

Anton T. and Carol J. Moehrke

v.

Town of Plainfield

Docket No.: 20508-03PT

REVISED AND RESTATED DECISION

Following the July 14, 2006 hearing on the “Town’s” reconsideration motion, the board grants the motion and vacates and revises its prior decision pursuant to TAX 201.37(g). For clarity, the board is restating the decision in its entirety, including the arguments presented by the parties.

The “Taxpayers” appeal, pursuant to RSA 76:16-a, the Town’s 2003 assessment of \$428,500 (land \$213,700; buildings \$214,800) on Map 12, Lot 3900, a partially constructed single-family residence on 31.20 acres (the “Property”). For the reasons stated below, the appeal for abatement is denied.

The Taxpayers have the burden of showing, by a preponderance of the evidence, the assessment was 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 assessment was higher than the general level of assessment in the municipality. Id. The board finds the Taxpayers failed to meet this burden of proof.

The Taxpayers argued the assessment was excessive because:

- (1) the Town's methodology lacked clarity and was inconsistent and houses of similar or better quality and size received lower assessments than the Property;
- (2) more specifically, the "neighborhood" condition factor ("120") overstated the value of the land and the "quality" factor ("A9"), a rating higher than for any other property in the Town, overstated the building value; and
- (3) the "correct assessment" for tax year 2003 should be \$387,023, which they calculated at the hearing by reducing the neighborhood factor (from "120" to "100") and the quality factor (from "A9" to "A8").

The Town argued the assessment was proper because:

- (1) the Taxpayers purchased the Property for \$155,000 on December 28, 2000 in an unimproved condition;
- (2) the improvements to the site (well, septic, driveway and underground utilities) and a reasonable appreciation factor (at least 1% per month) supports the land assessment;
- (3) the "120" neighborhood condition factor was applied consistently to all properties on Chellis Road;
- (4) the building values were determined based on sales data and information obtained from local realtors, contractors and the Town's full-time contract assessor and are also supported by actual cost information supplied by the Taxpayers; and
- (5) the Taxpayers did not provide any market value evidence to support an abatement of the Property.

Board's Rulings

Based on the evidence and arguments presented at the April 18, 2006 hearing and the July 14, 2006 rehearing, the board finds the Taxpayers failed to prove the Property was disproportionately assessed in tax year 2003. The appeal is therefore denied for the reasons presented below.

The Taxpayers presented a number of specific criticisms regarding the form and content of the Avitar reassessment manual (Taxpayer Exhibit No. 8) available at the time of the informal reviews during the tax year 2003 Town-wide revaluation and how this led to some confusion and difficulty in understanding the methodology used to assess the Property. While more clarity and transparency would have made the assessment process easier to understand, the Taxpayers clearly developed a sufficient understanding of the basis for their tax year 2003 assessment.

They also cited Porter v. Town of Sanbornton, 150 N.H. 363 (2003), which clarifies the legal standards for an abatement. As noted in Porter, criticism that a Town's methodology is "flawed" or "poor" or that it "could have used a more reliable methodology," even if justified, is not sufficient to meet the taxpayer's burden of proving disproportionality and entitlement to an abatement. Id. at 367, 369 and 371. Accord, Verizon New England v. City of Rochester, 151 N.H. 263, 271-72 (2004) ("disproportionality, and not methodology, is the linchpin in establishing entitlement" to an abatement). Therefore, no further discussion of the perceived shortcomings of the manual is necessary here.

As held in these cases, "to carry the burden of proving disproportionality, a 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." Id. at 272, citing Porter, 150 N.H. at 369. As emphasized by the Town, the Taxpayers have the burden of proof, but chose not

to present any evidence of the market value of the Property, either as partially constructed in 2003 or as completed in 2004. The Taxpayers argued at the rehearing that such evidence was not relevant to their appeal.¹ The board disagrees. Like the superior court, the board is obligated to consider and apply relevant supreme court decisions on tax abatement appeals, such as Porter and Verizon, which hold that market value evidence is key to an abatement.

