

Androscoggin Valley Country Club

v.

Town of Shelburne

Docket Nos.: 22751-06PT/23420-07PT

DECISION

The “Taxpayer” owns an 18-hole golf course (the “Golf Course”), located partially in Shelburne (“Shelburne”) and partially in Gorham (“Gorham”), and filed separate tax appeals against each municipality for tax years 2006 and 2007. The portion of the Golf Course in Shelburne, Map 2, Lot 3 (“Lot 3”), consists of 106.2 acres, according to the tax year 2007 assessment-record card. Lot 3 had abated assessments in tax years 2006 and 2007 of \$846,800 for the land and improvements.¹ The appeals for further abatement on Lot 3 in Shelburne are granted.

The portion of the Golf Course in Gorham, Map U1, Lot 1 (“Lot 1”), consists of 33.7 acres, according to the assessment-record cards. In separate Docket Nos. 22744-06PT and 23419-07PT, the Taxpayer appealed the tax year 2006 assessment of \$289,700 (land \$140,500; building \$149,200) and the tax year 2007 assessment of \$343,300 (land \$250,100; building \$93,200) on Lot 1. On April 8, 2009, the board held a consolidated hearing on both sets of

¹ See April 10, 2009 letter to the board from Shelburne’s assessing company, Avitar Associates of New England, Inc. (“Avitar”) confirming these values.

appeals (all four case dockets) and the board has taken notice of all of the valuation evidence presented in deciding the separate Lot 3 and Lot 1 appeals for each municipality (using one set of exhibit markings). At the request of Gorham's attorney, however, the board is issuing separate decisions for the lot located in each municipality rather than a consolidated decision.

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 Lot 3 assessment was higher than the general level of assessment in each tax year under appeal. Id. The Taxpayer carried this burden.

The Taxpayer argued the Shelburne assessments on Lot 3 were excessive because:

- (1) the Golf Course is situated between Route 2 and the Androscoggin River (near where it meets a tributary, the Peabody River) and is subject to annual flooding problems because of this location;
- (2) the land is in a flood plain and the highest and best use of the Golf Course is this long-standing use as an 18-hole golf course;
- (3) the Golf Course is "recreational" in nature, not a "championship" golf course which would have a higher quality and market value;
- (4) the market for recreational golf has been decreasing because of the increasing expense of golf equipment, the loss of jobs in the area and changing demographics, all of which has caused annual club memberships to decline from a peak of 525 members in 1996 to around 300 members for 2006 and 2007;

(5) the clubhouse, located in Gorham, is small (approximately 2,100 square feet) and only has a snack bar and other very basic facilities;

(6) due to flooding and river erosion of the topsoil, the Taxpayer had to abandon three existing holes and redesign the golf course in 2003, making the size of the entire course smaller by about 20 to 30 acres,

(7) an appraisal prepared by Charles F. Schubert, Jr. of Applied Economic Research (the “Schubert Appraisal,” Taxpayer Exhibit No. 1 with correction pages) estimated the market value of the Golf Course as a whole at \$530,000 as of April 1, 2006 and \$560,000 as of April 1, 2007 using the cost and income approaches, with an emphasis on the latter approach;

(8) after deducting the \$50,000 estimated value of personal property (the so-called “FFE”—furniture, fixtures and equipment), the Schubert Appraisal estimated the taxable value of the Golf Course to be \$480,000 and \$510,000, respectively, for these two tax years;

(9) after correcting for some computational and other errors noted at the hearing, Mr. Schubert concluded the taxable value of the Golf Course was \$460,000 in tax year 2006 and \$490,000 in tax year 2007;

(10) the Taxpayer was open to ‘any allocation’ of the total value of the Golf Course between the two towns, including the 70% (Shelburne) and 30% (Gorham) allocation suggested by the Shelburne assessor at the hearing, and

(11) Lot 3 is entitled to a substantial further abatement in each tax year.

