David and Carole Robinson

v.

Town of Sunapee

Docket No.: 21760-05PT

DECISION

The "Taxpayers" appeal, pursuant to RSA 76:16-a, the "Town's" 2005 assessment of $780,500 (land $721,100; building $59,400) on Map 121/Lot 19, a camp on a 0.45-acre lot (the "Property"). The Taxpayers also own, but are not appealing, a 0.34-acre vacant lot on Map 121/Lot 28 assessed at $59,700. For the reasons stated below, the appeal for abatement 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 Property is one of the original cottages on the lake, has no central heating and no insulation:

(2) the cottage is supported by piers, does not have any interior finish, draws water from the lake, does not have a view of the main lake from any room in the house and has limited seasonal use;

(3) there was a 2005 sale of a nearby property at 10 Ridgewood Point Road for $638,500 which has a fully insulated, year-round dwelling with a heating system and permanent plumbing, and a view of the main lake; and

(4) an appraisal performed by Mr. Fritz Giddings (the "Appraisal") estimated the Property's April 1, 2005 market value to be $475,000.

The Town argued the assessment was proper because:

(1) the Property is located close to the mouth of Job's Creek, a no wake zone, has 100 feet of waterfrontage and is serviced by municipal water and sewer;

(2) the Taxpayers' reliance on the sale of one nearby property (10 Ridgewood Point Road) cannot carry their burden of proof;

(3) the Appraisal is flawed; and

(4) several sales of waterfront properties on the same lake (five in Job's Creek), which share similar attributes of the Property, support the assessment.

The parties stipulated the $59,700 assessment on the Taxpayers' vacant lot identified on the Town tax maps as Map 121/Lot 28 is not disproportionate and, consequently, not under appeal.

The Town testified the general level of assessment used for the 2005 tax year was the weighted mean ratio of 93.5% as determined by the department of revenue administration. The Taxpayers did not dispute this ratio.

Board's Rulings

Based on the evidence and testimony, the board finds the Property's 2005 assessed value to be $701,300 based on a market value finding of $750,000 and the Town's 93.5% general level of assessment [$750,000 x 0.935 = $701,300, (rounded)]. The market value determination is primarily based on the Report.

Review Appraiser's Report

Subsequent to the hearing, the board directed one of its RSA 71-B:14 review appraisers to review the record of the hearing, perform an on-site inspection and prepare a report of her findings. Ms. Theresa M. Walker's summary appraisal report (the "Report") was filed with the board on December 12, 2008 with a copy sent to each party. The parties were given an opportunity (20 days) to comment on the Report and the board received comments from both the Taxpayers and the Town.

In the Taxpayers' response, they expressed that they were "extremely disappointed" with the Report stating the appraisal was not "reliable or … conceivable for any intelligent person to suggest." The board disagrees.

First, Ms. Walker was requested to do an analysis to arrive at a market value indication of the Property. Ms. Walker has extensive appraisal experience having been in the business since 1992 and is a certified general appraiser in the State of New Hampshire (NHCG-711), certainly qualified to appraise the Property and offer her opinion as to whether the assessment is proportionate to its market value. Further, while methodologies may vary, fee appraisal and mass appraisal procedures involve the same appraisal principals.

Second, the board will discuss the issues raised in light of the relevant statutes and case law and explain why it was appropriate to utilize its review appraiser in this case. The decision to do so was made after the record of the hearing was closed and the board began its

deliberations. On October 17, 2008 Ms. Cynthia L. Brown, the board's Senior Review Appraiser, informed the parties that "[p]ursuant to a request by the board, and under the general authority granted to the board in RSA 71-B:14" the review appraisers would 1) "conduct an inspection" of the Property at the board's request; 2) may be conducting "[a] review of any comparable sales provided" at the hearing; and 3) conduct an "independent valuation." Ms. Brown further indicated this was a fact-finding investigation and no testimony from any party as to the value of the Property would be taken. Both Ms. Brown and Ms. Walker inspected the Property and the Report was prepared by Ms. Walker.

