

**Cheney Revocable Trust**

**v.**

**Town of Durham**

**Docket Nos.: 21424-04PT /22407-05PT**

**DECISION**

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2004 and 2005 assessments of \$783,200 (land \$356,600; building \$426,600) on Map 20/3/2/2A, a dwelling on a 0.56 acre lot described as “Limited Common Area II-A” of the Wooden Nutmeg Farm Condominium (“WNFC”) (the “Property”). This case was consolidated for hearing purposes, including evidence and testimony, with the adjoining England Family Limited Partnership (“England”) (BTLA Docket Nos. 21425-04PT & 22406-05PT) property. For the reasons stated below, the appeals for abatement are denied.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the assessments were 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); Appeal of City of Nashua, 138 N.H. 261, 265 (1994). To establish disproportionality, the Taxpayer must show the Property’s assessments were higher than the general level of assessment in the municipality. Id. We find the Taxpayer failed to prove disproportionality.

The Taxpayer argued the assessments were excessive because:

- (1) although the exterior of the house is well constructed, the interior has lower cost features with a poor second floor layout;
- (2) the Property, along with another unit owned by England (Limited Common Area II-B), is part of WNFC which shares with 14 other individuals a clubhouse and dock of the Shankhassick Shorefront Association (“SSA”) (“Limited Common Area I” of WNFC);
- (3) the house shares a driveway with several other homes and a well and septic system with England;
- (4) as a result of its condominium form of ownership, the Property has numerous restrictions imposed on it;
- (5) the close proximity of the England property and the SSA commonly owned clubhouse and dock affect the privacy and value of the Property;
- (6) the Town has assessed the Property as if it were on its own lot instead of being part of a condominium; and
- (7) sales from a similar waterfront condominium in Newmarket, (The Meadow at “Moody Point”), indicate a site value of approximately \$240,000 and a total assessed value of \$615,000 for tax years 2004 and 2005.

The Town argued the assessment was proper because:

- (1) while technically part of the WNFC, the Property functions essentially as a single family dwelling because the only common area is the shared driveway with several adjoining lots;
- (2) the dwelling has exterior design and some interior features that warrant the “excellent” grade designation;
- (3) the Town’s comparable sales analysis, as part of Municipality Exhibit No. A, indicate

April 1, 2004 and April 1, 2005 values of \$915,000 and \$975,000 respectively; and

(4) the 2005 sale of 578 Bay Road for \$650,000, if adjusted for the site improvements and excess land, indicates a lot with a view and access to Great Bay has a value of approximately \$450,000.

Subsequent to the April 4, 2008 hearing, the board took an exterior view of the Property, the adjoining England property (BTLA Docket Nos. 21425-04PT & 22406-05PT), the SSA clubhouse and dock and all the comparables referenced in the parties' presentations.

The parties stipulated the general level of assessment was reasonably represented by the department of revenue administration's median ratios of 95% for 2004 and 87.3% for 2005.

### **Board's Rulings**

Based on the evidence, the board finds the Taxpayer failed to prove the assessments were disproportionate.

The board reviewed the declarations of WNFC and SSA (included as part of Taxpayer Exhibit No. 2) and agrees with the Town that while the Cheney/England/SSA limited common areas are part of a condominium form of ownership, the functional utility and ownership rights of both the Cheney and England properties are much more similar to traditional single family subdivision form of ownership. The WNFC declaration lays out the limited common areas as shown on Taxpayer Exhibit No. 4 and provides for the sharing of a common well and septic system and driveway access. Additionally, the declaration imposes certain collective covenants and use restrictions (see pages 9 and 10 of declaration). However, the Taxpayer testified that no condominium fees are paid nor is there any assessment of common expenses. Rather, each owner of the three limited common areas are responsible for their own maintenance of the grounds and upkeep of the buildings and the only cost shared is that of maintaining and plowing of the shared driveway. The testimony indicated the driveway is not only shared between the

three members of WNFC but is also common to several adjoining lots that also use it for access.

The individual who plows the driveway directly bills to the various individuals accessed by the driveway, thus there is no formal condominium assessment or otherwise for this shared access.

