

Town of New London

Docket No.: 18488-01RA

ORDER

This order responds to the Appearance and Motion to Intervene and for Rehearing (Motion) filed by Attorney Margaret H. Nelson on October 4, 2001. Attorney Nelson represents some 30 property owners and taxpayers in the Town of New London [the Town] whose waterfront-related properties may be subject to reassessment in tax year 2002 (the Objectors). Motion, & 1. For the reasons indicated below, the Motion is denied.

The Objectors take exception to a portion of the board's Order dated September 4, 2001 (the Order). The Order resulted from a Petition filed by other individuals in the Town (the Petitioners)¹ and was entered after a fully noticed public hearing on August 7, 2001 at which three of the Objectors were present and two testified. The Objectors seek a rehearing to set aside the part of the Order pertaining to a 2002 Update of Waterfront-Related Properties (Order at pp. 4-6). The board scheduled this remedial step to precede the 2003 Complete Reassessment (Order at pp. 7-9) because of demonstrated assessment inequities in the Town and the Town's representations that an update of waterfront properties would be feasible in tax year 2002, but

¹ Pursuant to RSA 71-B:16, IV, 50 or more individual taxpayers can initiate a reassessment proceeding by filing a complaint with the board.

that a complete reassessment should be delayed until 2003. Somewhat inconsistently, the Objectors request, as an alternative to eliminating the tax year 2002 update, a complete reassessment in tax year 2002. Motion, & 7.

The Town has filed a statement taking *Astrong exception@* to this alternative remedy (*Aa municipal wide revaluation in 2002@*), but *Adoes not oppose@* the remainder of the Motion. See *AResponse@* filed October 15, 2001. The lead Petitioner (April D. Whittaker) filed a statement opposing the Motion, disagreeing with its characterization of the Order and supporting a 2002 update followed by a complete revaluation in 2003. See letter filed with the board on October 12, 2001. The department of revenue administration (*ADRA@*), which has broad and expanded responsibilities in this area,² filed an appearance and objection on October 22, 2001, urging denial of the Motion on the grounds, among others, that *Aan update performed in accordance with professional standards and applicable law@* will result in *Aenhanced assessment equity@* and the Objectors are *Anot aggrieved@* by the Order.

The Motion raises several procedural issues (standing and notice and due process) which the board will address first, before explaining why a *Arehearing@* to eliminate the 2002 update, the relief sought by the Objectors, is not warranted.

I. Standing

The Motion joins a request for intervention with an application for a rehearing based

² See: RSA 21-J:3; J:9; J:9-b; J:11, II; and J:11-a (Supp. 2001).

upon the Objectors' alleged status as persons directly affected by the board's decision under RSA 541:3. The Objectors cite this statute and Appeal of Richards, 134 N.H. 148 (1991) to argue they are entitled to seek rehearing of the Order. Motion, & 1.

A. For Intervention

On the issue of intervention, however, the Objectors fail to cite any authority or even the applicable intervention statute, RSA 541-A:32. The Motion fails under RSA 541-A:32, I both because it is not timely and because it does not make an adequate factual showing. This section requires a petition for intervention to be submitted at least 3 days before the hearing and facts demonstrating that the petitioner's rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law. RSA 541-A:32, I (a) and (b).

The Motion was submitted 30 days after the Order was entered on September 4, 2001 and 58 days after the August 7, 2001 hearing. Ample notice of the hearing was given by a Show Cause Order dated July 2, 2001, which was both posted in the Town and published in a newspaper of general circulation. The Objectors had ample opportunity to seek intervention well before the August 7, 2001 hearing, but failed to do so.

Their request for intervention also fails under the standards of RSA 541-A:32, II, a supplementary provision permitting intervention at a later time (than 3 days before the hearing). The board reads this section to apply logically only to situations where a person was somehow prevented or unable to file a timely petition under paragraph I of the statute and where such intervention would be in the interests of justice and would not impair the orderly and

prompt conduct of the proceedings. In this case, the board finds intervention would not be in the interests of justice and would impair the orderly and prompt conduct of the proceedings.

