

Barbara B. Austin Grantor Trust
Barbara B. Austin, Trustee
and
Wilbur H. Austin Grantor Trust
Wilbur H. Austin, Trustee

v.

Town of Moultonborough

Docket No.: 17288-96PT

DECISION

The "Taxpayers" appeal, pursuant to RSA 76:16-a, the "Town's" 1996 assessments on the following "Properties":

\$503,619 (land \$167,300; buildings \$336,319) on "Lot 1," a 68-acre lot with a single-family home;

\$307,672 (land \$251,972, buildings \$55,700 on "Lot 55," a 7.35-acre lot with a single-family home (the Properties); and

\$375,000 on "Lot 81," a vacant .70-acre lot.

The Taxpayers also own, but did not appeal, two other properties in the Town with a combined \$41,300 assessment. For the reasons stated below, the appeal for abatements is denied on Lot 1 but granted on Lot 81 and Lot 55. The abatements, however, are not based on the Taxpayers' asserted values.

The board also grants the Town's motion to file a late response to the board's appraiser's report.

The Taxpayers have the burden of showing the assessments were disproportionately high or unlawful, resulting in the Taxpayers 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 Taxpayers must show that the Properties' assessments were higher than the

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general level of assessment in the municipality. Id. The Taxpayers carried this burden on Lots 55 and 81 but failed to carry this burden on Lot 1.

The Taxpayers argued the assessments were excessive because:

Lot 1

- (1) the land not in current use (NICU) has frontage on Lake Winnepesaukee but on the less desirable side of Long Island, and the base building site for this type of property should be \$200,000; and
- (2) the assessment should be \$453,619.

Lot 55

- (1) the land NICU does not have water frontage, but the Town has assessed the land as a waterfront lot;
- (2) the views are seasonal;
- (3) comparable properties of nonwaterfront lots on Long Island have been assessed at a base value of \$28,000; and
- (4) the land NICU has a fair market value of \$28,000.

Lot 81

- (1) until 1996, the Town treated this lot as nonbuildable;
- (2) because of the poor drainage, rocky nature and development restrictions

on the lot, it is unlikely that approval could be obtained for an on-site septic system; and

(3) the assessment should be as previously assessed at \$144,100.

The Town argued the assessments were proper because:

(1) all valid sales in the Town were studied to establish the values for the 1996 revaluation;

(2) all waterfront properties on points were assessed higher because the sales data indicated these lots were more valuable;

(3) Lot 1 has been assessed in the same manner as other waterfront lots, and the Taxpayers provided no evidence of market value;

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(4) the Taxpayers have mowed a path from their house on Lot 55 over the land NICU to the waterfront; therefore, there are more rights associated with the homesite because of its water access;

(5) the Taxpayers did not show that Lot 81 was unbuildable; and

(6) subsequent sales show the assessment was performed well and indicate waterfront values are increasing.

The board's review appraiser inspected the Properties, reviewed the property-assessment cards, reviewed the parties' briefs and filed a report with the board. This report concluded the proper market values should be: \$510,000 for Lot 1; \$300,000 for Lot 55; and \$226,000 for Lot 81. Note: The review appraiser's report is not an appraisal. The board reviews the report and treats the report as it would other evidence, giving it the weight it

deserves. Thus, the board may accept or reject the review appraiser's recommendation.

Board's Rulings

Lot 1

Based on the evidence, the board finds the Taxpayers did not show that Lot 1 was overassessed. The Taxpayers argued that the land assessment should have been calculated at \$200,000 rather than \$250,000. The only evidence the Taxpayers submitted was assessment comparables (Taxpayer Exhibit 11), but the board finds the assessment comparables are not helpful in determining the appropriate assessment for Lot 1. Because various factors must be considered when determining the appropriate base value for a lot, the board finds the Taxpayers' selective presentation of assessments in other locations on the island is not helpful.