RSA 71-B:5 gives the board the power and authority "[to] hear and determine all matters involving questions of taxation properly brought before it…. In determining matters before it, the board may institute its own investigation, or hold hearings, or take such other action as it shall deem necessary." (Emphasis added). RSA 71-B:14 authorizes the board to employ and utilize two review appraisers who "shall be competent to review the value of property for tax and eminent domain purposes." In addition , RSA 71-B:7 provides: "the board shall introduce into evidence and may take into consideration in determining any question any information obtained through its own investigation, including information obtained by persons employed under RSA 71-B:14." Further, the New Hampshire Administrative Procedure Act at RSA 541-A:31,VI provides that the record of an adjudicative proceeding includes any "staff memoranda" or report.

The board finds the use of its review appraiser to perform a summary appraisal report was well within the board's authority to make "its own investigation" and/or to "take such other action as it shall deem necessary" in order to reach a proper decision. In fact, in Appeal of Sokolow, 137 N.H. 642, 644 (1993), the supreme court noted the existence of these statutes and indicated the board had an obligation to utilize the expertise of its review appraisers when the "'lack of information' on valuation precluded their ability to grant the taxpayers' requested

abatements." In Sokolow, as in this case, any appraiser's report then becomes evidence and part of the record. Cf. RSA 71-B:7 and RSA 76-16-a, III.

If the board determines it is warranted, it can undertake its own investigation, take a view of the property and/or, under RSA 71-B:14, utilize a review appraiser to inspect and value the property for tax purposes. In this case, based on the evidence submitted at the hearing, the board, during its deliberations, determined it was warranted to employ its review appraiser.

The board's consistent practice is to treat the Report as one piece of the evidence giving it the weight it deserves. The board considers all other evidence admitted by the same standard.

Specific Findings

Based on the totality of the evidence and the board's experience[1], the board finds the Property's highest and best use is indeed for redevelopment with a single family residential dwelling.

The Taxpayers testified they were entitled to an abatement based on: 1) an independent appraisal; and 2) the sale of a nearby property. The board will address each of these bases separately.

The Taxpayers submitted an appraisal performed by Mr. Fritz Giddings, a New Hampshire Certified Residential Appraiser (NHCR-325), which estimated the Property's market value to be $475,000 on April 1, 2005. For several reasons, the board finds the Appraisal to be flawed in determining the Property's market value on April 1, 2005.

Most importantly, the board finds Mr. Giddings did not perform a complete and thorough highest and best use analysis of the Property in the Appraisal. The lack of an appropriate highest

[1] This board, as a quasi-judicial body, must weigh the evidence and apply its judgment in deciding upon a proper assessment. Paras v. City of Portsmouth, 115 N.H. 63, 68 (1975); see also Petition of Grimm, 138 N.H. 42, 53 (1993) (administrative board may use expertise and experience to evaluate the evidence).

and best use analysis significantly diminishes the reliability of the Appraisal's market value conclusion.

> Analysis of the highest and best use of the land as though vacant and of the property as improved is essential in the valuation process. Through highest and best use analysis the appraiser interprets the market forces that affect the subject property and identifies the use or uses on which the final opinion of value is based.

The Appraisal of Real Estate, Appraisal Institute (12th ed., p. 60). Mr. Giddings does, in his text addendum to the Appraisal, provide the following observations under the "site comments" section:

> "The physical, legal, financially feasible and maximally productive elements of Highest and Best Use for the subject property being appraised have been evaluated. Due to the residential appeal of the subject neighborhood and the present legal constraints on non residential development in this area, the subject's highest and best use is as a single family residential site."

Mr. Giddings proceeds to make comments about the Property's improvements, however, he does not provide any definitive highest and best use conclusion for the Property as improved in this or any other section of the Appraisal. However, in the sales comparison analysis section of the Appraisal, Mr. Giddings compares the Property to several other properties, all of which are improved and one of which (comparable sale #2) was purchased with the intention of redeveloping the site. Additionally, he states in the Appraisal "… many of the comparables have been replaced or significantly renovated or expanded since being purchased". This further supports the board's highest and best use conclusion.