In this regard, a taxpayer cannot meet the burden of proving disproportionality simply by referring to other properties that may have higher market values but lower assessments because the alleged underassessment of others is not a sufficient ground for an abatement. See, e.g., Appeal of Cannata, 129 N.H. 399, 401 (1987). Thus, while the board has considered the extensive evidence presented by the Taxpayers regarding other high value properties in the Town and their assessments (see, e.g., Taxpayer Exhibits 2, 3, 5 – 7), this evidence is insufficient to establish a basis for an abatement.

The Taxpayers did not dispute the Town's estimate that construction was 35% complete as of the assessment date (April 1, 2003) or that the Town's level of assessment was 100% for tax year 2003, but focused instead on two points of disagreement: (i) the neighborhood factor applied to the land; and (ii) the quality factor applied to the building. Each of these arguments is discussed further below.

First, the board finds no basis for reducing the neighborhood factor. A neighborhood factor is a means of taking into account differences in how the market values land in different areas of a town and is generally applied to a standard "base rate." In this case, the base rate was \$51,000 for the primary site and the Taxpayers asserted the "120" neighborhood factor (applied to all properties on Chellis Road, including the Property located at 171 Chellis Road) is too high

¹ One of the Taxpayers candidly acknowledged he had not read Porter, which the Taxpayers cited and which is also prominently mentioned in the Town's reconsideration motion.

because present activities on several other properties diminish their enjoyment of the Property.

The “Marsh” property, at 133 Chellis Road, is owned by an individual who occasionally operates wood processing equipment on part of it (the “wood lot”) in the morning before going to other jobs. According to the Taxpayers, this creates some noise issues for them during those times when they are bird watching or walking their dog. They also testified the “Putnam” property, at 84 Chellis Road, where a “concrete form lot” was operated, has “unsightly uses and operations” because it had been used for contractor storage and concrete processing operations and has an unfinished building. Marsh is an abutter and Putnam is located across the road and is at a farther distance from the Property.

The board has reviewed the photographs of the Marsh and Putnam properties (Taxpayer Exhibit No. 4). Especially in a rural area, it is quite possible for a neighborhood to have some mix between old structures and new construction, established residents (who work the land actively) and those who seek to enjoy and maintain a pristine setting.

The Town responded that the structures complained of on these properties are not visible from the developed home site on the Property and that, in any event, their existence does not require a change in the neighborhood adjustment. The board agrees. As noted, the Town uniformly applied the “120” factor to all properties located on Chellis Road, including the two the Taxpayers complain about. See also Municipality Exhibit No. B, ¶18 (in 2003, there were apparently “some 311 parcels with a land condition greater than 100” in the Town). The board finds the application of this factor did not result in disproportional assessment. The Taxpayers acquired the undeveloped land in December, 2000, over two years before the assessment date, for \$155,000 and then made substantial improvements to it, including adding a well and septic system. The value shown for the primary site is \$168,300 on the assessment-record card. This

value includes application of the “120” factor and is not disproportional when the purchase price, the cost of improvements and reasonable appreciation in land values are considered. Sales of other properties of roughly comparable acreage for example, 173 Chellis Road (Wendt, an abutter) and 175 Chellis Road in January, 2001 for \$160,000 each also support the Town’s land value.

The second point of dispute concerns the Town’s application of an “A9” factor to the Property. The Taxpayers noted the Property was the only one rated “A9” in the Town in tax year 2003, while others of arguably comparable quality received an “A8” rating. Under the Town’s “CAMA” (computer assisted mass appraisal) system, as reflected on the assessment-record cards presented, an “A9” designation applies a higher multiplier to the building cost estimate than the “A8” designation.

