

Elaine S. O'Donnell

v.

Town of Nottingham

Docket No.: 17999-99CU

FINAL DECISION

While this final decision (“Final Decision”) incorporates part of the board’s June 22, 2001 preliminary decision (“Preliminary Decision”), it is the Final Decision in this matter and replaces the Preliminary Decision.

Chronology

To put this Final Decision in perspective, the following chronology of the major events in this appeal is helpful. After several procedural issues and a continuance of the initial hearing date, a hearing was held in this matter on March 20, 2001, at which the “Taxpayer” was represented by her daughter, Kathy O’Donnell. At that hearing, the “Town” did not appear, but in accordance with TAX 202.06(i), the board proceeded with the hearing. Based on the evidence received in the hearing and the documents contained in the file, the board issued a Preliminary Decision on June 22, 2001. In that Preliminary Decision, the board made an initial determination of the total acreage of the Taxpayer’s “Property” and remanded the issue to the Town of assessing the two distinct areas of curtilage around the dwelling and the barn. The Preliminary Decision also required the Town to provide a detailed breakdown and documentation of how the RSA 76:13 and/or RSA 80:32 and 80:69 interest had been calculated

on an earlier \$56,332 abatement of assessed value. The Town submitted its revised assessment on July 16, 2001, along with a letter from the Town's administrator, Keith M. Trefethen, detailing the interest paid on the earlier abatement. The Taxpayer responded to the Town's submission on September 14, 2001. The Taxpayer's response also raised a concern that she or her agent were not allowed access to assessment records, and thus, could not adequately respond to the Town's submissions. Consequently, the board held a telephone conference with the parties on September 26, 2001, the result of which provided the Taxpayer with additional time to respond to the Town's submittal. The Taxpayer subsequently submitted further information on October 29, 2001, relative to the Town's revised assessment. During the board's deliberations that followed, the board concluded that one of its staff tax review appraisers (RSA 71-B:14) should investigate the parcel's total acreage and the areas encompassed by the various roads on the Property as they may not qualify for current-use assessment. Ms. Cynthia Brown, one of the board's tax review appraisers, submitted her report on March 6, 2002 ("Report"), and the parties were given 20 days to respond to the Report. Based on all the evidence submitted during this protracted process, the board makes the following rulings and findings.

Board's Rulings and Findings

The Taxpayer has the burden of showing, by a preponderance of the evidence, the assessment was disproportionately high or unlawful, resulting in the Taxpayer 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). The Taxpayer carried this burden.

First, the board finds the total area of the Taxpayer's parcel is 59.58 acres. Both the evidence submitted by the parties and the research performed by Ms. Brown in her Report support this finding. As the Report indicates, a plan dated May 2, 1979 establishes the total

acreage as 59.5799 (59.58 rounded) and the area was inclusive of all the right of ways and roads that access the Taxpayer's parcel and several other abutting lots. A copy of that plan was submitted in the Report and indicates it includes Hanlon Hill Road up to the land formerly owned by Gordon Mooers (Lot 2 on the Town tax map). However, a copy of the Town's tax map depicts Hanlon Hill Road terminating at the easterly bound of Lot 15. Based on the research done in the Report, the board concludes the tax map is in error and that Hanlon Hill Road, part of the Taxpayer's 59.58 acres, terminates at Lot 2. The Town should have its tax map corrected to reflect Hanlon Hill Road's depiction on the May 2, 1979 plan.

Second, the board finds the Town's revised assessment-record card, dated July 16, 2001, appropriately breaks down the 1.5 acres of land not qualifying for current use around the cottage and the barn. As noted on the Taxpayer's map accompanying her current-use application, the cottage and the barn are significantly removed from each, and consequently, the 1.5 acres needs to be split between the two structures to reflect the appropriate curtilage (CUB 301.04) associated with each structure.

Third, the board has reviewed the .62 acres the Town has assessed with the cottage and finds it is a reasonable value for its waterfront location. The board also reviewed the Taxpayer's comments relative to neighboring waterfront properties that were larger and, while assessed more, were not assessed proportionately higher. The board finds the Town's methodology is reflective of the market phenomenon that smaller lots generally have higher per-square-foot prices than larger lots, and thus, the relationship between differing lots sizes is not a straight-line relationship. Because assessments must track market value (see RSA 75:1) the board finds the Town's differing prices per square foot for different waterfront lots is appropriate.

