

Daniel and Sarah Ford

v.

Town of Durham

Docket Nos.: 19576-02PT and 20391-03PT

DECISION

The “Taxpayers” appeal, pursuant to RSA 76:16-a, the “Town’s” 2002 assessment of \$368,151 (land \$176,651; buildings \$191,500) and its 2003 assessment of \$745,037 (land \$404,800; buildings \$340,237) on a 32.25-acre lot (30.87 acres in current use) with a single-family home identified as Map 20 Lot 8/5 (the “Property” or “Lot 5”). The Taxpayers also own two lots assessed in current use that were not appealed: a 12.20-acre lot identified as Map 20, Lot 8/4 (“Lot 4”); and a 15.50-acre lot identified as Map 11, Lot 36/4. For the reasons stated below, the appeals for abatement are granted.

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, 138 N.H. 261, 265 (1994). To establish disproportionality, the Taxpayers must show the Property’s assessments were higher than the general level of assessment in the municipality. Id. The Taxpayers carried this burden.

The Taxpayers argued the assessments were excessive because:

- (1) the dormer has been valued too high given its low ceiling height and effective floor area;
- (2) the barn, which contains some office/living area and storage areas, is assessed higher than its contributory value as an accessory building to the main dwelling;
- (3) the house lot has no water frontage of its own but rather has a deeded easement to access the dock area located on the adjoining Lot 4 owned by the Taxpayers; nonetheless, the Town assessed the Property as if it had all the benefit and use of the waterfront assessed in current use on Lot 4; and
- (4) several other properties with frontage on Little Bay, Oyster River or Great Bay have similar views and, in some instances, better deep water access and yet are assessed for less.

The Town argued the assessments were proper because:

- (1) the Property has all the benefit and thus the value of a waterfront lot despite how the subdivision of Lot 4 separates Lot 5 from Great Bay;
- (2) the sale of several properties or conservation easements with frontage on Great Bay indicate the Taxpayers' assessment, when equalized, is not excessive; and
- (3) the classification of the dwelling's second floor as a three quarter story is due to the rear dormer and is consistent with the assessment of other dormered dwellings; the barn has an office/apartment area and has good quality storage area on both floors.

The parties agreed the general level of assessment for tax years 2002 and 2003 were 57.7% and 99%, respectively, based on the department of revenue administration's median ratios for those years.

Board's Rulings

Based on the evidence, the board finds the proper assessments to be: 2002 - \$350,751 (land \$159,251; buildings \$191,500); and 2003 - \$700,187 (land \$361,987; buildings \$338,200). The only adjustment the board finds warrants an abatement is an approximate 10% reduction for both years in the primary site value to recognize that, while the Lot 5 1.38-acre site not in current use ("Site") enjoys many of the attributes of a waterfront property, some of the waterfront bundle of rights are embodied in the narrow strip of Lot 4 between the Site and Great Bay and is assessed in current use.

These appeals raise two general questions: 1) does the Town's assessment methodology of the Site inappropriately capture some of the bundle of rights that are actually embodied in current use land of Lot 4; and 2) did the Taxpayers present adequate evidence to carry their burden in showing the ad valorem portion of the assessment exceeds a reasonable estimate of market value for those real estate rights not impacted by current use.

Valuation of the Land Not in Current Use (LNICU)

In 1995, the Taxpayers subdivided their 40 plus-acre parcel into Lot 5 and Lot 4 as generally described above. The unique configuration of Lot 4, including a 10 to 30 foot wide strip of waterfront land between Lot 5 and Great Bay, (see attached portion of Taxpayer Exhibit G at Addendum A) was created with two general purposes in mind: 1) in the short term to lower the Taxpayers' taxes; and 2) in the long term to prevent further waterfront development of Lot 5 by transferring Lot 4 to a conservation organization. (See Municipality Exhibit D.) The Town asserts that despite the configuration of the Taxpayers' subdivision, Lot 5 enjoys all the same rights of a Great Bay waterfront property and has assessed the Site utilizing the same factors as

other waterfront property. The Taxpayers assert the Town has inappropriately “recaptured” in the value of the Site waterfront related rights that are encumbered with current use assessment.