More importantly, assessment comparisons rarely are successful in showing overassessment. Rather, assessments must be based on market value. RSA 75:1. The Taxpayers did not present any credible evidence of Lot 1's market value. To carry their burden, the Taxpayers should have made a showing of Lot 1's market value. This value would then have been compared to Lot 1's

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assessment and the level of assessment generally in the Town. See, e.g., Appeal of NET Realty Holding Trust, 128 N.H. 795, 796 (1986); Appeal of Great Lakes Container Corporation, 126 N.H. 167, 169 (1985); Appeal of Town of Sunapee, 126 N.H. 214, 217-18 (1985). Because the Taxpayers did not submit any market information, the board cannot find overassessment.

We note the following as cumulative evidence. First, Mr. Bartlett's

report recommended a \$510,000 market value, which supported the equalized assessment. Second, the Taxpayers focused only on the land assessment, and the board is required to focus on the entire property when reviewing assessments.

Lot 55

The board finds an adjustment is warranted, resulting in a \$282,672 assessment.

The Taxpayers' main argument was that the Town erred in assessing the NICU land as if the land was waterfront property. The Taxpayers asked the board to ignore the fact that the Taxpayers owned and, therefore, had all of the rights to the land between the NICU land and the waterfront. The Taxpayers asserted that the NICU land should be assessed at \$28,000. As discussed next, the board disagrees with the Taxpayers' argument that the land should have been assessed without any consideration of the property's water-access rights, but the board finds an adjustment is warranted due to the distance between the NICU land and the waterfront.

In prior cases, e.g., John L. Arnold v. Town of Frankestown, Docket Nos.: 08718-90PT, 11152-91PT, 13819-93PT (copy attached), the board concluded that the assessment of NICU land may include consideration of attributes that inure to the benefit of the NICU land even if those benefits are located on that same taxpayer's current-use land.

This approach is the same approach that is applied to valuing any property, whether current use is involved or not. For example, assume: 1) the Taxpayers only owned the area that is NICU; 2) the Taxpayers did not own the

CU land; and 3) the Taxpayers had deeded water access. In such a valuation, one would have to consider and value the water-access rights because the market certainly would. The board does not see why this approach changes when valuing the Taxpayers' NICU land and other rights.

Consistent with the above conclusion, the board finds the Taxpayers' double taxation argument also to be without merit. The Town's assessment methodology does not add an additional tax to the current-use land. Rather, the NICU land must be valued with consideration of all of the factors that affect the NICU land and market value. See RSA 75:1; see also Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1975) (in assessing property, all factors that affect value must be considered).

Furthermore, the Taxpayers did not submit any market information to show that Lot 55 was overassessed. To carry their burden, the Taxpayers should have made a showing of Lot 55's market value. This value would then have been compared to Lot 55's assessment and the level of assessment generally in the Town. See, e.g., Appeal of NET Realty Holding Trust, 128 N.H. 795, 796 (1986); Appeal of Great Lakes Container Corporation, 126 N.H. 167, 169 (1985); Appeal of Town of Sunapee, 126 N.H. 214, 217-18 (1985).

The Taxpayers submitted assessment comparables, Taxpayer Exhibit 10, but those comparables did not have the same water-access rights that Lot 55 has.

We also note that Mr. Bartlett's report supported the assessment.

Despite the dearth of value evidence from the Taxpayers, the board has concerns about assessing the NICU land as waterfront land when the house on the NICU land is located over 700 feet from the water. In several cases, the board has made adjustments for distance to the water. Additionally, based on the photographs, the NICU land does not enjoy immediate views of the water, and thus, it is not appropriate to assess the NICU land as if it were

waterfront property. Because the burden is on the Taxpayers, the board concludes a conservative minus 10% adjustment is warranted due to the distance

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from the water. This results in an ordered assessment of \$282,672 (NICU land \$225,000 plus \$1,972 for current-use land (land total \$226,972); building \$55,700).

Lot 81

The board finds the proper assessment to be \$281,250.

The Taxpayers' main argument was that Lot 81 was unbuildable because of zoning, septic and shoreland protection issues. The board agrees that these issues must be considered in assessing Lot 81, but the board finds the Taxpayers did not show Lot 81 was unbuildable.

While the Taxpayers presented expert testimony on the developability of this site, the board finds that testimony did not show Lot 81 was unbuildable.