Fourth, the board has reviewed the issue raised in the Town's July 18, 2001 letter that the roads servicing the area appear to be contained in the Taxpayer's lot and that they should not qualify for current use. Because of that concern, the board also directed Ms. Brown to investigate the parcel size and road areas. In her Report, Ms. Brown found that approximately 2.3 acres are consumed in the four roads that are inclusive in the Taxpayer's lot (Mooers Road, Shore Road, Hanlon Hill Road and South Road). Roads such as these accessing residential properties do not qualify for current use. See RSA 769-A:7, IV (a) (roads installed to access residential, commercial and industrial improvements are disqualified from current use, while roads solely for agricultural, recreational, watershed or forestry purposes are exempt.) Consequently, the board finds that 2.3 acres of land formerly assessed as hardwood current-use land (see Taxpayer's current-use map) should be removed from current use and assessed at market value. Because this is an administrative correction, the board finds no RSA 79-A:7 land-use-change tax should be assessed. Further, the board finds the market value of the 2.3 acres encompassing these various roads has only nominal value in and of itself. The purpose of the roads is to provide access to the lots they service. Those lots presumably have been assessed based on sales that reflect lots with similar access. Consequently, the value of reasonable access that the roads provide is already inherent in the assessment of the lots that are serviced by the roads, and thus, the board finds a nominal value of \$100 for the 2.3 acres.

The board's findings relative to the land assessment can be summarized as follows:

Type	Acreage	Current-Use Value per Acre	Value
Residential Waterfront	.62 acres	n/a	\$131,000

Curtilage Around Barn	.88 acres	n/a	\$ 1,100
Road Area	2.3 acres	n/a	\$ 100
Unmanaged Hardwood	37.78 acres	\$59	\$ 2,230
Unproductive Land	6 acres	\$15	\$ 90
Wetlands	<u>12 acres</u>	\$15	<u>\$ 180</u>
Total Land Valuation	59.58 acres		\$134,700

The board finds the Town's earlier revised building assessments of \$53,200 for the cottage and \$21,000 for the extra features (barn, equipment shed, wood shed and boathouse) (total building assessed value of \$74,200) are reasonable estimates for the buildings' 1999 contributory value to the Property as a whole. The "extra features" valuation of \$21,000 does not include the previously assessed fireplace value of \$1,500 which has already been abated by the Town. (See assessment-record card with print date of December 5, 2000 compared to an earlier assessment-record card of July 7, 1999 which included the incorrect fireplace assessment.)

Lastly, the board notes the Town's most recent 2001 revised assessment-record card indicates a significantly lower cottage value due to extensive fire damage as of April 1, 2001. The only tax year appealed by the Taxpayer is 1999, and consequently, the board only has jurisdiction to find the proper assessment for the tax year 1999.¹ For the board to have jurisdiction to decide valuation differences due to physical changes in subsequent years the

¹ For an original appeal, the Board shall only consider and issue a decision on the property and the assessment for the original tax year. The Board shall not consider or issue a decision on subsequent tax years unless a subsequent appeal was Filed and consolidated with the original appeal. TAX 203.05(d). See also RSA 76:17-c.

Taxpayer would have had to have filed an appeal for the subsequent tax years challenging those subsequent valuations.

If the taxes have been paid, the amount paid on the value in excess of \$208,900 (land \$134,700; buildings \$74,200) 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 tax year 2000.

The Town shall accompany the Taxpayer's abatement check with a clear explanation of how the abatement and the associated interest has been calculated.

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

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

CERTIFICATION

I hereby certify a copy of the foregoing order has been mailed this date, postage prepaid, to Kathy O'Donnell, representative for Elaine S. O'Donnell, Taxpayer; and Chairman, Board of Selectmen of Nottingham.

Date: April 9, 2002

Anne M. Bourque, Deputy Clerk

0006

Elaine S. O'Donnell

v.

**Town of Nottingham
Docket No.: 17999-99CU**

ORDER

This order relates to the "Taxpayer's" July 17, 2002 Motion to Enforce ("Motion") and the "Town's" three responses of July 31, 2002, September 5, 2002 and October 5, 2002. After a review of the Town's most recent submission, the board concludes the Town has adequately

detailed the calculations for the 6% (RSA 76:17-a) interest on the overassessment and the 12% (RSA 76:13) delinquent interest.

Accordingly, the board finds the issues raised in the Taxpayer's Motion have been addressed, the board's abatement order contained in its April 9, 2002 "Final Decision" has been complied with, and thus, by this order, the appeal is closed.

For the record, the board notes that none of its decisions or orders related to this case ever stated or inferred that refund interest should be calculated on the late payments of the first bill issued pursuant to RSA 76:15-a. The board would also note it has consistently ruled that late payment interest should be calculated from the final tax bill only. See, for example, attached order, Whitney and Johnsen, Inc. v. Town of Sunapee, Docket No.: 17889-98PT. Regardless, the calculations performed by the Town under that misapprehension result in relatively de minimis additional taxes being refunded to the Taxpayer, and thus, no correction is ordered by the board.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Certification

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I hereby certify a copy of the foregoing order has been mailed this date, postage prepaid, to Kathy O'Donnell, representative for Elaine S. O'Donnell, Taxpayer; and Chairman, Board of Selectmen of Nottingham.

