David and Laura Maine

v.

Town of Deering

Docket No.: 21111-04PT

DECISION

The "Taxpayers" appeal, pursuant to RSA 76:16-a, the "Town's" 2004 assessment of $293,909 (2.0 acres of land not in current use ("NICU") $259,700; 17.7 acres of land in current use $3,009; buildings $31,200) on Map 218/Lot 35, a residential property at 96 Old County Road (the "Property"). [The Taxpayers also own, but did not appeal, Map 218/Lot 35/2, a 2.1 acre lot, which the parties stipulated was proportionately assessed.] For the reasons stated below, the appeal for abatement on the Property is granted.

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 Taxpayers carried this burden.

The Taxpayers argued the assessment was excessive because:

(1) the Taxpayers obtained an appraisal (the "Manias Appraisal," Taxpayer Exhibit No. 1) from a New Hampshire certified general appraiser, estimating the value of the primary site (NICU) at $68,000 as of April 1, 2005, one year after the assessment date;

(2) even if the Manias Appraisal is discounted, the value of the NICU was no more than $100,000 as of the assessment date, well below the Town's assessment of $259,700;

(3) while the Property has "very good views," the Town applied an excessive condition factor, overvaluing the view in comparison to other properties, including four lots on the same road which sold in 2005, to which the Property can be compared;

(4) it is not proper to attribute all the value to the view from the land NICU when the view results from having other land in current use; and

(5) a substantial abatement should be granted, greater than the amount the Town is now proposing.

At hearing the Town recommended revising the land portion of the assessment from $259,700 to $204,100, to reflect a reduction in the condition factor of the NICU, from a factor of 490% to a factor of roughly 385%, resulting in a total revised assessed value of $238,309. The Town argued the recommended assessment is proper because:

(1) the Town performed a revaluation in 2004;

(2) the Property has impressive views, as shown in the photographs contained in Municipality Exhibit No. A;

(3) the two sales of comparable view properties detailed in Municipality Exhibit No. B support the assessment;

(4) the Manias Appraisal uses properties from another town (Weare) to derive a 15% adjustment for view, which is not valid and is much too low because these properties did not have views that had been realized in 2004 and are not comparable to the Property; and

(5) the Taxpayers have not met their burden of proving a larger abatement is warranted.

Because of the proximity of the Property and the neighboring "Nelson Property" (Map 218/Lot 35/1) which was also appealed (Docket No. 21259-04PT), the board, with the agreement of the parties, held a consolidated hearing on both appeals on May 16, 2007 and took a view of the Property and other properties on Old County Road and Sky Farm Road on May 22, 2007. Because of the similar issues and the consolidated hearing, the board takes official notice of evidence presented in both the "Maine" and "Nelson" appeals. See RSA 541-A:33, V. The parties stipulated the level of assessment for tax year 2004 was 100.9%.

Board's Rulings

Based on the evidence, the board finds the proper assessment to be $227,659 (NICU $193,450; 17.7 acres current use $3,009; and buildings $31,200). This assessed value is based upon revising the condition factor of the NICU starting at a 400 factor for the view minus 10 for a cleared, but undeveloped lot as of April 1, 2004 and minus 25 for control for the view not being totally contained within the NICU.[1]

The board is unable to give any weight to the Manias Appraisal for a number of reasons. First, the comparables utilized were of sales of properties containing no view, all of which received a 15% adjustment based on a separate analysis of sales in Weare that compared a parcel

[1] At hearing the Town was represented by Avitar Associates of New England, Inc. ("Avitar"). The Avitar representatives testified the 10% reduction for the site being a cleared undeveloped site be applied to the view condition factor in a multiplicative fashion as opposed to subtracting it as had been previously done on the assessment-record card. The board reviewed the 2004 assessment-record cards submitted by the Town in various exhibits and reviewed the assessment-record cards contained in Avitar's 2004 revaluation manual. All adjustments to other view factors were subtracted rather than multiplied. Consequently, the board revisions are subtracted consistent with the methodology exhibited on the 2004 assessment-record cards of other properties in the Town.

with no view with five properties that did have views. The Town submitted photographs of the Manias Appraisal "view" properties (Municipality Exhibit No. C) which show the views were substantially inferior to the Property and thus the board concludes the 15% adjustment is grossly inadequate.

Second, the four properties at 274 to 302 Old County Road ("Mighty Oaks sales") sold in 2005 in a range from $69,000-$91,000. On its view (and also as shown in Municipality Exhibit No. D), the board was able to observe the residential development occurring on the Mighty Oaks lots and the views which have been opened up as part of the development. While the Mighty Oaks sales have views and topography inferior to the Property, the sales prices are higher than that estimated by the Manias Appraisal even if the Mighty Oaks sales are discounted for their subsequent sale dates in 2005.