Further, a review of the pictures of the Appraisal's comparable sales #1 and #2, included in Municipality Exhibit A, show properties with significantly different topographical features than the Property. The Property's relatively level topography would allow redevelopment to occur with reduced site costs compared to these two comparable sales.

The Taxpayers asserted the Property should not be assessed for any more than the selling price of the property at 10 Ridgewood Point Road which sold for $650,000 in August 2005. In support of their assertion, the Taxpayers claimed their cottage was inferior to the structure on this nearby property inasmuch as it had approximately three times the area, is a year round dwelling with heat, insulation and year round plumbing and has a better view of the lake. The board finds the Taxpayers' claims, while factually correct, are not determinative of the Property's market value given the Property's highest and best use determination as a redevelopment site. It is the board's experience, and it is evident in this case as well as stated by Ms. Walker in the Report, that for waterfront properties, the location (neighborhood) of a property has a major impact on its market value. For properties with similar locations, some other factors affecting value may include the size, topography and shape of the lots. The more relevant facts in this case are the Property is significantly larger (0.45 ac. v. 0.16 ac.), is rectangularly shaped, relatively level and has approximately the same amount of waterfrontage compared to the property at 10 Ridgewood Point Road. These physical characteristic differences indicate the Property, viewed at its highest and best use, has considerably greater utility than the property at 10 Ridgewood Road due to the options for placement of any new structures during redevelopment. Therefore, it is not unreasonable for the Property to have a higher assessed value than the 10 Ridgewood Point Road property.

In further support of the premise that the Property's highest and best use is for redevelopment with a single family, year round dwelling is the Town's testimony that the 10 Ridgewood Point Road property sold in August 2005 and was redeveloped with a new house. As the Taxpayers testified, this property already had a year round home that was superior to theirs. However, subsequent to the purchase, the new owners demolished the older house and built a new dwelling. This testimony lends credence to the conclusion that the Property's highest

and best use is for residential redevelopment. In addition, the list of sales of residential properties on page 7 of the Report which were razed and then redeveloped with new, larger, single family homes (including 10 Ridgewood Point Road) substantiates the highest and best use conclusion.

Assessments must be based on market value. See RSA 75:1. The board finds the best evidence of the Property's April 1, 2005 market value is the Report. We further find the general methodology employed by Ms. Walker as well as the choice of comparable sales she utilized to be reasonable. Ms. Walker verified the data for each of the comparable sales used with a party to the transaction, usually with one or more of the participating brokers. "Sales that are not arm's-length, market transactions (in accordance with the definition of *market value* used in the appraisal) should be identified and used with caution. To verify sales data, an appraiser confirms statements of fact with the principals to the transaction, if possible, or with the brokers, closing agents, or lenders involved." The Appraisal of Real Estate, Appraisal Institute, 12th ed., p. 423 (2001). The board notes the review appraiser's concerns regarding reconciling the adjustments qualitatively and quantitatively. Residential waterfront properties differ from their inland counterparts because the bulk of the value for a waterfront property is in the land/site versus a more typical residential property where the larger portion of the value is in the improvements. The Report determined the only adjustment warranted for physical characteristics was for the differences in location/neighborhood between the Property and the comparable sales.
Ms. Walker based this determination on the fact the Property and the comparable sales, while arguably not identical, had "similar overall utility", that is they all have waterfrontage, a dock and can be developed with a year round, single family dwelling. In the Report, Ms. Walker used the sale of the property located at 15 West Shore Road as the basis for calculating the location/neighborhood adjustment to be applied to each of the sales. She trended the sale price

of the 15 West Shore Road property for market conditions (time) and then subtracted the estimated value of the improvements for this property from its trended selling price. She estimated the improvements had a value from $125,000 to $175,000 and rounded that value range to $150,000.

