

Car Trust

v.

Town of Northumberland

Docket No.: 19871-02PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2002 total assessment of \$480,784 on a 40.6-acre lot developed with a race track and related improvements (the “Property”). Of the 40.6 acres, 18.1 acres are in current use; the Taxpayer does not dispute the current use assessment (\$2,084) on this land, but does dispute the ad valorem assessment on the remaining 22.5 acres (\$230,500) and the improvements (\$248,200). For the reasons stated below, the appeal for abatement is granted.

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. The Taxpayer carried this burden.

The Taxpayer argued the assessment was excessive because:

- (1) the Property is operated as a “short course” (¼ mile), stock car race track known as Riverside Speedway and has been used for this commercial purpose since the mid-1980’s, when it was acquired by the Taxpayer;
- (2) the land is located in a flood zone, borders the Connecticut River and is subject to spring flooding (as shown in the photographs in Taxpayer Exhibit 1) and erosion;
- (3) several races had to be cancelled early in the season because of wet conditions, which is a problem in most (“two out of three”) years;
- (4) an appraisal prepared by James Walker, President of White Mountain Appraisal, Inc. (the “Walker Appraisal”), for lending purposes, estimated the market value of the Property at \$172,000 as of September, 2002, using the cost approach primarily (80% weighting) and the income approach to a lesser extent (20% weighting);
- (5) the highest and best use of the Property is its present use as a race track, but due to market factors affecting the racing industry, attendance is declining and profitability is marginal;
- (6) the improvements are “seasonal” in nature, somewhat dated, in need of maintenance (because of age and flooding damage) and not of quality construction (“2’ x 4’s and Texture II materials”), diminishing their market value;
- (7) the Property has recently been listed with a real estate broker for prices ranging from \$229,000 to \$389,000, depending upon the prospective buyer’s intended use, but no bona fide purchase offers have been received; and
- (8) the Town’s own expert (contract assessor Leonard Nyberg) recognizes the assessment cannot be supported and recommends a substantial reduction in the assessment, but an even larger abatement is warranted.

The Town argued:

(1) most of the photographs presented in Taxpayer Exhibit 1 are not dated and do not indicate how, if at all, the alleged flooding affected the operation of the race track during the racing season or its market value;

(2) there are flaws in the Walker Appraisal, including its method of estimating land value per acre using a nonlinear (“exponential”) regression applied to a very small sample (six sales) of properties with very disparate sizes (4.58 - 177.9 acres), and the omission of two mobile homes and a construction trailer (the “trailers”) on the Property;

(3) Mr. Nyberg personally re-inspected and re-measured the Property after the appeal was filed to determine whether and how much of an abatement may be appropriate and, based on the information provided by the Taxpayer, the Town agrees the assessment did not reflect market value as of April 2002;

(4) based on the information submitted by the Taxpayer, a more valid estimate of the land value would involve computing an average price per acre using the six sales in the Walker Appraisal and then applying an agreed-to negative adjustment (33%) for flooding [40.6 acres x \$2,700 per acre = \$109,620 x .67 = \$73,400 (rounded)];

(5) a market value for all improvements of \$186,100 (rounded) can be derived by taking the replacement cost new of the trailers (not included in the Walker Appraisal - - approximately \$35,000), adding the estimated replacement cost of improvements (shown in Taxpayer Exhibit 2 - - \$222,880), applying Mr. Walker’s depreciation rate of 37.51% (resulting in a depreciated value of \$161,149) and adding the value of site improvements (\$25,000) estimated by Mr. Walker;

(6) these adjustments lead to a market value estimate (\$259,500) that is much higher than indicated by the Walker Appraisal (\$172,000), and the Town's expert therefore recommends the board award an abatement, but not to the extent argued by the Taxpayer; and

(7) one of the Town's selectmen (John Normand) expressed disagreement at the hearing with Mr. Nyberg's recommendation, but did not offer any evidence to support a different valuation.

The parties stipulated that the level of assessment for tax year 2002 was 92.3%.