Third, the Town presented the assessment-record cards and the sales of the Gregory E. Johnson ("Johnson") property, Map 241/Lot 11, and the Society for the Protection of New Hampshire Forests ("Society") property, Map 241/Lot 12, to support its assertions the revised assessment is correct and the Manias Appraisal understates the value. On its view, the board visited the Johnson and Society properties and agrees the views from both properties are similar or, in fact, slightly superior to the Property. Both the Johnson and Society properties however, have long access to the sites from which the best view is obtained. The board agrees with the Town that the sales are evidence that the Manias Appraisal value for $68,000 of the Property's NICU is exceedingly low. At the hearing, Mr. Maine conceded the NICU had a value approaching $100,000 due to its view.

Fourth, in the Nelson appeal, the Nelsons submitted an appraisal by Ms. Paula Clemente, estimating their property's value as developed. The cost approach portion of the Clemente appraisal estimates a site value (but without any supporting documentation) of $125,000.

In summary the board's review of the other evidence enumerated above indicates the Manias Appraisal's $68,000 estimate for the NICU is not reliable.

As referenced above, the board on its view compared the Property to the nearby Mighty Oaks sales on Old County Road and the sales of the Johnson and Society properties on Sky Farm Road. In general terms, the board finds the four Mighty Oaks sales have inferior view potential and steeper grade from the road to the residential sites than the Property. The board performed a comparative analysis of the Property's NICU with the Mighty Oaks sales. After adjusting the Mighty Oaks sales for change in market condition (time), deducting contributory value of the rear land, deducting for their wooded, undeveloped condition at the time of sale and adjusting for their inferior topography and view, the condition factors indicated for the Property's NICU are in the 350-375 range. Similarly analyzing the Johnson and Society sales and adjusting for time, for their partially developed state and for access and view differences, the condition factor indicated for the Property is in the 400-450 range. Based on the analyses, the board concludes a condition factor of 400 is reasonable for all the rights associated with the Property's site when fully developed.

The Taxpayers, however, argued that not all view rights are contained in the NICU and that the right to maintain much of the view (cutting of trees and maintenance of cleared field) is located outside the NICU. The Town's representative, Avitar, countered the reassessment's methodology made no distinction between the value of a site with total control of its view versus a site with a view but with little or no control over land which the view occurs.

The board finds merit in the Taxpayers' argument and both logic and general market evidence support this concept. Rights to maintain a view are often acquired separate to the sites from which the view is enjoyed. The board has observed over the years the acquisition or creation of view easements on adjoining parcels to protect the view enjoyed from a benefited parcel. While no plan was presented in either the Maine or Nelson appeals as to the exact location of the NICU, on its view the board noted the cleared areas around both sites appeared to exceed two acres and thus the board concludes the right to maintain and protect the view enjoyed from the NICU is partially contained in current use land. Just as water frontage and road frontage (which are major value influencing factors) are not considered in valuing current use land, (see Cub 303.01) so to is the right to maintain the view, which is partially embodied in the current use land, also negated through current use assessment.[2] Avitar's argument essentially would have the value of that right transferred to the NICU, the curtilage area. However, the evidence of view easements being transacted and acquired in the market contradict Avitar's assumption and methodology that all rights to view are contained within the land not in current use. Consequently, the board has reduced the 400 factor 25 points to 375 to account for the control rights inherent in current use land surrounding the NICU.

In conclusion, the board finds the resulting assessed value for the NICU reflects the very good views and the cleared, desirable site of the Property which collectively are significantly superior than the Mighty Oaks properties on Old County Road and similar or slightly inferior to the views from the Johnson and Society properties on Sky Farm Road. (The board also reviewed

[2] The board has consistently held in a number of cases that in valuing a parcel not in current use only those rights contained within the curtilage area can be assessed at market (ad valorem) value. Any market related rights that remain in or are embodied in the current use land are veiled by the assessment process which is a use based versus a value based assessment. See Jay S. Grumbling Revocable Trust v. Town of Lee, Docket No.: 21493-05LC; John M. Lovett v. Town of Sutton, Docket No.: 1510-94PT; Virginia A. Soule v. Town of Sunapee, Docket No.: 14773-93PT; and John L. Arnold v. Town of Francestown, Docket No.: 08718-90PT.

the assessment-record cards of 30 and 40 of Old County Road, both improved properties, which have similar orientation as the Property, but slightly inferior views and steeper topography. In those cases the Town had reduced view factors of 375 and 350 for topography and power-line issues.) Thus the board concludes an overall 400 factor reduced 25 points for the control of the views being outside of the NICU (and reduced 10 points for the cleared, but undeveloped lot condition) is proportional based on all the evidence submitted.

If the taxes have been paid, the amount paid on the value in excess of $227,659 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

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, <u>not the date this decision is received</u>. 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

_____
Albert A. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: David and Laura Maine, 118 Deering Center Rd., Deering, NH 03244, Taxpayers; Edward Tinker, Gary J. Roberge and Loren J. Martin, 150 Suncook Valley Highway, Chichester, NH 03258, Municipality Representative; and Chairman, Board of Selectmen, Town of Deering, 762 Deering Center Rd., Deering, NH 03244.

Date: June 13, 2007

_____
Anne M. Stelmach, Clerk