The Taxpayers assert the Report determined a speculative and hopeful, future value, rather than the Property's present value. The board finds the Taxpayers' contention that an appraiser must appraise a property for its "present" market value to be on point but misinterpreted. Every appraisal assignment whose purpose is to estimate a property's market value will have an "effective" date of value. This effective date could be considered the "present" date as it reflects a specific value on a specific date. In this case, the effective/present value under consideration is the Property's market value on April 1, 2005, the relevant date of this appeal and the Report estimates the Property's market value as of that date. The Taxpayers further contend in their comments to the Report that "Neither can an appraiser tax a property for Highest and best use" and it is improper to compare improved and unimproved properties. The board disagrees and finds that in order to determine any property's market value a proper highest and best use analysis is a recognized, essential element in the completion of such an appraisal assignment (see page 6 of this Decision). Fundamental to any highest and best use analysis, land is valued as if vacant and then as improved and whichever yields the highest value, which is one of the four elements of highest and best use analysis[2], is assigned as the property's highest and best use. In this case, the Report determines the highest and best use of the Property is for redevelopment with a residential property. Consistent with the sales utilized by Ms. Walker in the Report at page 7, many of the sales of improved properties on Lake Sunapee were purchased

[2] "In addition to being reasonably probable, the highest and best use of the land as though vacant and the property as improved must meet four implicit criteria. That is, the highest and best use must be 1) Physically possible, 2) Legally permissible, 3) Financially feasible and 4) Maximally productive." The Appraisal of Real Estate, Appraisal Institute, 12th ed., p. 307 (2001).

with older camp style residences similar to the Taxpayers and then the older improvements were removed and a newer, more modern, larger structure was erected.

The board finds the proper market value for the Property on April 1, 2005 is $750,000. This determination was made after a review of the parties' submissions, testimony and, as previously stated, the Report. Contrary to the Taxpayers' assertions, the board finds the Report follows accepted appraisal methodology and provides a well supported opinion of the Property's market value on April 1, 2005. To the $750,000 market value determination, the board has applied the equalization ratio of 93.5% stipulated to by the parties for the general level of assessment of the Town in 2005 and determined the proper assessment to be $701,300. The board has not allocated the value between land and building, and the Town shall make this allocation in accordance with its assessing practices. RSA76:11-a.

If the taxes have been paid, the amount paid on the value in excess of $701,300 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 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, <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(g). 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

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Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: David and Carole Robinson, 41 West Shore Road, Sunapee, NH 03782, Taxpayers; and Chairman, Board of Selectmen, Town of Sunapee, PO Box 717, Sunapee, NH 03782.

Date: June 5, 2009

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Anne M. Stelmach, Clerk

David and Carole Robinson

v.

Town of Sunapee

Docket No.: 21760-05PT

ORDER

This Order responds to the Town's July 2, 2009 Rehearing Motion (the "Motion") of the board's June 5, 2009 "Decision." The Taxpayers filed a July 14, 2009 letter in response to the Motion. Ordinarily, the board would treat such a letter as an objection to the Motion, however, because the Taxpayers' letter was not timely filed pursuant to Tax 201.37 (c) ("…no later than 5 days after the rehearing motion is filed…") and was not simultaneously copied to the Town pursuant to Tax 201.14 (a), the board will not respond to it. The board removes its July 9, 2009 suspension order and denies the Motion.

The Motion contends the board erred when it: 1) denied the Town's "motion to not allow into evidence" (the "First Motion") the "Appraisal" and testimony of Mr. Fritz Giddings; and 2) found the "motion to not [sic] dismiss for lack of evidence" (the "Second Motion") to be moot. At the hearing[3], the Town objected to the introduction of the "Appraisal" and testimony because the appraisal was unsigned and the Town was not noticed Mr. Giddings would attend the hearing and appear as a witness for the Taxpayers. The Town cited Tax 201.33 (a) and (b), Tax 201.34

[3] This appeal was initially scheduled to be heard on May 20, 2008. On its own motion, the board continued that hearing and rescheduled the appeal to be heard on September 12, 2008 "due to circumstances involving a separate appeal filed by the Taxpayers."

