's earlier note that expressed frustration with the Taxpayer's initial inability to explain the legal structure. The board works hard to receive the best available information so that we can make the best decision, and Attorney DiBrigida's efforts greatly assisted the board.

intended to run with the land (the individual units). In addition, just as in Locke Lake Colony Association, 126 N.H. at 141, the development scheme here is not akin to a club membership because: 1) membership is provided for in the title documents; 2) Association membership is mandatory; and 3) members cannot resign at will.

Three other issues warrant mention.

First, the Taxpayer's long-term leasing of the Boat Slips does not alter the board's analysis. Apparently, prospective purchasers consider all of the available amenities when purchasing a home at Granliden, and therefore, the unit prices would reflect the right to use the Association Property, including the potential of gaining either the long-term lease for a Boat Slip or a yearly Boat Slip lease. We also note, the Boat Slip leases are considered personalty and cannot be taxed. See Hampton Beach Casino v. Town of Hampton, 140 N.H. 785, 788 (1996) (subject to some narrow exceptions, leasehold interests are not taxable as realty).

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Second, in response to a board inquiry, the DiBrigida letter, page 9-10, discusses other rights held by the Taxpayer, namely the right to build 11 additional units. These rights may have a taxable value because the Association could develop and sell the sites (with a two-thirds majority vote required to convey real estate). While these interests may be taxable, the board could not conclude that any value actually exists, especially given the uncertainty concerning whether the approvals are still valid. Attorney DiBrigida did an excellent job researching and describing the Taxpayer's legal

structure, and we find his research on the issue of further developable sites also reliable. His research indicated no conclusion could be made about whether the rights even exist anymore. It appears the Taxpayer would have to return to the planning board for new approvals. Without those approvals, the board finds attributing any value to the additional developable sites would be speculative.

Third, the Taxpayer's Property also appears to be subject to an additional covenant (amended covenant #10) that, if applicable to the Boat Slips, prohibits the Association from subdividing and selling the Boat Slips.

If the taxes have been paid, the amount paid on the value in excess of \$100 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 Town has undergone a general reassessment, the Town shall also refund any overpayment for 1995. 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.

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  
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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 Granliden Community Association, Taxpayer; and Chairman, Selectmen of Sunapee.

Date: November 26, 1996

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Valerie B. Lanigan, Clerk

0006

Granliden Community Association

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ORDER

Pursuant to the board's October 11, 1996 teleconference, the "Taxpayer" shall, within 20 days, file the documents and explanations requested by the board.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Date:

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Valerie B. Lanigan, Clerk

CERTIFICATION

I hereby certify a copy of the foregoing order has been mailed this date, postage prepaid, to Granliden Community Association, Taxpayer; and Chairman, Selectmen of Sunapee.

Date:

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Valerie B. Lanigan, Clerk

0007

Granliden Community Association

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ORDER

This order relates to whether either party objects to Member MacLellan participating in deciding the rehearing motion.

Attorney Nelson of Sulloway & Hollis has now filed an appearance for the "Town." Member MacLellan has two connections with Sulloway & Hollis. First, he was a Sulloway & Hollis attorney before being appointed to the board. Second, his wife, Eleanor MacLellan, is a Sulloway & Hollis attorney.

Member MacLellan thinks he can objectively decide the rehearing motion.

Nonetheless, if either party objects to Member MacLellan's participation that party shall file an objection within 10 days of the clerk's date below. Regardless of whether an objection is received the board intends to have a third member review the record and participate in deciding the rehearing motion.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Valerie B. Lanigan, Clerk

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, Joseph A. DiBrigida, Jr., Esq., counsel for the Taxpayer; Margaret H. Nelson, Esq., counsel for the Town; and Chairman, Selectmen of Sunapee.

Date: January 6, 1997

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Valerie B. Lanigan, Clerk

0006

Granliden Community Association

v.

Town of Sunapee

Docket No.: 15811-94PT

ORDER

The board has reviewed the "Town's" rehearing motion and the "Taxpayer's" objection. The Town asserted in the rehearing motion that the board erred by concluding the unit assessments captured the boat-slip values.

The board is familiar with the assessment methodology most municipalities use, and the board assumed the Town used the same methodology. This methodology involves deducting building costs from sales prices with the remaining value called "the amenity value." This amenity value captures all value in excess of building costs and reflects items such as land, roads, and recreational amenities.