As RSA 79-A:1 states in the declaration of public interest, assessing property at its lower current use value is a valuable tool to encourage the preservation of open space. The board has long acknowledged, however, the difficulty in fairly assessing LNICU that is surrounded by value-enhancing attributes of land that is in current use. As first enunciated in John L. Arnold v. Town of Francestown, BTLA Docket Nos.: 8718-90PT, 11152-91PT and 13819-93PT and in several subsequent cases, there is no one technical or mechanical way of determining the proper value of the LNICU. However, as is discussed in Arnold:

In most properties there are many factors that influence value and contribute to the determination of the highest and best use. Such factors are nearly endless but commonly include influences, both internal and external, to the property such as location, size, utility, access, improvements, topography, view, and zoning. In valuing an unrestricted property, the effect of various value influencing factors are normally viewed collectively. However, in reality, such factors are rarely distributed evenly throughout the property. Some portions of a property may embody certain factors more than other portions. For example, the area of a lot that contains improvements is more valuable than unimproved areas, and the location on a lot from which a view is obtained is generally more valuable than obscured locations.

However, when a property is subject to current use assessment, certain rights and value influencing factors are temporarily veiled and not valued for taxation purposes. N.H. CONST. pt. II, art. 5-B; RSA 75:1; chap. 79-A. These rights and factors still exist and are held by the owner, but they are suppressed or restricted by current use for tax purposes until sometime in the future when the land that embodies those rights or value influencing factors no longer qualifies for current use and is then assessed at market value.

Land not in current use (LNICU) does not have its rights or factors restricted by current use assessment and should be valued at its highest and best use considering the rights and factors directly inherent in the LNICU and any effect the balance of the property has on the LNICU. Id. at pp. 5-6. (Emphasis added.)

Here, the Site enjoys most, but not all, of the benefits of a waterfront property. As testimony indicates, the Site where the improvements are located has views of Great Bay. Lot 5 also has a recorded easement to its benefit on Lot 4 for accessing the dock area and Great Bay on Lot 4. Further, Lot 5 is separated from Great Bay by a strip of land (part of Lot 4) that is only 10 to 30 feet in depth. Thus, we find the Taxpayers and any subsequent heirs or assigns of Lot 5 will enjoy most of the same benefits that Great Bay waterfront properties enjoy with the exception of being able to control the vegetation on Lot 4, which could impede Lot 5's view of Great Bay, and who can access the strip on Lot 4. While certainly the Taxpayers, because they still own Lot 4, collectively control the entire bundle of rights of Lot 4 and 5. However, because Lot 4 is assessed in current use, the market value of those rights is masked by the current use assessment. Of these two factors (view control and access control) the board finds the potential loss of control of vegetation is by far a more significant factor than the potential of the public utilizing the narrow strip of land between Lot 5 and Great Bay. It is unlikely, given the significant other frontage of Lot 4, that any future public use would not significantly involve the narrow strip of Lot 4 that wraps around Lot 5.¹

As stated earlier, there is no absolute or technical way to estimate the extent to which

¹ During its deliberations, the board noted that technically the portion of Lot 4 that is encumbered with the dock (Taxpayer Exhibit 5) should not qualify for current use assessment because of such improvements. The Town should have assessed the market value of the dock and small area it encompasses on Lot 4 and reduce the eligible land for current use by that area. However, technicalities aside, the Town has, in essence, done that by considering the deeded rights that Lot 5 has to the dock and the dock value in the Lot 5 assessment, and thus, any market value assessment of the dock and access to Great Bay is reasonably captured in the assessment of Lot 5. See Soule v. Town of Sunapee, BTLA Docket No.: 14773-93PT (May 23, 1996) and McDowell/Widerstrom v. Town of Alton, BTLA Docket No.: 6336-89 (March 22, 1993) (intensively developed waterfront areas with docks, beaches and sheds do not qualify for current use). Cf. Wiggin v. Town of Moultonborough, BTLA Docket No.: 17866-98PT (August 3, 2000) (a seasonal dock with a long historical use of moving agricultural products and available for public recreational use, is in keeping with the RSA 79-A:1 purpose of current use and, thus, does not disqualify the area from current use).