Board's Rulings

Based on the evidence, the board finds the proper assessment to be \$276,784. The basis for this finding is detailed below after a discussion of the approaches to value taken by each party's expert and their limitations.

The board recognizes the specialized use of the Property as a stock car race track and the apparent lack of comparable properties on which to base a valuation. Neither party used a sales comparison approach. As noted above, the Taxpayer relied primarily on the cost approach and, to a lesser extent, the sales comparison approach, while the Town based its position on the cost approach.

At the hearing, the Town's expert, Mr. Nyberg, conceded the Taxpayer is entitled to an abatement, but disagreed with the methodology and conclusions of the Taxpayer's expert, Mr. Walker, regarding the value of the Property and therefore the size of the abatement. The Town did not submit any appraisal or other valuation evidence of its own, but instead Mr. Nyberg limited his testimony to critiquing and making adjustments to the Walker Appraisal.

The key issue requiring determination by the board is the value of the land not in current use ("NICU"), a total of 22.5 acres. The Walker Appraisal considered six sales in the Town from December, 2001 through February, 2002, estimated a gross value of the land (\$1,115 per

acre x 40.6 acres = \$45,269, as corrected) and then made a 33% “Flood Area” negative adjustment which results in a net value of \$30,330 (as corrected) for the 40.6-acre tract as a whole. Cf. Taxpayer Exhibit 1, pp. 28-29.

Although Mr. Walker testified to his vast experience in valuing property in the North Country and particularly in the Town, the Walker Appraisal was prepared for financing purposes and therefore did not focus on the land NICU, but rather estimated the market value of the entire parcel (40.6 acres) owned by the Taxpayer. It also excluded certain improvements (three mobile homes) situated on the Property because they were not owned by the Taxpayer, but by a related person.

Mr. Walker did not physically inspect the six sale properties he used as comparables, describe them in any detail, adjust his analysis for differences between commercial zoning and use (the Property) and agricultural or residential zoning and use (applicable to the six sales), or document how, if at all, the data used in his analysis was verified.

Mr. Walker used a nonlinear (exponential) regression equation to find a curve to fit the six sales data points and establish a relationship between land size and price. While Mr. Walker emphasized in his testimony the high “R²” obtained using his equation (0.921), correlation is not, of course, causation. See Exhibit 1, Walker Appraisal, p. 28.

Mr. Nyberg, for his part, took the same six sales reported in the Walker Appraisal and simply computed a simple average price per acre (\$2,700) to arrive at a higher market value for the land than Mr. Walker did. As noted above (see paragraph (4) of the Town’s arguments), Mr. Nyberg multiplied this average price per acre by the total acreage and agreed with Mr. Walker regarding a negative 33% “flooding” adjustment, which leads to an estimated land value of approximately \$73,400, more than double the estimate arrived at by Mr. Walker

(\$30,300). The board notes that this market value is well below the total indicated value based on the assessment.

There are a number of difficulties accepting either expert's methods or conclusions at face value. The board has therefore applied its own judgment and experience¹ to the evidence presented to arrive at a reasonable market value for the land NICU for the purpose of determining a revised assessment for the Property. Before doing so, the board will briefly summarize the problems encountered in light of the evidence presented.

One difficulty is that the sale prices used in the Walker Appraisal are not verifiable from his testimony, from the appraisal itself, or from the actual assessment-record cards submitted by the Taxpayer as part of Exhibit 1. Valid sale price comparisons require accurate information and verification that the sales were arm's-length. Neither appears to be the case with five of the six sales presented in the Walker Appraisal.