Shelburne argued the assessments on Lot 3 (as abated and except as noted below) were proper because:

(1) Shelburne commissioned an appraisal prepared by Andrew G. LeMay (the “LeMay Appraisal,” Municipality Exhibit A), which estimates the real estate value of the Golf Course as

a whole, using the sales and income approaches, to be \$1,150,000 as of April 1, 2006 and April 1, 2007;

(2) the LeMay Appraisal uses a 65% operating expense assumption in the income approach rather than the much higher percentage in the Schubert Appraisal and found comparable sales that give a more reliable indicator of value than the cost approach;

(3) the much lower estimates of value presented in the Schubert Appraisal are not supportable in light of the errors noted at the hearing, an earlier appraisal prepared for a bank loan obtained by the Taxpayer (see Taxpayer Exhibit No. 2, the “RDL Appraisal,” estimating an \$835,000 going concern market value as of April, 2002) and the sale of another 18-hole course in the North Country (the Waumbek Golf Course in Jefferson, which sold for \$710,000 in June, 2003 in a related party (family) transaction); and

(4) Shelburne is willing to agree a 70%-Shelburne), 30%-Gorham allocation of value of the Golf Course is appropriate.

The parties agreed the levels of assessment in Shelburne were 101.7% in 2006 and 100.6% in 2007, the median ratios computed by the department of revenue administration.

Board’s Rulings

Based on the evidence, the board finds the proper assessments on Lot 3 to be \$534,000 (rounded) in tax year 2006 and \$528,000 (rounded) in tax year 2007, based on market value findings of \$525,000 for Lot 3 in each tax year (using a 70% allocation of the value of the Golf Course to Shelburne, adjusted by the 101.7% and 100.6% levels of assessment noted above).

The appeals are therefore granted for the reasons discussed below.

The appraisers for the Taxpayer and Shelburne (but not Gorham) agree on the approach of valuing the Golf Course as a whole because of its integrated use for this purpose and agree

this is the highest and best use.² The board agrees and finds the most reasonable approach is to consider the Golf Course as a single economic unit with land in two adjacent municipalities that contributes to this highest and best use. (The board has addressed the contrary position taken by George E. Sansoucy, Gorham's appraiser, that each lot should be valued separately and for different highest and best uses more fully in the separate Decision issued concurrently in the Gorham appeals referenced above.)

The Taxpayer is also agreeable to 'any reasonable' percentage allocation of the market value of the Golf Course, for assessment purposes, between the two towns. Upon consideration of the testimony of Shelburne's assessor (Gary Roberge of Avitar) and the other evidence presented (and considering the various allocation scenarios testified to by Mr. Sansoucy), the board finds a 70%-Shelburne, 30%-Gorham allocation is reasonable.

The sole remaining, but far from inconsequential, disputed issue between the Taxpayer and Shelburne is the taxable market value of the Property as a whole in each tax year. The parties agreed, however, the Golf Course is of "recreational" rather than "championship" quality. Given the challenges and complexities inherent in valuing "special use" properties like golf courses, some differences between appraisers in estimating market value can be anticipated. See, generally, Laurence A. Hirsch, "Golf Courses/Valuation and Evaluation," The Appraisal Journal (January, 1991), pp. 38 – 47.

In making market value findings, the board considers and weighs all of the evidence, including, in these appeals, the respective appraisals submitted for the Taxpayer, Shelburne and Gorham, applying the board's "experience, technical competence and specialized knowledge" to this evidence. See RSA 71-B:1; and former RSA 541-A:18, V(b), now RSA 541-A:33, VI,

² This highest and best use conclusion was also reached by another appraiser, Richard D. Lord, in 2003. See the "RDL Appraisal," Taxpayer Exhibit No. 2, p. 34.

quoted in Appeal of City of Nashua, 138 N.H. 261, 265 (1994) (the board has the ability, recognized in the statutes, to utilize its “experience, technical competence and specialized knowledge in evaluating the evidence before it”). Further, in making findings where there is conflicting evidence, the board must determine for itself the weight to be given each piece of evidence because “judgment is the touchstone.” See, e.g., Appeal of Public Serv. Co. of N.H., 124 N.H. 479, 484 (1984), quoting from New England Power Co. v. Littleton, 114 N.H. 594, 599 (1974), and Paras v. Portsmouth, 115 N.H. 63, 68 (1975); see also Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 256 (1994).

