

**Edward R. Wallace**

**v.**

**Town of Stoddard**

**Docket No.: 18222-00OS**

**DECISION**

The landowner (“Landowner”) appeals, pursuant to RSA 231:30, a betterment assessment of \$82.31 by the “Town” on a 3-acre parcel (Map 106, Lot 21) bordering Highland Lake (the “Property”). For the reasons stated below, the appeal is denied.

RSA 231:30 provides: “The landowner shall have the same right of appeal and [shall] follow the same procedures as are applicable to the assessment of taxes.” The Landowner therefore has the burden of proving the betterment assessment was improper or disproportional. See Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985); and TAX 203.09(a).

The Landowner argued:

- (1) the “only” access to the Property he uses is by water across Highland Lake, not by land;
- (2) the Property neither abuts the road improved by the Town (a 7/10th mile section of Kings Highway) nor any roads leading to it;
- (3) the Property simply has an unimproved right of way (50 feet in width) that extends for

approximately ½ mile across other property in the Lakeside District and then intersects another road (North Circle) that connects with two other roads (Nichols Drive and Tigola Trail) to then intersect Kings Highway;

(4) this right of way was neither sought nor acquired by the Landowner, whose family has owned the Property since the 1940s, but was imposed later by the Planning Board in connection with the subdivision of other land;

(5) because the right of way contains wetland and is heavily wooded, building a road would cost more than the value of the Property and, even if a road across the right of way is built in the future by the Town or by others and connects the Property to other roads and the Kings Highway, the Landowner has no intention of using it; and

(6) since the Property neither abuts nor is served by the betterment to Kings Highway, no assessment is proper under RSA 231:29.

The Town argued:

(1) the cost of the improvement of Kings Highway approved, after three Town meetings and adequate public notice, was approximately \$20,000 and was divided equally among 252 owners of land that abutted or was served by the improvement, resulting in a one-time betterment assessment of only \$82.31 to the Property;

(2) the test to determine if a betterment assessment is proper is objective rather than subjective: not whether the Landowner personally wanted or will use the right of way and then other roads to

get to Kings Highway, but whether, because of enhanced access to all the lots, the Property has

received “benefits” from the improvement of Kings Highway under RSA 231:29; and

(3) the Landowner has failed to meet his burden of proof.

### **Board’s Rulings**

RSA 231:29 reads, in material part:

**“Betterment Assessments Against Abutters and Those Served.** The cost of constructing . . . such highways . . . shall be assessed by the selectmen against the owners of property abutting or served by such facilities in an amount not to exceed the entire cost . . . and the amount so assessed upon each owner shall be reasonable and proportional to the benefits accruing to the land served. . . . All such assessments thus made shall be valid and binding upon the owners of land so abutting or served by these betterments.”

A “valid and binding assessment” must therefore normally satisfy at least two conditions. First, it must be made only against “owners of property abutting or served by such facilities.” The issue here is whether the Property, which does not abut the improvement, is “served by such facilities.” The second condition, discussed below for the clarification and benefit of the parties, but not raised by the Landowner in the appeal document filed with the board, see TAX 202.02(d), is whether the amount assessed (\$82.31) is “reasonable and proportional to the benefits accruing to the land served.”

On the first issue, the board agrees with the Town that the Landowner failed to meet his burden of proving the Property is not “served” by the improvement of Kings Highway. The Town is correct that an “objective” test should be applied to this condition. Whether the Landowner now or hereafter personally intends to use the right of way to access other roads and then Kings Highway is not relevant, since the Property is “served” (benefitted) by having improved access. All other things being equal, the Property, like the other lots assessed, should have more value because of the improvement of Kings Highway than before the improvement. The Town was therefore justified in including the Property in the special assessment.

The Landowner's subjective argument, that he, personally did not want, and will not use, the improvement either now or in the future, must fail. Personal, subjective benefit cannot be the standard or else far more common municipal exactions (for schools, fire and police protection, as well as roads) could be questioned by taxpayers in specific instances who, for example, may be childless or who prefer to contract for such services privately or do without them.