For municipalities in general, and for the Town in this case, which has not had a reassessment for the past 13 years, some definite end and finality to the proceedings is required if the Town is to begin to carry out the lengthy process of performing an assessment update and town-wide reassessment in an effective and efficient manner. To prolong the proceedings indefinitely with one or more additional hearings simply because a relatively small group of individuals in the Town, who believe the update would result in an increase in their own assessments, would unduly impede the goal of assessment equity (the interests of justice) and would result in unnecessary delay (impacting the orderly and prompt conduct of the proceeding), especially in light of the various post-reassessment remedies available to the Objectors discussed later in this order.

In this regard, the board notes the legislative intent reflected in newly amended RSA 71-B:5, V (Supp. 2001) that issues pertaining to reassessment practices [brought before the board through DRA petitions under RSA 21-J:11-a, II (b)] are entitled to a priority for scheduling hearings and for final rulings as well as a priority if an appeal is taken to the supreme court. (Emphasis added.) See also RSA 71-B:5, II. The timing considerations that underlie proper reassessments apply equally to petitions initiated under RSA 71-B:16, IV.

B. For Rehearing Under RSA 541:3

RSA 541:3 both prescribes who may apply for a rehearing (persons Adirectly affected@) and sets the discretionary standard (Agood reason@) for granting or denying it:

541:3 Motion for Rehearing. Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

The issue of who is Adirectly affected,@ in the context of an RSA 71-B:16 reassessment order, is one of first impression for the board.

On the one hand, as noted above, the Objectors claim to be Adirectly affected@ by the Order and cite RSA 541:3 and Appeal of Richards, supra, in support of their motion for rehearing. In that case, the supreme court upheld an earlier denial of a motion to intervene [in a Public Utilities Commission (APUC@) ratemaking proceeding] as Auntimely,@ 134 N.H. at 153, but later held several (but not all) non-party appellants had standing to bring a motion for rehearing and to appeal to the supreme court (under RSA 541:3 and RSA 541:6, respectively) on a showing they were Adirectly affected@ by the PUC decision. 134 N.H. at 154 and 156-58.

On the other hand, the board must question whether the Objectors have standing since the supreme court also recognized in the same case that ANo individual or group of individuals has standing to appeal when the alleged injury caused by an administrative agency=s action affects

the public in general, particularly when the affected public interest is represented by an authorized official or agent of the State.@ Appeal of Richards, *supra*, 134 N.H. at 156, citing Blanchard v. Railroad, 86 N.H. 263, 264-65 (1933). Both the Town and the DRA attended the August 7, 2001 hearing and neither has filed a direct objection to the Order or has independently sought a rehearing.

To the extent the Town incurs additional costs in performing an assessment update of waterfront property,@ this will be a cost borne by all taxpayers , *i.e.*, the public in general,@ and not the Petitioners as a separate class. By its terms, the Order simply requires the Town to perform a study . . . 1) [to] review all sales within the Town . . . and 2) [to] conduct a stratified ratio study of waterfront properties . . . to determine what interim adjustments for 2002 are appropriate.@ Order at p. 6.

Unlike the PUC decision raising utility rates by a certain amount in Appeal of Richards, *supra*, the board's Order only involves the possibility, not the certainty, of alleged injury (allegedly improper increased assessments for owners of waterfront property such as the Objectors),³ but will depend upon significant further steps undertaken by the Town to perform the sales review and updated ratio study specified in the Order. The Order also prescribes notification and an opportunity for informal reviews for correction and revisions@ before any

³ The Objectors appear to recognize this is only a possibility. See Motion, & 1 (the Objectors may be subject to reassessment . . .@) (Emphasis added).

proposed increased assessment is implemented by the Town. At best, a claim of >direct effect= is premature and can only be evaluated after further actions are taken by the Town which may or may not have a specific impact on each of the individual Objectors.

The Motion=s assertion that the Objectors are Adirectly affected@ by the Order presupposes a specific outcome of the 2002 update. The results of such an update cannot be predicted until further market analysis, as prescribed in the Order, is done by the Town to determine if, and to what magnitude, waterfront assessment adjustments are needed. The board also notes it will have continuing jurisdiction over the reassessment process and can reexamine, if necessary, the outcome of the steps taken by the Town to achieve assessment equity. See RSA 71-B:17 and B:21.