The Taxpayer, relying on the Schubert Appraisal, as corrected and adjusted by Mr. Schubert at the hearing, contends the best estimates of market value for the Golf Course (excluding untaxable personal property) are \$460,000 in 2006 and \$490,000 in 2007, while the LeMay Appraisal, relied on by the Town, reaches substantially higher value conclusions of \$1,150,000 for each tax year. (To arrive at these estimates, each appraiser deducted an estimated value of \$50,000 for the untaxable personal property, golf carts and so forth, associated with the Golf Course.) Mr. Schubert used the income and cost approaches, but placed very little weight on the latter, and Mr. LeMay used the income and sales approaches, placing more weight on the sales approach for his final estimate of value.

In New Hampshire, the supreme court has recognized no single valuation approach is controlling in all cases, Demoulas v. Town of Salem, 116 N.H. 775, 780 (1976), and the tribunal reviewing the valuation is authorized to select any one of the valuation approaches based on the evidence presented. Brickman v. City of Manchester, 119 N.H. 919, 920 (1979). The board finds, on balance, the appraisal and other evidence presented indicates the most reasonable

estimate of the value the Golf Course can be obtained by focusing on the income approach,³ but has also considered the Waumbek Golf Course sale for \$710,000 in June, 2003 (described in the Schubert Appraisal, Taxpayer Exhibit No. 1 at pp. 63-64 and discussed further below) as a further check on the reasonableness of its conclusions.

Mr. Schubert looked at historical financial information to derive “stabilized” income and expense estimates for the Golf Course. He estimated this income to be \$331,675 in 2006 and \$346,900 in 2007 and operating expenses near 72% (72.7% and 72.6%) to arrive at net operating income (“NOI”) estimates of \$68,875 and \$72,450 for these years. (See Taxpayer Exhibit No. 1, p. 71, as corrected in Mr. Schubert’s March 20, 2009 letter, now part of this exhibit.)

Mr. LeMay also used historical financial information from the Taxpayer (for 2004, 2005 and 2006) to arrive at a “reconstructed” income estimate of \$345,500. (See Municipality Exhibit A, Part III, p. 20.) This estimate is reasonably close to Mr. Schubert’s estimates, but Mr. LeMay applied a 65% expense ratio to arrive at a much higher NOI (\$121,000, rounded).

Weighing these respective estimates, the board finds a stabilized estimate of \$345,000 for Golf Course income is reasonable and consistent with the appraisal and other evidence presented. While this estimate is quite close to Mr. LeMay’s “reconstructed” income estimate, the board finds his estimate expense ratio to be somewhat low, given the testimony regarding the condition

³ See also RDL Appraisal, p. 55: “the income approach to value is considered to be the primary and most reliable method for developing a value for golf courses. The exception to this practice is in regions of the country where there are concentrations of golf courses, and sales are not uncommon.”

and maintenance requirements of the Golf Course. Applying a 72% expense ratio⁴ to this estimate yields an NOI of \$96,600 and then applying a 12% capitalization rate yields a going concern market value estimate of \$800,000 (rounded). Deducting \$50,000 for non-taxable personal property (the agreed upon value by each appraiser), the board finds \$750,000 to be the most reasonable estimate of the taxable value for the Golf Course in each year under appeal.

This estimate is, of course, much higher than the Taxpayer's estimate, but testimony at the hearing (including cross-examination of Mr. Schubert by Mr. Roberge) reflected some amount of computational and other errors in the Schubert Appraisal which diminish its credibility and the weight the board can give it. In addition, as Mr. Roberge pointed out at the hearing, Mr. Schubert's estimate of value is quite a bit lower than the value estimate of another appraiser, Richard D. Lord, obtained and used by the Taxpayer when it sought and received bank financing: the RDL Appraisal (Taxpayer Exhibit No. 2) estimated the "going concern" value of the Golf Course at \$835,000 as of April, 2003.