On the second condition, the board will note its concerns regarding the assessment method applied by the Town. Selectman GrandPre' testified the cost of the improvement (approximately \$20,000) was divided equally among each of 252 land owners. Each owner was assessed the same amount, regardless of the number of lots owned, the value of each lot, whether the lot abuts the road or has direct or indirect access, whether the lot was improved, or any other relevant factor that might affect whether "the amount so assessed upon each owner shall be reasonable and proportional to the benefits accruing to the land served."

The board questions whether ignoring relevant factors and opting for the simplest method (assessing each owner the same amount with no consideration given to the number of lots owned, their value or access) can result in a "valid and binding" assessment in this case. If the issue had been properly presented, a remand of the case to the Town might be warranted for a determination of what is a reasonable and proportional amount, as required both under the statute and Pt. 2, Art. 5 of the New Hampshire Constitution.

The board has in mind Land/Vest Properties, Inc. v. Town of Plainfield, 117 N.H. 817 (1977), a case involving improvements to "two class V highways leading to but located outside plaintiff's proposed subdivision." The supreme court made an analogy between subdivision exactions and special assessments, and applied the "proportional and reasonable" assessment

standard in Pt. II, Art. 5 of the New Hampshire Constitution. The court held a subdivider, subjected to an exaction for offsite improvements, “can be compelled ‘only to bear that portion of the cost which bears a rational nexus to the needs created by, and [special] benefits conferred upon, the subdivision.’ [Quoting from] Longridge Builders, Inc. v. Planning Bd. of Princeton Tp., 52 N.J. 348, 350, 245 A.2d 336, 337 (1968).” Id. at 823.

Similarly, the Town has an obligation to establish and apply a “rational nexus” between the “benefits accruing to the land served” and the amount of special assessments in order to meet both statutory and constitutional standards. These standards are in jeopardy when a somewhat arbitrary factor (the number of landowners) is relied upon without taking into account other relevant factors mentioned above, even if “[n]o single factor can be determinative.” Id. at 825. In making the allocation, “future and indirect benefits” from the improvements, and not just “present conditions,” can be considered. Id. at 824; accord, Frisella v. Town of Farmington, 131 N.H. 78, 84 (1988). The allocation method chosen by the Town, while no doubt simple and direct, may have violated the “reasonable and proportional” condition. See also Rollins v. Dover, 93 N.H. 448, 449 (1945) (“under our Constitution . . . [r]easonable and just have the same meaning . . . Taxes must be not merely proportional but in due proportion, so that each individual’s just share, and no more, shall fall upon him.”) (Quotations omitted.)

The Landowner, however, did not appeal the issue of whether the amount of his assessment was reasonable and proportional, perhaps because he had no such complaint given the small sum involved (\$82.31) and the relatively small adjustment that might result if the Town applied the correct standard. Because of this failure to appeal the issue, the board cannot now decide the issue in his favor or remand the case to the Town for further proceedings. See N.E.

Brickmaster v. Town of Salem, 133 N.H. 655, 658 (1990): “since [appellant] Brickmaster did not appeal the factual issue of whether the amount it was required to pay for off-site improvements bore a rational nexus to the proposed [development], see Land/Vest[, supra at 823], that issue is not before us.” As a result, the appeal in Brickmaster was denied. The board cannot apply the “rational nexus” test articulated in Land/Vest without also imposing the requirement imposed by Brickmaster regarding who must raise the issue and when.

Under the board’s rules, the appellant is “limited to the grounds stated in the Appeal Document,” TAX 202.02(d), and the Landowner did not appeal the amount of assessment, but only the fact of assessment of the Property. Consequently, the appeal is denied despite the substantial question as to whether the assessment was reasonable and proportional in amount as applied to the Landowner. The board cannot decide this issue sua sponte.

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 Ronald A. Wallace, Representative for Edward R. Wallace, Taxpayer; and Chairman, Board of Selectmen of Stoddard.

Date: June 12, 2001

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Lisa M. Moquin, Temporary Clerk