In particular, no assessment-record cards were presented for two of the properties ("Dupuis" and "Siros"). The "Hodgdon" sale involved land entirely in current use within an agricultural zone, diminishing its comparability to the Property, which is commercially zoned and used, with the bulk of land NICU; an additional problem is that the Taxpayer submitted nine assessment-record cards for the Hodgdon property (Map R19, Lots 852-1 through 852-9), but these cards depict a total of only 47.97 acres, not the "93.10" acres used in the Walker Appraisal. The assessment-record card for the "Bodie" property used in the Walker Appraisal states the sale may be "questionable" (indicating apparent uncertainty regarding whether it was a bona fide arm's-length sale); it was also purchased for the construction of a residence, not a commercial

¹ See RSA 71-B:1; RSA 541-A:33, VI ("The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence."); and Appeal of Nashua, 138 N.H. 261, 264-65 (1994); cf. Petition of Grimm, 138 N.H. 42, 53 (1993).

use. The “Trombly” sale (Lost Nation Road) appears to contain inaccurate information: the assessment-record card states the “listing” price at \$39,900, but nothing more (not the \$39,300 used by Mr. Walker). It is not clear whether a sale actually took place. In addition, all 68.14 acres on the Trombly property are in current use, diminishing its comparability to the Property.

Before addressing the remaining (“Maressa”) sale included in the Walker Appraisal, the board must note that it can give no weight to Mr. Walker’s conclusion (on p. 28 of his appraisal) that “no premium” could be associated with the commercial zoning of the Property. Mr. Walker apparently made no effort to either find or mention commercial land sales outside of the Town that might have affected his assumptions and conclusions. All other things being equal, commercial land should command a higher value per acre than land restricted to agricultural or residential uses. As evident from the Coulombe Real Estate materials in Taxpayer Exhibit 1, the Property is currently listed for sale as a “commercial property” that could be used as a stock car or “go-cart track” and/or a campground with “tent sites . . . as well as RV sites.” The listing further describes the Property as having “a beautiful sandy beach on the Connecticut [R]iver with 4,321 feet abutting the river.” For these and other reasons, the board finds some premium, say 40% per acre, is reasonable for the Property, when compared to non-commercial land.

Based upon the evidence submitted, the only sale verifiable from the submitted assessment-record cards appears to be “Maressa” (5.03 acres sold for \$25,500 in May, 2002 for a presumed residential use), which indicates a value of approximately \$5,000 per acre. Using this data, the board has developed a \$111,000 estimate for the value of the land NICU based on this sale. In this estimate, a \$7,000 per acre value was employed (to take into account a 40% premium for the commercial zoning and use of the Property), as follows: $\$7,000 \times 22.5 \text{ acres} = \$157,500 \times 0.67$ [the agreed 33% “flooding” adjustment] = $\$105,525 + \$5,950$ [equalized value

of septic and site work from Property assessment record card] = \$111,500 (rounded)]. This \$111,500 estimate is well below the value reflected in the assessment under appeal, but is above the land value estimates presented by either expert.

There was considerably more agreement among the experts regarding how the improvements on the Property should be valued. Mr. Walker's computation of the replacement cost of most of the improvements is \$222,880, as shown in Taxpayer Exhibit 2. The board finds merit in Mr. Nyberg's testimony that \$35,000 should be added to this estimate for the approximate, replacement cost (shown on the assessment-record cards for the Property) of the trailers excluded from the Walker Appraisal. Mr. Nyberg also agreed with Mr. Walker regarding the amount of effective depreciation (0.3751) and the value of other site improvements (\$25,000). Making these adjustments, the board finds a market value of \$186,100 (rounded) for the improvements [$\$222,880 + \$35,000 = \$257,880 \times 0.6249 = \$161,149.21 + \$25,000 = \$186,149.21$].

The final steps involve: adding the estimated value of the land NICU and the improvements (\$111,500 and \$186,100 = \$297,600); adjusting for the (92.3%) level of assessment: $\$297,600 \times 0.923 = \$274,700$ (rounded); and finally adding in the actual (undisputed) assessment on the remaining current use land: \$2,084. The board therefore finds the total assessment on the Property for tax year 2002 should be abated to \$276,784 using the cost approach.

The board further notes the above market value estimate for the land NICU and improvements (\$297,600) is consistent with other evidence: the Taxpayer's agent, Coulombe Real Estate, listed the Property for sale in 2004 in a price range of \$269,000 to \$389,000 (depending upon intended use).

