Henry G. Carnevale

v.

Town of Sutton

Docket No.: 18265-99PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the “Town’s” 1999 assessments on two lots located on Route 114: $15,600 on Map 06, Lot 393,088 (land $8,500; buildings $7,100), a 2.07-acre lot with an old service garage; and $95,700 on Map 06, Lot 449,072 (land $32,629; buildings $63,071), a 22.70-acre lot with a single-family home and barn (collectively the "Property"). For the reasons stated below, the appeal for abatement is denied.

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); and Appeal of City of Nashua, 138 N.H. 261, 265 (1994). To establish disproportionality, the Taxpayer must show the Property's assessment was higher than the general level of assessment in the municipality. Id. We find the Taxpayer failed to prove disproportionality.

The Taxpayer argued the assessment was excessive because:

(1) the Property is contaminated and "worthless";

(2) the Taxpayer previously tried to sell the Property, but could not find anyone willing to purchase it for even $40,000 (provided they give him a life estate, i.e., allow him to live on the Property until his death); and

(3) the true cost of cleaning up the Property's existing contamination well exceeds the putative market value of the Property in a "clean" condition.

The Town argued the assessment was proper because:

(1) in 1992 a town-wide revaluation was performed and in 1999 the Town's equalization ratio was determined to be 1.11 by the department of revenue administration ("DRA");

(2) the Town granted the Taxpayer a substantial abatement on the two lots (totaling $80,000) and the 1999 assessment, as abated, is not disproportional to the market value of the Property;

(3) the abatement reflected adjustments both for the physical condition of the Property and the estimated cost of correcting the contamination problems; and

(4) the Taxpayer failed to meet his burden of proving the Property was disproportionately assessed.

Board's Rulings

While this appeal generated extensive testimony and evidence, the simple task for the board is to determine whether the two assessments, as abated by the Town, of $15,600 and $95,700 are proportionate assessments of the Property, taking into account the contamination issues associated with it. The process of determining whether the assessments are proper will be to: 1) estimate the Property's market value without contamination; 2) estimate the contamination effect (reduction of market value); and 3) equalize the resulting market value finding by the

Town's 1999 level of assessment.

Level of Assessment

Beginning with the last issue, the board finds no evidence of the Town's level of assessment was submitted other than the Town's assertion that the DRA's 1999 equalization ratio of 111% is reasonable. Barring evidence to the contrary, the board finds the Town's 1999 level of assessment to be 111%. Appeal of City of Nashua, supra at 265-66.

Market Value Without Contamination

It is a generally recognized appraisal practice in estimating the value of environmentally-impacted properties (contaminated properties) to begin with the value of the property as if not contaminated and then discount that value for the effect of the contamination.

> To calculate the impaired value, one begins with the unimpaired value and deducts the cost to remediate the site and the impact of stigma. The same phenomenon is witnessed in the analysis of a sale of contaminated property. The property sells to a knowledgeable buyer at an impaired price. This price generally consists of two elements:
>
> · First, the buyer's estimate of the [sic] cost to remediate
> · Second, a discount due to uncertainty (stigma)
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> Totaling the two yields the unimpaired value.

The Appraisal Institute, The Appraisal of Real Estate, 216 (12th ed. 2001).

During the hearing, the Town's assessor, Mr. George Bean, testified that his estimate of the Property's April 1, 1999 market value without contamination, but considering the Property's state of deferred maintenance was approximately $150,000. The Taxpayer submitted no evidence of the Property's value in a "clean" (uncontaminated) condition.

Subsequent to the hearing, the board requested its RSA 71-B:14 tax review appraisers to

perform a market value estimate of the Property, without consideration of any contamination issues, and file a report ("Report") with the board. The Report was submitted to the board on December 19, 2001 with copies provided and time allotted to the parties for comments. The Report estimated a market value of $162,000 based on the direct sales comparison approach. The Report indicated the cost and income approaches were not applicable due to the difficulty of estimating depreciation for the older buildings and because single-family homes are generally not bought and sold on the basis of their rental income. The board's tax review appraisers inspected the Property, reviewed five comparable sales which were adjusted for differences between them and the Property and arrived at an estimated market value of $162,000 without any contamination.

The board finds the best evidence as to the Property's market value without contamination is the $162,000 estimate contained in the Report. This estimate is based on five comparable sales and reasonable, documented adjustments made to those sales. The Report's market value is in a range consistent with the Town's market value estimate of $150,000.

Effect of Contamination

The Property has a long, well-documented history of having been used as an auto salvage and garage facility by both the current and previous owners. The board has reviewed all the documentation submitted by the Taxpayer and the Town relative to site investigations performed on behalf of the New Hampshire Department of Environmental Services ("DES"). The board concludes the contamination that remained as of April 1, 1999 was extensively documented, readily quantifiable, and thus, can be adjusted for on a cost to cure basis. The board finds the Sanborn, Head and Associates Site Investigation (Taxpayer Exhibit #7) ("Sanborn Analysis")

and the Summary of Site Investigation and Future Actions by DES (Municipality Exhibit B) ("Summary") are the best evidence of what a prospective purchaser would rely upon in estimating the effects of the contamination to the Property.

