

Barbara A. Albright and William S. Polewarczyk

v.

Town of Chester

Docket No.: 17293-96PT

**DECISION**

The "Taxpayers" appeal, pursuant to RSA 76:16-a, the "Town's" 1996 adjusted assessment of \$87,250 (land \$18,500; buildings \$68,750) on a 3.03-acre lot with a single-family home (the Property). For the reasons stated below, the appeal for abatement is granted.

The Taxpayers have the burden of showing the assessment was 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 Property's assessment was higher than the general level of assessment in the municipality. Id. The Taxpayers carried this burden.

The Taxpayers argued the assessment was excessive because:

(1) the total construction cost for the Property, including land and buildings, was \$157,000;

(2) there were some inaccuracies on the assessment-record card such as the kennel being identified as a porch, the number of plumbing fixtures, and the quality of the interior finish;

(3) there is a visible communications tower within five hundred feet of the Property and an abutter has notified them that he will be spreading sludge on his farm which has a negative impact on the Property's value;

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(4) the market value of the Property on April 1, 1996 was \$150,000; and

(5) the assessment should be \$74,260.

The Town argued the assessment was proper because:

(1) the Property was assessed using the state manual and the Taxpayers' Exhibit #3 is erroneous due to the Taxpayers lack of knowledge of the state manual;

(2) an appropriate value for the kennel with no heat was captured using the enclosed frame porch (EFP) guidelines;

(3) four comparable sales support the assessed value; and

(4) the Taxpayers have not submitted any market evidence to support an abatement.

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

Based on the evidence, the board finds the proper assessment to be \$78,300 based on a market value finding of \$159,800 and the Department of Revenue Administration's (DRA) equalization ratio for the Town of Chester of .49 ( $\$159,800 \times .49 = \$78,300$ ).

The Taxpayers testified the total construction cost of the Property was \$157,000. This included the cost to acquire the land of \$25,000 and the cost

to construct the improvements of \$132,000. The board finds these construction costs to be the best evidence of market value that was submitted. The Taxpayers testified they purchased the land for \$25,000 in an arm's-length transaction. Typically, the majority of arm's-length transactions involve a realtor and, therefore, a realtor's commission. The land was purchased directly from the seller and no realtor's commission was paid. The board finds that the seller of the land had a figure in mind that he wanted to net after expenses (\$25,000). If the land had been for sale through a realtor the owner would have placed a higher selling price on it in order to achieve the same net proceeds. For this reason the board has adjusted the purchase price of the land by a typical realtor's commission for vacant land of 10% to arrive at the value of the land component of the purchase price of \$27,800 ( $\$25,000 \div$

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.9 = \$27,800 rounded). The Town testified that land values are hard to judge without an appraisal. The board finds that, while this statement may be accurate in general, the situation in the instant case is that the Taxpayers knew the land, negotiated with the seller and purchased the land through an arm's-length transaction and other than a realtor's commission, this figure is the best indicator of the market value for the lot.

The Taxpayers testified the total construction cost for the improvements was \$132,000. The Taxpayers stated there were several factors that should reduce the building portion of the assessment that are not reflected on the assessment-record card. Some of these include the proximity of a communications tower, the spreading of sludge on the neighbor's farm, and several factual inaccuracies. The Taxpayers testified they had knowledge of

the tower before they purchased the lot and that this was reflected in the purchase price. The board's decision is based on the market value of the Property as of April 1, 1996. The notice of intent to spread sludge was in April 1997; therefore, the board will not address any market effect the sludge may have on the Property because the market would have been unaware of any intent in April 1996. Some of the inaccuracies identified by the Taxpayer need not be separately addressed because the board has found an overall market value of the Property based on the construction costs and purchase of the land.

The Town testified the figures and methodology were accurate given the use of the state assessment manual and the plumbing fixtures and story height accurately depicted the value of the building. The Town submitted a spread sheet which analyzed the Property's assessment and compared it to the assessments of four properties in Town that had sold. While the spread sheet's grid made adjustments to the four comparable assessments in a logical fashion, the initial premise that the assessments of the four comparable properties were correct makes the entire procedure unreliable. In order for the final value opinion to have credence, the board would have to accept

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the assessments of the four comparable properties as accurate to begin with. However, the four comparable properties had varying assessment-to-sales ratios giving the board limited confidence in their accuracy. It would have been more accurate and more appropriate had the Town made adjustments to the actual selling prices of the four comparables using market derived adjustments and then factored the estimated market value by the DRA's equalization ratio to determine an appropriate assessed value for the Property.

Therefore, for the reasons stated above, the board finds the correct assessment to be \$78,300.

If the taxes have been paid for the tax year 1996, the amount paid on the value in excess of \$78,300 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. 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 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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Michele E. LeBrun, Member

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Douglas S. Ricard, Member

**Certification**

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Barbara A. Albright and William S. Polewarczyk, Taxpayers; and Chairman, Selectmen of Chester.

Date: September 11, 1998

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Valerie B. Lanigan, Clerk

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ORDER

This order responds to the "Taxpayers'" motion for cost reimbursement filed on December 14, 1998 which is denied.

The Taxpayers requested costs be assessed against the "Town" because the board's decision granting an abatement proved the appeal was not frivolous or filed without merit.

The board's authority to assess costs is contained in two statutes:

(1) RSA 76:17-b, which states, "(w)henever, after taxes have been paid, the board of tax and land appeals grants an abatement of taxes because of an incorrect tax assessment due to a clerical error, or a plain and clear error of fact, and not of interpretation, as determined by the board of tax and land appeals, the person receiving the abatement shall be reimbursed by the city or town treasurer for the filing fee paid under RSA 76:16-a, I."; and

(2) RSA 71-B:9, in part, which states, "(c)osts may be taxed as in the superior court."

Generally, the courts and this board do not have the authority to award costs against a municipality in a tax abatement case unless there is a specific statute authorizing such an assessment of costs. See Tau Chapter of Alpha XI Delta Fraternity v. Town of Durham, 112 N.H. 233, 235 (1978). RSA 76:17-b does give the board specific authority to have the filing fee reimbursed by the Town if the tax assessment was due to a "clerical error or a

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plain and clear error of fact and not of interpretation as determined by the board of tax and land appeals \*\*\*." In this case, the board finds no clerical error or plain, clear error of fact but rather an issue subject to judgement.

Therefore, the board declines to order the Town to refund the Taxpayers' filing fee.

Under the board's RSA 71-B:9 authority to assess costs, the court has allowed the assessment of attorney's fees against the state or one of its political subdivisions only where bad faith is found in the process of securing "a clearly defined and established right". Harkeem v. Adams et al, 117 N.H. 687, 691 (1977). The court further states that bad faith is shown where the party in question has acted vexatiously, wantonly, obdurately or obstinately. The board finds the Town's actions in this case did not constitute bad faith.

The board finds the ordered revised assessment is within 10% of the original assessment appealed by the Taxpayers. The board also finds that the Town made a reasonable effort to justify and sustain the original assessment although the board in the final decision found that the assessment needed revision. For this reason, the board finds no bad faith on the part of the

Town to justify awarding costs under RSA 71-B:9.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Michele E. LeBrun, Member

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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 Barbara A. Albright and William S. Polewarczyk, Taxpayers; and Chairman, Selectmen of Chester.

Date: January 15, 1999

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Valerie B. Lanigan, Clerk

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