The board has reviewed all of the Taxpayer's remaining arguments, including those stated in the "Narrative" submitted at the hearing, and need not address them here in light of the findings stated above. The "Narrative," for example, claims the "land area" has been reduced due to the settlement of a boundary lawsuit with "Craggy" and the effects of erosion, but insufficient evidence regarding these items and their effect on the market value of the Property was submitted by the Taxpayer.²

In deciding this appeal, the board has weighed two considerations. On the one hand, the burden of proof remains with the Taxpayer to establish its entitlement to an abatement and the amount thereof. See, e.g., Porter v. Town of Sanbornton, 150 N.H. 363, 367-68 (2003). On the other, the Town's own expert (Mr. Nyberg, its contract assessor) stated his belief, both before and at the hearing, that a substantial abatement is appropriate;³ he stated his recommendation was based on a more accurate valuation of the land and improvements. While some disagreement was expressed by one of the Town's selectmen with the recommendation of its own expert, the Town did not present any other valuation evidence to support the assessment.

The board has responded to the Taxpayer's Requests for Findings of Fact and Rulings of Law in Addendum A attached to this Decision.

If the taxes have been paid, the amount paid on the value in excess of \$276,784 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

² The board finds the income approach to value prepared by Mr. Walker was based upon an uncritical acceptance of unaudited financial information presented to him by the Taxpayer. Reported income varied widely in the years 1998 through 2001 and Mr. Walker's decision to "average" them to stabilize income and apply a capitalization rate would seem to be an unreliable method for valuing the Property, since this approach leads him to conclude the net present value of the Property is only \$26,200 (see Taxpayer Exhibit 1, Walker Appraisal, pp. 32-34), which is almost ten times less than his estimate using the cost approach. Id., p. 36. The board therefore disagrees with Mr. Walker that his income approach estimate is entitled to any weight in this appeal (such as the 20% used in his reconciliation and final value opinion).

³ Cf. the board's June 27, 2005 Order, which mentions prior communications between Mr. Nyberg and the Taxpayer's attorney.

Unless the Town has performed a general reassessment or has reappraised the property in good faith pursuant to RSA 75:8, the Town shall use the ordered assessment in tax years subsequent to that appealed. 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

Michele E. LeBrun, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Margaret H. Nelson, Esq., Sulloway & Hollis, P.L.L.C., Post Office Box 1256 Concord, New Hampshire 03302, counsel for the Taxpayer; Chairman, Board of Selectmen, Town of Northumberland, 2 State Street, Groveton, New Hampshire 03582; and Leonard J. Nyberg, Jr., Nyberg Purvis & Associates, 125 Savageville Road, Lisbon, New Hampshire 03585, representative for the Town.

Date: August 19, 2005

Anne M. Stelmach, Clerk

ADDENDUM A

The Taxpayer's Requests for Findings of Fact and Rulings of Law are replicated below, in the form submitted and without any typographical corrections or other changes. The board's responses are in bold face. With respect to the Requests, "neither granted nor denied" generally means one of the following:

- a. the Request contained multiple requests for which a consistent response could not be given;
- b. the Request contained words, especially adjectives or adverbs, that made the request so broad or specific that the request could not be granted or denied;
- c. the Request contained matters not in evidence or not sufficiently supported to grant or deny;
- d. the Request was irrelevant; or
- e. the Request is specifically addressed in the Decision.

Findings of Fact

1. The Taxpayer owns a 40.60 acres parcel on which it operates a ¼ mile stock car race track, known as Riverside Speedway, located in the Town of Northumberland (Map R 5, Lot 54) (the "Property").

Granted.

2. As of April 1, 2002, the Property's aggregate assessment was \$480,784 (Land - \$232,548; Buildings - \$248,200).

Granted, except for land total of \$232,584.

3. The Town of Northumberland's equalization ratio for April 1, 2002 was determined by the New Hampshire Department of Revenue Administration to be 92.3%.

Granted.