The board is unable to agree with the LeMay Appraisal's emphasis and higher weighting of the sales approach, as well as the lower capitalization rate he used in his income approach, based primarily on six golf course sales outside of the North Country. The board considered using the sales approach to value the Golf Course, but, upon review of the six comparables used by Mr. LeMay and his methodology, find them to be less useful in these appeals for several

⁴ This is closer to the historical figures noted above and used by Mr. Schubert. There was credible testimony from the Taxpayer's two witnesses that the Golf Course is professionally managed, but has a shorter season and perhaps somewhat higher maintenance expenses because of flooding and river erosion issues. It is, of course, possible that some operating efficiencies could be achieved if a golf course is owned by a professional investor rather than by an entity composed of individual members who may have somewhat mixed motives between maintaining sufficient profitability to keep the Golf Course viable financially and a desire to allow continued recreational enjoyment. On the revenue side, there was evidence presented that the Golf Course may have limited flexibility in increasing membership dues (\$675 for single member, unlimited golf each season) and higher per round fees (estimated to be about \$35 per round) given the number of other courses in the area. At this price structure, the 'break-even' point for being a member is the expectation of playing approximately 19 – 20 rounds at the Golf Course each season. Roughly 80% of the total rounds at the Golf Course are played by members. See RDL Appraisal, p. 38.

reasons. Two are from out of state (Connecticut and Massachusetts) in more densely populated and favorable demographic areas and the remaining four (Loudon, Kingston, Franklin and Newport) are from more densely populated areas, also with somewhat better demographics on the whole. See the LeMay Appraisal (Municipality Exhibit A), Part III, pp. 12-16. The unadjusted reported range of sales prices of these six golf courses (\$1,890,000 to \$4,890,000) is well above Mr. LeMay's final value estimate of \$1,150,000, which may be a further reflection of these differences and the difficulties inherent in relying on these sales to any extent. Mr. LeMay tried to standardize his comparisons by applying five factors extrapolated from his data (including price per round of golf played, total revenue multiplier and a net income multiplier), but he still computed a fairly wide value range (\$968,000 to \$1,274,000) applying these factors to the Golf Course. Id. at p. 18. Mr. LeMay further conceded in his testimony the subject may not be a "prime course" for an investor to consider for purchase. Chiefly for these reasons, the board was unable to place much weight on the sales in the LeMay Appraisal.

Turning to the Schubert Appraisal, the board understands Mr. Schubert's stated reasons for not placing any weight on the four "most recent" golf course sales in the area. See Taxpayer Exhibit No. 1, pp. 57 – 66. The Waumbek Golf Course sale for \$710,000 in June, 2003 is, however, of some usefulness in considering the reasonableness of the value estimates discussed above. Waumbek is also located in Coos County in the Town of Jefferson on Route 2 and 115A, roughly in the same demographic area but perhaps at a bit more remote location, approximately 17 miles from Gorham. Waumbek wound up as a "family transaction," selling within one year of being listed at \$900,000, according to Mr. Schubert. Weighing these considerations, the board finds it is reasonable to conclude Waumbek's value as a going concern in an arm's-length

transaction would be bracketed somewhere between \$750,000 and \$850,000, with some developable land potential included in this value estimate.⁵

In reaching its market value conclusions, the board also considered market demand factors. As noted in the RDL Appraisal, at p. 10, except for one mixed luxury residential/golf course development in Campton, approximately 55 miles to the southwest, “no new courses have been constructed in northern New Hampshire in many years.” As reflected in the testimony of the Taxpayer’s witnesses (Jerry Nault and Michael O’Neil, past and present directors, officers and members), the Taxpayer faces challenges just to keep its membership base from declining from its present level of about 300 golfers. Their testimony is supported by the fact the market for recreational golf no longer appears to be in the growth phase it was several decades ago, making the market for such properties less robust.⁶