It is clear from the testimony and the board's independent review of the Shoreland Protection Act (RSA Chapter 43-B), the Town's zoning ordinance, and the department of environmental services septic rules that development of Lot 81 would require approvals and waivers for waterfront properties. However, the Taxpayers' expert was not experienced in seeking waivers. On cross-examination by the Town, the expert admitted that she had only done one other lakefront septic system. Because the expert did not present sufficient information on this issue, the board performed independent research pursuant to RSA 71-B:5 I. ("[T]he board may institute its own investigation *** as it shall deem necessary.")

The board obtained a copy of the Town zoning ordinance that was in effect on April 1, 1996. Unlike most zoning ordinances, the Town's zoning

ordinance does not contain a provision concerning development of nonconforming lots. The only information on nonconforming lots is in Article VII B (last unnumbered paragraph on page 17), which states, "NON-CONFORMING LOTS WHICH ARE CONTIGUOUS AND UNDER THE SAME OWNERSHIP MAY BE DEVELOPED ONLY WITH THE ADJACENT LOT(S)." The inference from this is that nonconforming lots that are not contiguous to other owned lots are developable on their own. Such a conclusion is consistent with the grandfathered status of lots. Based on Page 7

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reading the ordinance, the board finds the zoning ordinance would not prevent development but may require that the prospective developer obtain zoning-board approval before development.

The Shoreland Protection Ordinance is also not an absolute bar to development of Lot 81. RSA 483-B:10 I (Supp. 1998) states: "Except when otherwise prohibited by law, present and successive owners of an individual undeveloped lot may construct a single-family residential dwelling on it, notwithstanding the provisions of this chapter."

Furthermore, the septic regulations, Env-Ws 1001.02, specifically allows waivers for septic design and approval. We also note that Env-Ws 1008.04 (b) allows certain septic tanks to be located closer to surface waters: "The distance between a septic tank and surface water *** may be reduced to 50 feet if pipe having an SDR of 26 or equivalent is used and the tank is sealed and grouted." The board is not saying that this specific regulation would provide relief to this Property. We refer to this regulation as additional evidence that the Taxpayers' expert did not have a working knowledge of waterfront septic systems, and therefore, her testimony has diminished reliability.

Ultimately, the board finds the Taxpayers did not show Lot 81 was

undevelopable. Nonetheless, it is clear, that developing Lot 81 will require a significant investment of time and resources to obtain the necessary approvals. Additionally, because of the nonconforming nature of the lot and the fact that when obtaining waivers significant restrictions are often required that limit the size and extent of improvements, the board finds an adjustment should have been made for these factors. The Town failed to do so. Again, the board notes that the Taxpayers did not submit any valuation evidence, but the board finds itself compelled to make some adjustment based on the assessment methodology. Therefore, the board has made an adjustment of minus 25% to the land assessment, which results in an assessment of \$281,250 ($\$375,000 \times .75$).

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Taxpayers' Findings of Fact and Rulings of Law

In these responses, "neither granted nor denied" generally means one of the following:

- a. the request contained multiple requests for which a consistent response could not be given;
- b. the request contained words, especially adjectives or adverbs, that made the request so broad or specific that the request could not be granted or denied;
- c. the request contained matters not in evidence or not sufficiently supported to grant or deny;
- d. the request was irrelevant; or
- e. the request is specifically addressed in the decision.

1. Granted.
 2. Granted.
 3. Granted.
 4. Granted.
 5. Denied.
 6. Neither granted nor denied.
 7. Neither granted nor denied.
 8. Denied.
 9. Denied.
 10. Denied.
 11. Granted.
 12. Granted.
 13. Neither granted nor denied, see Taxpayer Exhibit 2.
 14. Granted.
 15. Neither granted nor denied.
 16. Neither granted nor denied.
 17. Denied.
 18. Denied.
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19. Neither granted nor denied, see Taxpayer Exhibits 3 and 5.
20. Neither granted nor denied, see Taxpayer Exhibit 3.
21. Denied.
22. Denied.
23. Denied.
24. Granted.
25. Granted.

