

**Paul E. and Y. Karen Kerouac**

**v.**

**City of Nashua**

**Docket No.: 17896-98PT**

**DECISION**

The "Taxpayers" appeal, pursuant to RSA 76:16-a, the "City's" 1998 assessments of three lots, all shown on the City's Map H: Lot 152 - \$112,500 (land \$90,900; buildings \$21,600), a .28-acre lot used for a landscape business office; Lot 160 - \$42,000 (land only), a .79-acre backland lot used for a landscape business; and Lot 106 - \$301,900 (land only), a 1.61-acre lot used for a landscape business ("Appealed Lots"). The Taxpayers also own, but did not appeal, three other lots ("Non-Appealed Lots") with a combined assessment of \$834,900. (The Appealed Lots and Non-Appealed Lots collectively contain 6.13 acres<sup>1</sup> (the "Property")). For the reasons stated below, the appeal for abatement is denied.

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<sup>1</sup> The acreages listed are based on the assessment-record cards which the board finds are the best evidence of area for tax year 1998. The Taxpayers submitted a site plan at the hearing which showed the Property was comprised of 7.92 acres but the plan was not available to the City until after the conclusion of the 1998 tax year. At the hearing, the Taxpayers sought to appeal the assessment on Lot 104 also. But the City had no record of an abatement application on Lot 104.

The Taxpayers have the burden of showing, by a preponderance of the evidence, the assessments were disproportionately high or unlawful, resulting in the Taxpayers paying a disproportionate share of taxes. See RSA 76:16-a; TAX 201.27(f); TAX 203.09(a); Appeal of City of Nashua, 38 N.H. 261, 265 (1994). To establish disproportionality, the Taxpayers must show the assessment of the Property, as a whole, was higher than the general level of assessment in the municipality. Id. We find the Taxpayers failed to prove disproportionality.

The Taxpayers argued the assessments were excessive because:

- (1) the Property is zoned “park-industrial” and a variance approval or rezoning would be needed to use the Property as commercial property, concededly its highest and best use;
- (2) there was more reluctance in 1998 by the City to grant a rezoning or variance than there might be today; and
- (3) not all of the Appealed Lots are useable because of wetlands and wetland buffer zones.

The City argued the assessments were proper because:

- (1) “trends” in the City are that variances are “readily available” to realize the highest and best use as commercial property and the City utilized these trends in the update of values which it performed in the 1997-98 period;
- (2) even prior to 1998, a number of variances had been granted to the Taxpayers on the Property; and
- (3) the market value of the Property as a whole (including the Non-Appealed Lots) supports the City’s total assessed value, and this value can be apportioned among the six lots using the City’s equalization ratio of 0.95.

### **Board's Rulings**

While the Taxpayers chose to appeal the assessments on only three of the six contiguous parcels they own, the board is required to consider whether the aggregate assessments of the six parcels (Property) are disproportionate in determining whether to grant any abatement. See Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985) “When a taxpayer challenges an assessment on a given parcel of land, the board must consider assessments on any other of the taxpayer’s properties, for a taxpayer is not entitled to an abatement on any given parcel unless that aggregate valuation placed on all of his property is unfavorably disproportionate to the assessment of property generally in the town. Bemis &c. Bag Co. v. Claremont, 98 N.H. 446, 449, 102 A.2d 512, 516 (1954). ‘Justice does not require the correction of errors of valuation whose joint effect is not injurious to the appellant.’ Amoskeag Mfg. Co. v. Manchester, 70 N.H. 200, 205 46 A. 470, 473 (1899) (citations omitted).”

The parties stipulated the City’s level of assessment was 95% as determined by the department of revenue administration’s 1998 equalization survey. This means assessments generally were 5% lower than market value. The Property’s equalized assessment (indicated market value) was \$1,359,474 (aggregate assessment of \$1,291,500 divided by the 0.95 equalization ratio). This equalized assessment is intended to reflect an approximation of market value. For the board to grant an abatement on the Appealed Lots, the Taxpayers had to show the Property (six lots) was worth less than the \$1,359,474 indicated market value. We find the Taxpayers failed to make such a showing.