Before ruling on the motion, the board wants to receive additional evidence on the Town's assessment methodology that was used in valuing the units. A separate hearing notice is attached to this order. At the hearing, the Town shall produce a witness familiar with the unit assessments at Granliden. This witness should be prepared to explain the Town's methodology, with appropriate supporting documents. This documentation shall include the

sales analysis for Granliden used in the 1989 revaluation and the sales analysis used in the 1993 update.

The parties may, by agreement and in lieu of a hearing, submit this issue to the board in writing. If the parties agree to waive a hearing: (1) within 10 days of the clerk's date below, one party shall so notify the board; (2) by the date scheduled for the hearing, the Town shall file its response with the board, sending a copy to the Taxpayer (This submission shall include the information ordered in the second paragraph of this order.); and (3) the Taxpayer shall have 10 additional days to file its response.

Upon review of the written information, the board shall either issue its order on the rehearing motion or schedule a hearing if deemed necessary.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Ignatius MacLellan, Esq., Member

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Michele E. LeBrun, Member

CERTIFICATION

I hereby certify that copies of the foregoing order have this date been mailed, postage prepaid, to Joseph A. DiBrigida, Jr., Esq., Counsel for Granliden Community Association, Taxpayer; Margaret H. Nelson, Esq., Counsel for the Town of Sunapee; and Chairman, Selectmen of Sunapee.

Dated:

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Valerie B. Lanigan, Clerk

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CORRECTIVE ORDER

This order amends paragraph 3, line 1 of the board's February 3, 1997 order to read as follows.

"To avoid surprise, the Town shall, by Monday, February 10, 1997, make available to the Taxpayer \*\*\* ." The rest of the order shall remain unchanged.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Valerie B. Lanigan, Clerk

CERTIFICATION

I hereby certify that copies of the foregoing order have this date been FAXED and mailed, postage prepaid, to Joseph A. DiBrigida, Jr., Esq., Counsel for the Taxpayer; Margaret H. Nelson, Esq., Counsel for the Town; and Chairman, Selectmen of Sunapee.

Dated: February 3, 1997

Valerie B. Lanigan, Clerk

0005

Granliden Community Association

v.

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ORDER

This order responds to the "Taxpayer's" motion regarding expert testimony and information exchange. The motion is denied as to the Taxpayer's expert testimony but granted concerning the information exchange.

The sole purpose of the limited hearing is to receive evidence from the "Town" concerning its assessment methodology. At the hearing, the Taxpayer may cross-examine the Town's witnesses about the assessment methodology. Subject to any objection, the Taxpayer's expert information could be used, not for substantive evidence, but for cross-examination purposes. The board will not, however, at this hearing, accept the Taxpayer's expert testimony or report. If the board ultimately grants a full rehearing, the Taxpayer would most likely be allowed to present its expert testimony.

To avoid surprise, the Town shall, by Monday, March 14, 1997, make available to the Taxpayer (by fax, hand delivery or by allowing the Taxpayer

to pick up) the documents intended to be relied on by the Town's witnesses.

This deadline should not overburden the Town. The Town is only being asked to provide the evidence that: 1) should be readily available because it is based on existing assessment data; and 2) was referenced in the Town's rehearing motion. See Motion, Section II.

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Ignatius MacLellan, Esq., Member

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Michele E. LeBrun, Member

CERTIFICATION

I hereby certify that copies of the foregoing order have this date been FAXED and mailed, postage prepaid, to Joseph A. DiBrigida, Jr., Esq., Counsel for the Taxpayer; Margaret H. Nelson, Esq., Counsel for the Town; and Chairman, Selectmen of Sunapee.

Dated: February 3, 1997

Valerie B. Lanigan, Clerk

0005

Granliden Community Association

v.

Town of Sunapee

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ORDER

This order responds to the "Town's" rehearing motion, which is denied. The motion did not demonstrate that the board erred in its decision, and thus, the motion failed to show any "good reason" to grant a rehearing. See RSA 541:3.

The board held a hearing to obtain additional information from the Town about whether the value of the "Slips" was included in the assessments of the "Units." The board concludes the Unit assessments included the Slip values.

Granliden is a residential community that consists of individually owned Units and commonly owned "Association" property. All Unit owners must be Association members. The Association owns and manages the common property, which includes the waterfront area, the tennis courts, the golf course and the roadways.