4. Adjusted by 92.3%, the Town's aggregate assessment of the Property of \$480,784 indicates a fair market value of \$520,893 as of April 1, 2002.

Granted.

5. The Property which abuts the Connecticut River is located in a flood zone. See Flood Map #3300036 005B, Zone AE.

**Granted, except for inadvertent error in reference to Flood Map
#3300360003B.**

6. Several acres of the Property have been lost prior to 2002 due to erosion and a portion of the remaining acreage is wet and unusable.

Neither granted nor denied.

7. The Property has been the subject of floods and wet conditions which has impacted race track operations and the general use of the property.

Granted.

8. The improvements on the Property associated with the race track (outdoor bleachers, concession stands and other seasonal structures) are several years old and in average condition.

Granted.

9. The race track ran at a loss for three (3) of the four (4) years preceding April 1, 2002.

Granted.

10. Attendance at the race track, and resulting income, has been adversely affected by its location, the types of races it can present and other factors, while expenses, such as insurance, have continued to rise.

Granted.

11. The Property has been on the market on and off over the last 5 years. It has been advertised in trade journals for the race track industry, along with “word of mouth” and other approaches. The Property has been listed most recently with Coulombe Real Estate, a North Country real estate agency. That listing occurred after the 2002 tax year. At the recommendation of Coulombe, the Property has been listed with two different asking prices: 1) as a vacant land

parcel of \$229,000 and 2) assuming an on- going business operation as a stock car race track, go-cart track, or campground at \$286,000 to 389,000.

Neither granted nor denied.

12. The Taxpayer has received no offers at any price for the Property, either prior to or after April 1, 2002

Denied.

13. James Walker of White Mountain Appraisal, Inc., located in Franconia, New Hampshire, has substantial experience in valuing real estate in New Hampshire's North Country.

Granted.

14. Mr. Walker performed an appraisal of the Property as of September 3, 2002 to determine its fair market value. The purpose of the appraisal was to be used as a guide for loan underwriting.

Granted.

15. Mr. Walker's conclusion that the highest and best use of the Property was its current use as a race track was reasonable given the limited other potential uses for the Property, the fact that it had run at a profit in the past, and the fact that adjacent properties are either agricultural, sparse residential or limited commercial uses.

Granted.

16. Mr. Walker properly considered the applicability of all three approaches to value – cost, income and market – in reaching his value conclusions.

Granted.

17. Mr. Walker relied on a well recognized cost estimation manual, Marshall Valuation Service, to estimate the depreciated cost of the improvements and his estimate of land value was based on an analysis of Northumberland land sales, reasonably adjusted for the flood plain location of the Property.

Granted.

18. Mr. Walker's discounted cash flow analysis reasonably relied on the Property's average net income and employed a discount rate of 12.25% which was reasonable, given the risks associated with the race track operations.

Neither granted nor denied.

19. Mr. Walker's decision not to develop the market approach was reasonable given that there were no sales of comparable race tracks in Northern New Hampshire or Vermont on which he could rely to do such an analysis.

Granted.

20. Mr. Walker's value conclusion of \$172,000 reflected the Property's fair market value as of April 1, 2002.

Denied.

Rulings of Law

21. A fair and proportional assessment of the Property as of April 1, 2002 would not exceed \$158,756 (\$172,000 adjusted by 92.3%).

Denied.

22. The Taxpayer has met its burden of demonstrating that its assessment was excessive and disproportional and is accordingly, entitled to an abatement of all taxes paid its 2002 assessment in excess of \$158,756. RSA 76:16-a; *Appeal of Town of Sunapee*, 126 NH 214, 489 A.2d 153 (1985).

Denied.

23. Pursuant to RSA 76:17-c, the Town of Northumberland may not assess this property in excess of \$158,756 and shall abate all taxes paid on assessments in excess of that amount until such time as it, in good faith, reappraises the Property due to changes in value or conducts a general reassessment in the municipality. *Appeal of Town of Newmarket*, 140 NH 279, 665 A.2d 1088 (1995).

Denied.