and Tax 201.35 as justification for not allowing the Appraisal and Mr. Giddings' testimony into evidence. Upon questioning from the board at the hearing, the Town, through its Assessor, Mr. Normand Bernaiche, testified he received a copy of the Giddings Appraisal in July, 2008, had an opportunity to review the Appraisal and had discussions with the Taxpayers with respect to the Appraisal. Mr. Giddings testified the fact the Appraisal was unsigned was merely an oversight and the document provided to Mr. Bernaiche was exactly the same as the Appraisal submitted at hearing. The board found it was not necessary for Mr. Giddings to file an appearance prior to the hearing because he was not a representative of the Taxpayers but rather was the Taxpayers' witness and his appearance was not prejudicial to the Town because he was available for questions and cross examination during the hearing. If the Town had concerns regarding any potential witnesses the Taxpayers might call, those concerns could have been addressed through discovery requests to the Taxpayers prior to the hearing. Because the First Motion was denied, the board found the Second Motion to be a moot issue.

In its Motion, the Town further contends because the Board found Mr. Gidding's appraisal to be "flawed," and it was the primary basis for the Taxpayers' appeal, the board should have dismissed the appeal for lack of any Taxpayer evidence. We disagree. First, the Town is correct the board placed little weight on the Taxpayers' appraisal. However, as stated on page 6 of the Decision, Mr. Giddings compared the Property to several other improved properties, one of which was purchased "with the intention of redeveloping the site." The Taxpayers argued the assessment should not be higher than the nearby sale at 10 Ridgewood Point Road. Thus, upon deliberation, the board determined there were sufficient questions raised to employ its RSA 71-B:5 statutory authority "[to] institute its own investigation…or take such other action as it shall deem necessary…" and engage its RSA 71-B:14 review appraisers to make "its own investigation in order to reach a proper decision." In Appeal of Sokolow, 137

N.H. 642 (1993), the supreme court cited the board's statutory authority in tax abatement appeals "after inquiry and investigation . . . [to] make such orders thereon as justice requires" (see RSA 76:16-a and RSA 71-B:5, I) and, by implication, encouraged the board to utilize its staff review appraisers in an efficient and effective manner. For the board to agree with the Town's premise that "the lack of evidence" presented by the Taxpayers that the appeal must necessarily be denied would create such an unreasonably high threshold for the Taxpayers' burden so as to be unrealistic and make such an appeal hollow. See Tax 201.27(f) ("[T]he standard of proof shall be by the preponderance of the evidence.") As stated in the Decision, the board found it was well within its statutory authority to engage the review appraisers.

The board disagrees with the Town's claim that Ms. Walker's report needed other "sound and proper adjustments" and that making those adjustments would result in a higher market value for the Property. This comment is similar to the Town's remarks made in its January 20, 2009 response to the board review appraiser's report. Contrary to the Town's assertion, the review appraiser did consider all those factors listed by the Town. Ms. Walker found "[I]n many cases, the market data was contradictory and it was difficult to determine which physical aspects contributed to the sales price." This led to her determination that the only quantitative adjustment she could justify from market data was for location or neighborhood. The Town did not provide any examples of adjustments using a paired sales analysis or other procedure incorporating market data to support its claim.

Because the board found the Property's highest and best use was for residential redevelopment with a single family dwelling, it is unnecessary for the board to more closely examine whether or not the property at 10 Ridgewood Point Road was a year round residence or something less. Ms. Walker's report treated the sale of that property as a sale for redevelopment and used it as one of the comparable sales in her report.

For the previously discussed reasons, the board finds the Town did not demonstrate the board erred in the Decision and, thus, the Motion failed to show any "good reason" to grant a rehearing. See RSA 541:3.

Any appeal of this Order must be by petition to the supreme court filed within 30 days of the Clerk's date shown below. RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Michele E. LeBrun, Member

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Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing Order has this date been mailed, postage prepaid, to: David & Carole Robinson, 520 Old Springfield Road, Sunapee, NH 03782, Taxpayers; and Chairman, Board of Selectmen, Town of Sunapee, PO Box 717, Sunapee, NH 03782.

Date: August 19, 2009

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Anne M. Stelmach, Clerk