Lot 5 is reduced by having the intervening frontage contained in Lot 4. However, in weighing all the rights that are still contained in the bundle of rights of Lot 5, the board has estimated the value of the rights embodied in Lot 4 for controlling the tree growth and public access is about 10%. Thus, we have reduced the condition factor applied to the one acre portion of the Site by approximately 10% from both assessment years (from 2 to 1.8 for 2002 and 2.25 to 2.0 for 2003).

Proportionality of Ad Valorem Portion of the Assessment

Reducing the 2002 and 2003 assessments for the reasons stated in the prior section results in ad valorem assessments for both years (excluding the current use land and its current use value) of: 2002 - \$349,300 and 2003 - \$698,150. Equalizing both years' assessments by the agreed upon median ratios produces the indicated market values of 2002 - \$605,373 ($\$349,300 \div .577$) and 2003 - \$705,202 ($\$698,150 \div .99$). The Taxpayers' evidence is next reviewed to determine if the Taxpayers carried their burden by showing that these resulting indications of market value are excessive and disproportionate.

The Taxpayers' main argument relative to the ad valorem portions of the assessments was that the dormer and the value on the barn were excessive: 1) compared to how they had been assessed; and 2) compared to their contributory value. The Taxpayers also argued they were disproportionately assessed by comparing their assessments to assessments of other properties in the Great Bay, Little Bay and Oyster River tidal areas.

The board finds the Taxpayers' argument does not tip the scale and prove the Property is disproportionately assessed relative to market value. The Town presented some sales information of other properties in the Great Bay tidal area and, while those properties obviously vary significantly as to the lot size, configuration and scope of improvements, their general market

indications support the Town's contention, and the board finds the equalized assessed values are not in excess of market value. The Taxpayers presented no market value evidence to support their assertion that the equalized market value indications were excessive.

The Town also presented general testimony that the market does not show a direct correlation between deep water access and value. The Town argued, and the board agrees, that water frontage conveys many desirable attributes, deep water access being but one of them. Others are privacy, seclusion, view and enjoyment of conservation and wildlife habitat. The board finds adequate evidence in the record that properties in the Great Bay area are being marketed with all these attributes affecting value. Thus, we are not swayed by the Taxpayers' argument that they are disproportionally assessed vis-à-vis other properties that have better water access than the Property.

The Town presented evidence and reasonable arguments it had assessed the dormer in a consistent fashion with other properties and that the barn is of good quality and provides an office and an apartment area that would be attractive and valuable if the Property was sold. While the Town did not apply as much obsolescence to the barn as in previous years and as the Taxpayers wished, it did apply 10% functional obsolescence to recognize its accessory nature and a reduced resale value.

Even if, for argument purposes, it is assumed the Taxpayers' assertions are correct that the Town utilized inappropriate methodology in valuing the dormer and the barn, that, in and of itself, does not lead to a finding of disproportionality. Here, as the supreme court found in Porter v. Town of Sanbornton, 150 N.H. 363 (2003), the Taxpayers' assertions do not result in a showing that the resulting assessment is disproportionate to market value.

To carry the burden of proving disproportionality, the taxpayer must establish that the taxpayer's property is assessed at a higher percentage of fair market value than the percentage at which property is generally assessed in the town. Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985). The plaintiffs produced no evidence regarding the fair market value of their properties. Rather, they attempted to prove disproportionate tax burdens by demonstrating that the Town employed a flawed method.

. . . While it is possible that a flawed methodology may lead to a disproportionate tax burden, the flawed methodology does not, in and of itself, prove the disproportionate result.
Id. at 368-69.

If the taxes have been paid, the amount paid on the value in excess of the assessments of: \$350,751 for 2002 and \$700,187 for 2003 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Until the Town undergoes a general reassessment or in good faith reappraises the property pursuant to RSA 75:8, the Town shall use the 2003 ordered assessment for subsequent years. RSA 76:17-c, I and II.

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(f). 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

Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Daniel and Sarah Ford, 433 Bay Road, Durham, New Hampshire 03824, Taxpayers; and Chairman, Town Council, Town of Durham, 15 Newmarket Road, Durham, New Hampshire 03824.

Date: March 29, 2005

Anne M. Stelmach, Deputy Clerk

ADDENDUM A