The City produced separate assessment-record cards for each of the six lots; however, these assessments were based on the valuation of the six lots as one economic unit and

proportioned allocations of value. The board finds the City's consideration and assessment of the six lots as one economic unit is appropriate given the facts in this case. See, e.g., Appeal of Loudon Road Realty Trust, 128 N.H. 624, 628 (1986); "There is no hard and fast rule that can be applied universally to guide assessors in determining whether [adjoining] parcels of land are to be assessed separately or together . . . [N]o single factor is decisive of the issue." (Citations omitted; brackets in original.) See also RSA 75:9.

In this case, the lots had been separately acquired by the Taxpayers at different times in the past; however, the Taxpayers had assembled and used the lots in an integrated fashion for their landscaping business. Further, the evidence submitted regarding the Taxpayers' marketing of the Property by the Masiello Group supports the City's conclusion that the Property should be valued as one economic unit. This conclusion is further supported by the fact that if the Appealed Lots were not contiguous to the Non-Appealed Lots, the value of the Appealed Lots would be significantly diminished. An approach isolating each lot is contrary to the premise that property should be valued at its highest and best use. By being contiguous and under the same ownership with the Non-Appealed Lots, the Appealed Lots gain greater utility through access and by providing open space and lot dimensional requirements for the more valuable frontage lots. Also, viewing the six lots as one economic unit diminishes the impact of the 75-foot wetland buffer in effect as of April 1, 1998.

The board finds the City's assumption of highest and best use as commercial development is reasonable. While the evidence is clear that the Property is not currently zoned for intensive commercial use, the board finds that either rezoning or obtaining a variance for

such uses is probable. The board realizes that potential highest and best use must be reasonable and not highly speculative or remote, but must be based on a permitted use or the reasonable probability of a zoning change. See Appraisal Institute, The Appraisal of Real Estate (11 ed. 1996 p 227-28) (“the reasonable probability of zoning change must be considered.”); and Appraisal Standard Board, Uniform Standards of Professional Appraisal Practice, (1999 ed. Standards Rule 1-3) (... [A]n appraiser must ... identify and analyze the effect on use and value of existing land use regulations, reasonably probable modifications of such land use regulations, economic demand, the physical adaptability of the real estate, and market area trends ... .”) (Emphasis added.)

The board finds the record is replete with evidence that either a zoning change or a variance to allow intensive commercial use would be readily obtainable. The City and the Taxpayers both testified to a number of variances obtained within recent times in the immediate neighborhood of the Property and indeed for the Property itself. The City testified there was a trend in the neighborhood for such variances being granted or rezoning requested. The City further testified that both general business and highway business zones were not that distant on either side of the Taxpayers’ Property, reflecting the general commercial development trends on Route 101A. In fact, testimony regarding the marketing of the Property by the Taxpayers and the

number of offers received indicate the market is generally recognizing that the Property would likely be developed into more intensive commercial uses than it is currently.

In short, the board finds the Taxpayers’ position that the Property should be assessed at

only its present permitted use, given all the evidence of all the conversions to more intensive use with variances and zoning changes, to be unreasonable and not credible in light of the marketing attempts and history of the Property.

The board concludes that, based on considering the Taxpayers' entire Property, no abatement is justified for the Appealed Lots.

**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. Denied, based on areas on assessment-record cards.
  2. Denied, based on areas on assessment-record cards.
  3. Granted.
  4. Denied, due to incorrect acreage on assessment-record cards.
  5. Granted.
  6. Granted.
  7. Granted.

8. Granted.
9. Granted.
10. Granted, with opinion date changed to 1943.
11. Granted.
12. Granted.
13. Granted.
14. Granted.
15. Granted.
16. Granted.
17. Granted.
18. Granted.

### **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

Albert F. Shamash, Esq., Member

**CERTIFICATION**

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to Paul E. and Y. Karen Kerouac, Taxpayers; Stephen M. Bennett, Esq., Counsel for the City of Nashua; and Chairman, Board of Assessors of Nashua.

Date: May 3, 2001

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Lisa M. Moquin, Temporary Clerk