Date: October 21, 2002

Anne M. Bourque, Deputy Clerk

0006

Elaine S. O'Donnell

v.

Town of Nottingham

Docket No.: 17999-99CU

ORDER

By letter dated November 5, 2002, taxpayer Elaine S. O'Donnell, with her daughter Kathy O'Donnell acting as her representative (collectively, the "Taxpayer"), filed a "Motion for Costs" with the board. On November 20, 2002, the board requested "an itemization and clarification of all costs" claimed by the Taxpayer within ten (10) days. On January 7, 2003, the Taxpayer was "placed in default," pursuant to TAX 201.04(a) and (d), due to her failure to comply with the November 20, 2002 order. On January 29, 2003, the Taxpayer "submitt[ed] an itemization of expenses involved in this action," explaining that, for emergency medical reasons involving several family members, she was in transit between New Hampshire and South Dakota during the intervening period and did not receive the board's November 20, 2002 order until January 18, 2003. On February 6, 2003, the Town filed and objection to the Taxpayer's Motion for Costs.

The board finds the Taxpayer's default is excusable for the reasons she has explained; consequently the board will proceed to determine the merits of the Motion for Costs pursuant to

TAX 201.05(b). The Town has filed no response regarding the Motion for Costs. The board nevertheless finds the Motion for Costs should be denied for the reasons set forth below.

First, the board's power to award costs is limited by statute and the board has no inherent authority in this area. Appeal of Land Acquisition, L.L.C., 145 N.H. 492, 497-98 (board "is not authorized to award attorney's fees in property tax abatement appeals"; statute permits "board to award 'costs' only").

Second, several statutes govern the Motion for Costs. RSA 71-B:9, which gives the board certain authority and powers, states "[c]osts may be taxed as in the superior court." Also relevant, however, is RSA 76:17-b, which provides that the Taxpayer is entitled to reimbursement of "the filing fee paid under RSA 76:16-a, I" whenever the board, after taxes have been paid, "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 interpretation, as determined by the [board]."

In this regard, although this appeal initially involved the Town's denial of the Taxpayer's current use (CU) application as untimely, upon remand the Town granted the Taxpayer CU on 58.08 acres, leaving issues pertaining to the proper assessment of 1.5 acres not in current use (NICU) and whether the Taxpayer was entitled to a further abatement and reimbursement of interest on delinquent taxes. See the board's Preliminary Decision dated June 22, 2001. On April 9, 2002, the board issued its Final Decision in the Taxpayer's favor, reducing the overall assessment to \$208,900 (land \$134,700; buildings \$74,200). (The Taxpayer later filed a Motion to Enforce with respect to the Final Decision, but this motion was denied by Order dated October 21, 2002.)

As a result, the board finds the substance of this appeal did involve an “abatement of taxes” and therefore RSA 76:17-b should be applied to determine if the Taxpayer is entitled to a reimbursement of her \$65 filing fee. Pursuant to this statute, the board determines she is not entitled to such reimbursement because the appeal did not involve a “clerical error, or a plain and clear error of fact,” but instead involved issues of “interpretation” pertaining to the correctness of the Town’s assessment practices.

Along with the board’s \$65 filing fee, the Taxpayer claims in her Motion for Costs various and sundry other cost items in the total amount of \$2,209.09. The board has reviewed each of these items, including a \$1,000 “Retainer” for an attorney, “postage for 31 mailings,” and gas and lodging expenses presumably pertaining to trips between South Dakota and New Hampshire. Although substantial in amount, this itemization does not entitle the Taxpayer to an award of costs.

In exercising its statutory power to tax costs “as in the superior court” under RSA 71-B:9, the board must follow New Hampshire Superior Court Rule 87 which governs the authority to award costs to the prevailing party. Other than the issue of the filing fee, addressed above, none of the costs itemized in the Motion For Costs fall within the scope of “Allowable Costs” authorized by parts (b) and (c) of this rule. Cf. Emerson v. Town of Stratford, 139 N.H. 629, 630-31 (1995) (vacating award of various costs to the prevailing party, including mileage and postage, because such costs were not authorized by court rule). The board is sympathetic to the efforts expended by the Taxpayer on this appeal and the significant costs and expenses incurred.

None of the itemized costs can be taxed against the Town on this appeal, however, and the

Motion for Costs is therefore denied in its entirety.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify copies of the above order have been mailed this date, postage prepaid, to Kathy O'Donnell, 61 Clough Sanborne Hill Road, Webster, New Hampshire, 03303, representative for the Taxpayer; and Chairman, Board of Selectmen, Town of Nottingham, Post Office Box 114, Nottingham, New Hampshire, 03290.

Date: February 14, 2003

Anne M. Bourque, Deputy Clerk