The board notes a distinction of some importance in the application of RSA 541:3. In Appeal of Richards, supra at 156, the movants had no other effective avenue of redressing the injury they alleged (an unjustified Aincrease in electric rates@), except through an appeal of the PUC decision through the Arehearing@ and appeal process in RSA 541:3 and 541:6.⁴ In

⁴ See also Appeal of Psychiatric Institutes of America, 132 N.H.177, 181 (1989), where competing applicants for a certificate of need (CON) were granted standing to seek a rehearing of the health care agency=s decision under RSA 541:3 and to appeal as persons directly affected by that decision, where the applicable statute had only expressly permitted the initial applicant a

contrast, ample and multiple opportunities exist for the Objectors to correct any alleged errors the Town may commit in performing either the update or the full reassessment in 2002 and 2003 both under the Order itself, as noted above, and under the relevant statutes.

C. The Relevant Statutory Framework

To better understand these concerns, a review of the applicable statutory framework is helpful. The authority to appraise and assess taxes lies with the selectmen and assessors of each municipality. See RSA 75:1 (2001 Supp.) (AThe selectmen shall appraise . . . all other taxable property at its market value@); and RSA 75:8, I (2001 Supp.) (AAnnually, and in accordance with state assessing standards, the assessors and selectmen shall adjust assessments to reflect changes so that all assessments are reasonably proportional within that municipality@). See also footnote 6, infra. The board notes that, in its response to the Motion at & 4, the Town represents its understanding of this statutory obligation and its intention Ato comply with this statute as early as possible.@

After municipalities perform their assessing responsibilities, taxpayers have recourse to file RSA 76:16 abatement requests and subsequent appeals to the board or the superior court pursuant to RSA 76:16-a and 17, respectively. These abatement requests and appeals are focused on an individual taxpayer=s proportionate tax burden and not on the systemic assessment issues addressed in RSA 71-B:16 and B:16-a.

right of appeal.

Appeal of systemic assessment problems is also provided in several other statutes. The DRA, pursuant to RSA 21-J:3, XXV (2001 Supp.), may petition the board to order a reassessment of property within a municipality. Also, RSA 21-J:3, XXVI (2001 Supp.) requires the DRA to review and certify every five years that assessments within a municipality are made in accordance with RSA 75:1. The DRA may order a municipality to perform certain corrective actions as part of this process and, if the municipality does not agree, may petition the board to order such corrective action [as is] necessary to ensure that the municipality's assessment[s] are in accordance with RSA 75:1. See RSA 21-J:11-a, II (b); and RSA 71-B:5, V (2001 Supp.). In addition, as noted above, RSA 71-B:16 provides other avenues for the board to review and

resolve alleged systemic assessment problems in any municipality. See RSA 71-B:16, II, III & IV. The latter provision was utilized by the Petitioners in this proceeding.

These statutes provide a process for making systemic reviews of assessment equity and are distinct from the board's authority over individual taxpayer appeals. Because the board's authority in these instances is to order a reassessment of any or all the property in a taxing district, it is reasonable to conclude individual taxpayers are more appropriately considered indirectly affected rather than directly affected by the possible outcome of any partial or full reassessment especially since specific individual remedies exist under RSA 76:16-a and 17.

II. Requisite Notice and Due Process

Alleging they are surprised and aggrieved by the Order, the Objectors state they

Abeliev[ed] their interests were being protected by New London@ as an explanation for why they did not seek to intervene in the original [August 7, 2001] hearing@ and now appear to claim a lack of requisite notice and a violation of their Adue process@ rights. See Motion at §§ 3 and 4.F. We disagree.