Refund

If the taxes have been paid for the tax year 1996 on all of the Taxpayers' properties, the amount paid on the value in excess of \$282,672 for Lot 55 and \$281,250 for Lot 81 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 1997 and 1998. 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 and Appeals

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

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Philip M. Hastings, Esq., Counsel for Barbara B. Austin Grantor Trust, Barbara B. Austin, Trustee and Wilbur H. Austin Grantor Trust, Wilbur H. Austin, Trustee, Taxpayers; Mary E. Pinkham-Langer, Agent for the Town of Moultonborough; and Chairman, Selectmen of Moultonborough.

Date: March 4, 1999

Valerie B. Lanigan, Clerk

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ORDER

This order relates to the Taxpayers' April 5, 1999 Motion for Reconsideration (Motion). For the reasons that follow, the board denies the Taxpayers' Motion.

Members MacLellan and LeBrun had presided at the hearing in this matter and signed the board's March 4, 1999 decision (Decision). Subsequent to the Decision, but prior to the motion being filed, Member MacLellan left the board for other employment. Consequently, Chairman Franklin has completely reviewed the record (file, exhibits and recording of hearing) and participates in the ruling on this Motion.

In short, the board denies the Taxpayers' Motion because the arguments raised in the Motion were raised during the hearing and addressed in the Decision. However, the board further clarifies certain points raised by the Taxpayers.

Lot 81

The Taxpayers presented arguments and evidence as to why Lot 81 was not easily developable. The board found merit in these arguments but did not find that the Lot was undevelopable for the reasons stated in the Decision. The board relied on its own judgment in applying a 25% adjustment to the assessment for the uncertainty and risks of obtaining the waivers and permits necessary for development of the Lot. The 25% adjustment was not derived from the earlier assessment-record card although evidence was submitted that a similar adjustment had been made to the earlier assessment. Further, the board did not rely on its review appraiser's estimate of value due to the magnitude (\$100,000) of his location adjustment and the lack of documentation of how it was derived. Lastly, the Taxpayers did not submit any market evidence of the value of Lot 81. They simply stated that the previous assessment of \$144,100 should continue to be the assessed valuation. The board finds this does not fulfil the Taxpayers' burden as it is not current market evidence and it is the assessment prior to the 1996 town-wide reassessment derived from a previous market base which in 1995 was at 88% of market value.

Lot 55

The board gave no weight to the Taxpayers' argument that the 1.55 acres not in current use (NICU) should be assessed as simply having road frontage only and not being within the context of a larger waterfront parcel. The Taxpayers' argument asks the board to treat the land NICU as if it were in a vacuum or as if it were a separately titled sub-divided lot. It is not. The plans submitted show a delineation of the 1.55 acres from a parcel totaling

7.35 acres that is to be assessed at ad valorem with the balance to be assessed as current use. This delineation for current-use assessment
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does not sever the rights that the land NICU has as being part of a larger parcel having access to the water. By simply being a portion of the entire 7.35-acre lot, which is still a separate legal lot, the 1.55 acres captures some of the waterfront rights that relate to the entire lot. The Taxpayers argue that by this delineation all the waterfront rights shift out of the land NICU to the land in current use. This is not so because anyone who has title to the 1.55 acres has the right to access the water front. The board attempted to make an adjustment due to the distance from the water frontage of the 1.55 acres NICU. Because the Taxpayers did not submit any value evidence other than arguing the 1.55 acres had no waterfront influence, the board had to rely on its judgment in applying an appropriate factor. "Given all the imponderables in the valuation process, [j]udgement is the touchstone."
Public Service Co. v. Town of Ashland, 117 N.H. 635, 639 (1977).

Lot 1

The board's decision adequately addresses the issues raised in the Motion relative to this lot.

Pursuant to RSA 541:6, any appeal of this order by the Taxpayer to the supreme court must be filed within thirty (30) days of the date on this order.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

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Certification

I hereby certify a copy of the foregoing order has been mailed this date, postage prepaid, to Philip M. Hastings, Esq., counsel for Barbara B. Austin Grantor Trust, Barbara B. Austin, Trustee and Wilbur H. Austin Grantor Trust, Wilbur H. Austin, Trustee, Taxpayers; Mary E. Pinkham-Langer, Agent for the Town of Moultonborough; and Chairman, Selectmen of Moultonborough.

Dated: May 5, 1999

Lynn M. Wheeler, Clerk

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