The board had questions regarding whether the factor applied to the Property was proper, especially on the assessment date when the Property was still in the construction phase (only 35% complete); the board initially concluded the factor should be reduced “for the purpose of improving assessment consistency and equity,” but has reconsidered this conclusion. There are instances where errors on assessment-record cards (such as square footage calculations or “view” determinations for example), can lead to assessment discrepancies that require correction. Here, however, the evidence, when considered as a whole after the rehearing, demonstrates the Taxpayers failed to show the Property was disproportionately assessed, even if arguably the Town could have erred in applying the building quality factor. In other words, the Taxpayers failed to show how this alleged error resulted in disproportionality. "Justice does not require the correction of errors of valuation whose joint effect is not injurious to the appellant." Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985), quoting Amoskeag Mfg. Co. v. Manchester, 70

N.H. 200, 205 (1899). The Taxpayers can only show injury, i.e., that they are “aggrieved” by the assessment, see RSA 76:16-a, if it resulted in disproportionality. No such showing has been made in this appeal.

As reflected on the assessment-record card, the Town performed two physical inspections of the Property, once on May 19, 2003 during the construction phase and concurrent Town-wide revaluation and then on May 14, 2004 after the house was completed. George Hildum, the Town’s assessor since 1995, made the inspections and was supplied with extensive cost information by the Taxpayers (detailed in Municipality Exhibit No. C). Mr. Hildum concluded, based on the information received, that the Property’s market value supported the “A9” assessment. The board finds the Taxpayers failed to meet their burden of refuting this conclusion.

At the rehearing, the Town noted the Property is no longer the only one rated as an “A9” and that another newly constructed house has received this rating. The Town also noted the Romke and Wendt properties are not entirely comparable to the Property. The 3-story, post and beam “barn” on the Romke property, connected with an underground tunnel, may be quite costly and elaborate, but it is only one of three buildings on the Property, contains no bedrooms and is considered as an ancillary building used for recreation. The Wendt property is a one-story structure with a raised, walk-out basement, making it distinguishable and likely to be less valued by the market.

In brief, the board has reconsidered its decision and finds the Taxpayers have not sustained their burden of proving they are entitled to an abatement simply on the basis of a difference of opinion regarding the “A8” or “A9” rating. While there is no doubt a “subjective” component, which the Taxpayers critique, in this and other aspects of the assessment process, no

abatement is warranted unless a more objective test is met: disproportionality reflected in an assessment that is more than the market value of the Property adjusted by the level of assessment in the Town. Absent any evidence from the Taxpayers of the market value of the Property, the board cannot conclude it was overassessed for the year under appeal.

In light of these rulings, the board concludes the “view” requested by the Taxpayers is unnecessary and their request is denied. The Taxpayers’ “Request for Administrative Notice” of another tax abatement case in superior court is also denied because it is not applicable to this Decision.

Finally, the board has considered the “objection” to the rehearing process made by the Taxpayers in their pleadings dated June 30, 2006, but not received by the board until the July 14, 2006 rehearing. The Taxpayers did not make a timely objection to the Town’s June 2, 2006 reconsideration motion, but instead filed a reconsideration motion of their own on June 15, 2006. Contrary to the Taxpayers’ later objection and complaint at the hearing that the Town was being given a “do-over,” a rehearing was granted, not on the basis of new evidence, but on discrete questions of law which the board wished to consider further and to gain a better understanding of the facts pertaining to the appeal. For the rehearing, both parties received notice and an opportunity to submit any additional evidence they may have had pertaining to these questions. The board has inherent discretion to consider such evidence, as well as legal arguments, at a rehearing and no error occurred by granting a rehearing in this appeal.

For all of these reasons, the appeal is denied.

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

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Revised and Restated Decision has this date been mailed, postage prepaid, to: Anton & Carol Moehrke, PO Box 202, Meriden, NH 03770, Taxpayers; Loren J. Martin, Gary J. Roberge, and Edward Tinker, Avitar Associates of New England, Inc., 150 Suncook Valley Highway Chichester, NH 03258, representatives for the Municipality; and Town of Plainfield, Chairman, Board of Selectmen, PO Box 380, Meriden, NH 03770.

Date: August 2, 2006

Anne M. Stelmach, Clerk