Historically, the area comprising WNFC had three cottages in the same ownership which could not have been subdivided. The Taxpayer restructured the property rights with the approval of the Town in the only way that separate title could be transferred through the formation of a condominium with the three limited common areas: Limited Common Area I, the waterfront access, dock and clubhouse for the SSA; Limited Common Area II-A, the Cheney dwelling; and Limited Common Area II-B, the England dwelling. As a consequence, while the form of ownership is technically as a condominium, it was structured to facilitate subdivision of an already encumbered parcel into two separate dwelling sites and a shared waterfront area for 14 other lots/individuals. (The board was unclear from the documents submitted whether lots benefited by SSA are limited to those currently granted that right or whether the Taxpayer or some affiliated Cheney entity retain the right to further designate access to other additional lots as Mr. Cheney seemed to infer during a portion of his testimony.)

In viewing the comparables and in particular Moody Point, the board observed the use and enjoyment of the Property is more similar to the single family home subdivided parcels than the condominium units at Moody Point. While the Cheney and England dwellings and SSA facility are in relatively close proximity to each other, there is more open space, larger limited common areas and in general a more spacious feel to their parcels than the 50 plus units at Moody Point. While legally structured as part of a condominium, the Cheney and England properties are essentially indistinguishable physically from the single family dwelling lots that surround them in this area of Great Bay.

The board finds Mr. Lutter's land extraction from sales of condominium units at Moody Point, despite the facial similarities of the WNFC Association and the Moody Point Community Association (see Taxpayer Exhibit No. 6), does not capture all the property rights inherent in the Property. The Property has better and more proximate views and access to Great Bay than the sales utilized by Mr. Lutter at Moody Point. While the Property is in close proximity to the SSA waterfront facility, the board finds any reduction in privacy is largely offset by the close proximity of the excellent docking facility to the Property. Both the view and this docking facility are significantly superior to those similar features of the Moody Point sale. The Town did, nonetheless, reduce the land assessment condition factor by 10 percentage points (from 2.25 to 2.15) for the shared driveway and proximity to the shared SSA docking facility.

On balance, the board finds the Town's land assessment is generally supported by the sales the Town discussed in Municipality Exhibit No. A, two of which are in sight of the Property. While certainly all the sales are improved with different styles and size of dwellings, they are all generally in the same market strata, much more so than the condominium sales at Moody Point presented in Mr. Lutter's Taxpayer's Exhibit No. 3. Further, much testimony was presented about the purchase of 578 Bay Road (in 2001 for \$278,600), its subsequent partial development (driveway and site work \$150,000 to \$250,000 estimate) and its resale in 2005 for \$650,000. The board viewed this property as it has been subsequently developed and noted its good view of Great Bay albeit somewhat tunnel view. Even accounting for the extensive site work and that the lot contains 36 plus or minus acres, the residual value attributable to the house site with a view of Great Bay and access through the SSA shorefront facility indicates that the Property's site assessment of \$356,600 is not excessive given its superior view and more proximate location to Great Bay.

The Taxpayer did present some testimony and evidence that in particular the interior of the home contained lesser quality components but the Taxpayer failed to show that the Town's assessment as a whole was disproportionate. The Town's building assessment methodology is a combination of a quality or grade designation and a cumulative point system of the various building components. In this case, the cumulative grade factor of 1.68, combined with the size adjustment factor, resulted in an adjusted base rate of \$113.02. The Town testified that the cumulative point system recognized that some of the interior components were of lower grade and resulted in a lower overall grade factor.

The test here, as it is in all appeals, is whether the total assessment when equalized is disproportionate to market value. In short, the board finds the Taxpayer's evidence fails to show that the assessments are disproportionate. Further, the Town has presented supporting evidence that the assessments are not excessive and if equalized by the levels of assessment are reasonable estimates of market value.

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.

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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

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Paul B. Franklin, Chairman

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Michele E. LeBrun, Member

**Certification**

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Mark Lutter, Northeast Property Tax Consultants, 14 Roy Drive, Hudson, NH 03051, representative for the Taxpayer; and Chairman, Town Council, Town of Durham, 15 Newmarket Road, Durham, NH 03824.

Date: 6/17/08

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Anne M. Stelmach, Clerk