The waterfront area consists of a beach, 33 boatslips and 20 moorings. The moorings were not subject to this appeal, but they certainly should be

considered because the moorings and the Slips in combination make up the boating access for this development. It would be an error to focus on only one part of the boat access amenity, namely the long-term slip leases.

There was much discussion about the distinction between a short-term slip lease and a long-term slip lease. In fact, the distinction makes no real difference. There are only 33 Slips. All Slips are subject to a long-term

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lease. Some Slips may also be subject to short-term leases. If a Unit owner with a long-term lease decides not to occupy a Slip for a given year, the Unit owner notifies the Association, and the Association then executes a short-term lease with another Unit owner. This arrangement maximizes the availability of Slips. Furthermore, the moorings are available as part of the waterfront amenity.

Because of the ownership structure of Granliden, the Association is, in essence, the Unit owners. Each Unit owner has access to the complete package of amenities, and the Unit purchase prices would reflect that complete package. Prospective purchasers of a Unit would include in the purchase price consideration for the Unit and the various Association amenities. The value of a specific amenity would vary from individual to individual. Some purchasers may have no interest in boating and may only want to use the beach or the golf course. Others may attribute a substantial value to the availability of the Slips and the moorings. It would be difficult, if even possible, to show what part of a Unit purchase price was for the Slips. But this difficulty does not prove the purchase price excluded consideration of the Slips. All in all, the board concludes the Unit assessments included consideration for all of the waterfront amenities, including the Slips.

Even the Town admitted the Unit sales prices would have included consideration of the short-term slip leases. The Town, however, continued to insist that the long-term slip leases have resulted in a shifting of value that is not captured in the Unit values, and therefore, the Town asserted that value must be separately assessed. For this order, the board disagrees with the Town's assertion. We note, however, that one board member has lingering concerns (See Dissenting Opinion) about whether the long-term slip leases shifted value that was not fully captured in the Unit values.

In summary, the board denies the rehearing motion and confirms the original decision, finding the Slip values were captured in the Unit assessments.

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Ignatius MacLellan, Esq., Member

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Michele E. LeBrun, Member

**DISSENTING OPINION**

I respectfully dissent from the majority opinion in this order. I would grant the Town's rehearing motion and find the Taxpayer did not carry its burden of proving the \$165,000 assessment was improper.

I agree with the majority opinion that the Units' sales prices reflect the complete package of amenities available at Grandliden except that the sales capture only the potential for a Unit owner having access to and use of the Slips. I believe the arrangement the Association has established - leasing these limited amenities (Slips) to some of the Unit owners - reflects a value that is retained by the Association in the fee simple ownership of these amenities.

The concept is fairly straightforward. For a property to be leased in any market, regardless of how limited that market may be, it must have value to the parties involved. In this case, testimony was presented that the rents received by the Association from these leases have been determined so as to cover the expenses for maintaining the Slips. However, it is clear from the Association's bylaws and testimony that nothing prohibits the leases exceeding the expenses of maintaining the Slips - except perhaps the inherent political dynamics of a homeowners association. Because the Association has the ability to lease the amenities to certain Unit owners and not others and at an amount greater than expenses, I believe there is a value that exceeds that which

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is captured by the potential for these amenities when an individual purchases a Unit.

While perhaps the most equitable way to assess these taxes would be to the holders of the leasehold interests, the individual Unit owners with such leases, the supreme court has determined that leaseholds for terms of years are considered personalty and not realty. Indian Head National Bank v. City of Portsmouth, 117 N.H. 954 (1977). Taxing the Association, the fee owner of the Property, would reflect the value the individual Unit owners have in the

use and possession of the Slips by the leases. The Association could then through its budgetary process allocate these taxes as one of the expenses to be covered by the rents obtained from leasing these limited amenities.

Lastly, the Town's assessment of \$5,000 per Slip does not seem unreasonable when compared to the market value of boatslips on Lake Sunapee. While certainly it is difficult to estimate the value remaining with the Slips, the Town's value being one-fifth to one-sixth that of full-market value adequately recognizes the significant limitations on the use and transferability of the Slips.

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Paul B. Franklin, Chairman

**Certification**

I hereby certify that a copy of the foregoing order has been mailed this date, postage prepaid, to Joseph A. DiBrigida, Jr., Esq., counsel for the Taxpayer; Margaret H. Nelson, Esq., counsel for the Town; and Chairman, Selectmen of Sunapee.

Date: March 12, 1997

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Valerie B. Lanigan, Clerk