The board=s July 2, 2001 Show Cause Order cited both the specific RSA 71-B:16, IV statute by which the board gained authority to proceed with its investigation and the board=s general authority in ordering reassessments under RSA 71-B:16 and 16-a, and specifically, RSA 71-B:16, III. Further, the Show Cause Order required the Town to post the order in two public places and publish it in a newspaper of general circulation to provide for widespread notice to all interested taxpayers. The Show Cause Order also specifically stated Athe board will also hear testimony from any New London taxpayers relative to the need for a general reassessment of all property.@ The board took these additional steps even though the statute only requires Anotice to the selectmen or assessors . . . and a hearing at which the selectmen or assessors shall have the opportunity to be heard.@ See RSA 71-B:16-a. The fact that RSA 71-B:16-a requires notice only to the Town=s assessing officials is a recognition that reassessment orders directly affect them in carrying out their responsibilities and only indirectly affect individual taxpayers through the new assessments that may result.

The board also notes three of the ten taxpayers present at the August 7, 2001 hearing (Rosenfield, Linehan and McCormick) are part of the group of Objectors seeking a rehearing and, in fact, two of the three (Rosenfield and Linehan) presented testimony at that time. Also, during the hearing, the DRA=s stratified ratio analyses for tax years 1999 and 2000, filed with

the original Petition, were reviewed and discussed, particularly as to the level of assessment of several strata including waterfront property, and testimony was elicited regarding the need for, and feasibility of, an update. See Order at p. 6. Consequently, the board finds that adequate notice was provided to any interested taxpayers in New London; indeed, many of those concerned with the need for a reassessment were present at the hearing, testified and heard the testimony of other individuals.

Further, the board believes that no due process rights were violated because of the alternative statutory remedies mentioned in the preceding section. Even prior to filing individual abatement requests and appeals, the Objectors, as taxpayers, have several avenues for providing information to the Town to ensure proper and accurate assessments of their property. RSA 75:1 provides that the selectmen shall . . . consider all evidence that may be submitted to them relative to the value of property, the value of which cannot be determined by personal examination.⁵ As noted above, the Order requires that after any adjustments are proposed to waterfront property the Town shall provide an opportunity for informal reviews for correction and revision.⁶ Consequently, the taxpayers have several opportunities relative to their individual properties to ensure proportional assessments.

The board has consistently acted under its RSA 71-B:16 authority to craft reassessment orders to fit problems identified during the board's investigations (see TAX 208.05) and the evidence and testimony presented during a show cause hearing.⁵ The board's reassessment

⁵ For example, in 1988 in Meredith (Docket No. 0122-88), the board ordered that an assessment of all taxable properties on the islands of Lake Winnepesaukee . . . be made at the same proportion of market value as all other properties in the town.⁶ In Claremont, Columbia,

orders have been consistent also with findings in Appeal of Wood Flour, Inc., 121 N.H. 991, 994 (1981) that the board has broad authority to remedy inequities in disproportionate assessments and in the Appeal of Net Realty Holding Trust, 128 N.H. 795, 799 (1986) that A fair and proportionate taxation@ requires Aa constant process of correction and adjustment of assessments.@

III. Substantive Objections to Order

As explained above, the board finds the Objectors lack standing to intervene or to move for a rehearing under RSA 541:3 and received adequate notice and a full opportunity to appear at the hearing held prior to the issuance of the Order and without deprivation of any due process

Barnstead and Middleton (Docket Nos. 18398-00RA, 18361-00RA, 18253-00RA and 01447-91, respectively), the board has ordered assessment updates of discrete classes of property such as manufactured homes and waterfront property that were significantly out of proportion with the town=s overall level of assessment. Further, in Marlow (Docket No. 18478-01RA), the board ordered the town to reassess all its forest land current-use properties. The board also notes that the DRA=s 600 rules, which are cited as part of the applicable rules and statutes the towns must comply with in performing any reassessment, define partial revaluations and updates. See REV 603.01 (j) and (k).

rights. Assuming for argument purposes, however, that the Objectors are deemed to have standing, the board finds no Agood reason@ exists under RSA 541:3 to grant a rehearing. See also TAX 201.37.