Further supporting this conclusion is the settlement agreement signed between DES and the Taxpayer, recorded at the Merrimack County Registry of Deeds on September 28, 1998, that requires the remaining tires to be removed either prior to, or as a condition of, any sale of the Property. The fact that DES would agree to take no further action relative to its earlier order to remove the tires and has not pursued requiring clean-up of the contaminated soils is an indication that DES considers the extent of the contamination to be reasonably quantified and of such a nature so as not to pose a serious public health to surrounding properties.

Consequently, the board finds the estimates to clean up the site enumerated in the Summary are the best evidence for discounting the $162,000 "clean" market value estimate to arrive at the Property's market value in 1999. Further, the board finds the extent of the contamination is adequately documented and the associated costs to clean up is sufficiently estimated so that there is no significant uncertainty or stigma to account for in the discounting of the market value.

The following addresses in more detail the various contamination issues and explains the board's conclusions of the previous paragraph.

Groundwater

The Property has seven groundwater monitoring wells which indicate that "all results meet state standards" and consequently, the "groundwater observed [does] not warrant

remediation" (Summary and Sanborn Analysis at 15, respectively). While some low concentrations of metals were detected in the Sanborn Analysis, they were not of such levels as to warrant any further action other than continued sampling. Id.

Soils

Based on data derived from 19 test pits and various soil samples, the Sanborn Analysis and the Summary identified two areas of contaminated soils that need to be addressed either with use restrictions or removal of those soils. The cost of removal of the area south of the barn is estimated in the Summary at $10,000, and while a plan of remediation for the area to the northwest of the residence has not been developed, the board finds the Town's estimate of $10,000 in treatment costs is reasonable, considering the description of the contamination contained in the Sanborn Analysis. While the Sanborn Analysis recommends additional testing to fully assess the limits of the contaminated soils, the board finds enough soil analysis has already been performed to get a general sense of the extent and nature of the contamination.

Underground Storage Tanks

Both the Sanborn Analysis and the Summary indicate that an empty underground storage tank remains on the garage lot (Map 6, Lot 393,088). Id. The board finds the estimate of $5,000 for removal of the storage tank is conservative and appears limited to the $5,000 deductible under the Oil Discharge Disposal Clean Up Fund administered by DES (see August 25, 1999 letter from DES to TN).

Tire Disposal

Two estimates of the volume and/or number of tires were submitted. First, included with the Taxpayer's appeal were two letters from Darcy Hodgdon of Hodgdon Brothers, Inc., of

Ascutney, Vermont, estimating "a million tires at the site" and a resulting estimate of $50,000 for cleaning up the site plus an additional fee, which was not calculated, for hauling tires away to an undisclosed location. Second, Appendix E of the Sanborn Analysis contains a volume and tonnage estimate of the tires calculated by a photogrammetric analysis of the existing five tire piles plus a 20% contingency factor to "take into consideration the imprecision of the estimation method as well as the presence of the other, smaller on Site accumulation of tires not included in the five piles." The Sanborn Analysis estimated approximately 1,200 cubic yards or approximately 9,600 tires based on its method.

The board is unable to give any weight to the Hodgdon estimate of a million tires. That estimate is based on unquantifiable assumptions and would indicate that between 200,000 and 250,000 vehicles had moved through that site during the salvage operations of the current and previous owners. Given the number of vehicles that Hodgdon indicated they had removed for the current owner (800), such an estimate for the number of tires appears to be extreme. Further, using the Sanborn Analysis conversion of a weighted average of eight tires per cubic yard, a million tires would indicate 125,000 cubic yards of tires exist on site. Given the testimony, photographic evidence, and maps contained in the Sanborn Analysis, the board finds that 125,000 cubic yards of tires (i.e., about 13 times that estimated in the Sanborn Analysis), buried or unburied, is absurdly excessive. Consequently, the board finds the best estimate of both the volume and the cost ($22,000) to remove the tires is contained in the Sanborn Analysis.

Remediation Adjustments

Thus, the total estimated cost to clean up the site is $37,000. Applying a 25% contingency factor to the estimate would result in approximately $46,000 (rounded) which a

prospective buyer might expect, as a very liberal estimate, to pay to remediate the Property. Subtracting this estimate to remediate from the Report's market value of $162,000 results in an indicated market value for the Property of $116,000. Multiplying $116,000 times the Town's 1999 level of assessment of 111% results in an indicated assessment of $128,750 (rounded) ($116,000 x 1.11). This estimate is higher than the Town's abated assessment of the two lots of $111,300. Consequently, the board concludes the Town's abated assessment is a reasonable estimate of the Property's assessment given its contamination issues.

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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Michele E. LeBrun, 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: Henry G. Carnevale, Taxpayer; Timothy Bates, Esq., counsel for the Town; and Chairman, Selectmen of Sutton.

Date: May 14, 2002

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Anne M. Bourque, Deputy Clerk

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