Focusing on the Objectors= substantive arguments, the board disagrees with the Motion=s assertion that the Order creates a >bifurcation= of the reassessment process in the Town. The assessment update ordered for 2002 is very specific in that the Town needs to review the market data of waterfront properties and all other properties sold during the same recent period of time to ensure that any adjustments done to waterfront properties are proportional to the overall level of assessment of all properties in the Town in 2002. Indeed, this is nothing more than what is required of the Town in RSA 75:8 (2001 Supp.), as the Town notes in its October 15, 2001 response to the Motion at paragraph 4.

The Objectors also mention what they perceive as the Amany problems@ the Town will encounter in performing the update. Motion, & 5. These Aproblems@ are only factors any update needs to consider, but do not justify not performing the update at all. At page 6 of the Order the board did consider the practical aspects of whether an update could be done, such as identifying waterfront properties, a time frame in which to do it and the like, and determined, based on testimony of the Town=s assessing expert, an update could be practically carried out. Further, the board disagrees with the Motion that such an update would be Ahurried,@ again for the reasons just stated. In fact, the board notes the Motion is internally inconsistent, in that on one hand it argues the 2002 update would be hurried and yet alternatively argues that the entire Town could be reassessed in 2002 as opposed to 2003. The board does not agree with the >all or

nothing= nature of the Objectors= position, but instead believes assessment equity can be accomplished progressively and cumulatively, where the facts indicate this approach is more feasible.⁶

The Objectors question the facts presented at the August 7, 2001 hearing, such as the reliance on two years of sales data (the 1999 and 2000 >equalization surveys=) and the small sample size (seven waterfront sales in the Town in 1999 and eight in 2000).⁷ As noted above, when the Town performs the sales update it can consider more recent sales and broaden the size of the sample. The concerns of the Objectors are simply not sufficient to require a rehearing.

⁶ In Appeal of Net Realty Holding Trust, *supra* at 799, the court noted: Awe are convinced that the ideal of fair and proportionate taxation can be approached only through a constant process of correction and adjustment of assessments. RSA 75:8, indeed, requires selectmen and assessors to engage in just such continual revision by examining appraisals for error each year.@

⁷ The Objectors allege there are A550 to 600 units of waterfront property@ in the Town. Motion, & 4.A. The Town=s Administrator (Jessie Levine) testified, however, that only 400 parcels (out of a total of 2900 in the Town) are waterfront.

In short, the cumulative body of law cited by the board⁸ requires the board to order the Town to review the waterfront properties as soon as practicable to improve the overall assessment proportionality. It is in effect just an affirmation of the Town=s assessing responsibilities now outlined in RSA 75:8, I and II (2001 Supp.). The reassessment ordered does not predetermine the exact nature or magnitude of the Town=s adjustments but does require the Town to comply with its statutory assessments responsibilities and revise assessments where market data indicates adjustments are needed.

IV. Conclusions

The board concludes no rehearing is warranted because the Motion lacks merit both on procedural and substantive grounds. The Town shall proceed in carrying out the 2002 update and 2003 town-wide reassessment as prescribed in the Order. Absent a stay or other specific ruling, neither the Motion nor any subsequent proceedings that may be undertaken should serve to suspend or delay the operation or implementation of the Order. See RSA 541:18.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

⁸ Sirrell v. State of New Hampshire & a., No. 2001-003, __N.H.__, <http://www.state.nh.us/courts/supreme/opinions/0105/sirre087.htm> (May 3, 2001); Opinion of the Justices, (Reformed Public School Financing), No. 00-179, __N.H.__, <http://www.state.nh.us/courts/supreme/opinions/00012/ojschool.htm> (December 7, 2000); Claremont School District v. Governor, 142 N.H. 462, 471 (1997); Appeal of Net Realty Holding Trust, *supra*; Appeal of Town of Sunapee, 126 N.H. 214, 219 (1985); Appeal of Wood Flour, *supra*.

Michele E. LeBrun, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify that a copy of the foregoing order has been mailed this date, postage prepaid, to: April D. Whittaker, Lead Petitioner; John F. Teague, Esq., counsel for the Town of New London; Chairman, Board of Selectmen, Town of New London; Mark J. Bennett, Esq., counsel for the DRA; and Guy Petell, Director of Property Appraisal, DRA.

Date: October 25, 2001

Lisa M. Moquin, Clerk