For all of these reasons, the board finds the Taxpayer met its burden of proving the Golf Course was disproportionally assessed in each tax year, but not to the degree estimated in the Schubert Appraisal. The appeals are therefore granted. In Shelburne, the tax year 2006 assessment should be abated to \$534,000 (rounded) and the tax year 2007 assessment should be

⁵ Mr. Sansoucy, Gorham’s appraiser, testified at the hearing he was part of an investment group considering the purchase of Waumbek for \$850,000 at one point, but later decided against it (cf. RDL Appraisal, p. 45, referring to a “preliminary offer” for Waumbek, later withdrawn, at this price). Mr. Sansoucy noted Waumbek was of slightly lesser quality than the Golf Course, but may have some land with development potential, a view shared by the Taxpayer’s representatives at the hearing.

⁶ Compare the picture painted in the January, 1991 Hirsch article, cited above at p. 38, which summarized National Golf Foundation estimates of substantial increases during the 1980’s in the population of golfers and the number of golf courses needed to meet expected demand.

abated to \$528,000 (rounded). The relevant calculations are presented below:

Androscoggin Valley Golf Course	Allocation Percentage	Estimated Market Values		Levels of Assessment		Indicated Assessments	
		2006	2007	2006	2007	2006	2007
Total Estimated Taxable Value		\$750,000	\$750,000				
Shelburne (Lot 3)	70%	\$525,000	\$525,000	101.7%	100.6%	\$533,925	\$528,150
Gorham (Lot 1)	30%	\$225,000	\$225,000	57.2%	100.6%	\$128,700	\$226,350

If the taxes have been paid, the amount paid on the value in excess of \$534,000 in tax year 2006 and \$528,000 in tax year 2007 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Until the Towns undergoes a general reassessment or in good faith reappraises the property pursuant to RSA 75:8, the Towns shall use the ordered assessment of \$528,000 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, 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(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

Paul B. Franklin, Chairman

Albert F. Shamash, Esq., 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; Chairman, Board of Selectmen, Town of Gorham, 20 Park Street, Gorham, NH 03581; Steven A. Clark, Esq., Boutin & Altieri, P.L.L.C., PO Box 1107, Londonderry, NH 03053, counsel for the Town of Gorham; Chairman, Board of Selectmen, Town of Shelburne, 74 Village Road, Shelburne, NH 03581; and Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258, Contracted Assessing Firm for the Town of Shelburne.

Date: May 26, 2009

Anne M. Stelmach, Clerk

Androscoggin Valley Country Club

v.

Town of Shelburne

Docket Nos.: 22751-06PT/23420-07PT

ORDER

Both the “Taxpayer” and the Town of Shelburne (“Shelburne”) have filed rehearing motions with respect to the May 26, 2009 Decision ordering an abatement in each tax year. The suspension order issued on June 12, 2009 to allow the board time to review the rehearing motions is hereby dissolved. The Taxpayer’s rehearing motion contends the board erred by not deducting more for personal property from the going concern value of the Property, an 18-hole golf course, and therefore the taxable value should be lower. Shelburne’s rehearing motion contends the board erred because the taxable value of the Property should be higher.

Both rehearing motions are denied as they fail to show “the board overlooked or misapprehended the facts or the law...” in the Decision. RSA 541:3; Tax 201.37(e). See Appeal of Nashua, 138 N.H. 261, 263-64 (1994). Because the Decision adequately details the board’s findings on the conflicting evidence and arguments presented, no rehearing or reconsideration is warranted.

The Taxpayer's argument that the board should have made a larger deduction for personal property is without merit. The Taxpayer's own expert, Mr. Schubert, and another expert, Andrew LeMay, presented appraisals where both deducted \$50,000 for personal property, as did the board in estimating the taxable market value of the Property.

Shelburne contends the board should disregard the "Schubert Appraisal" presented by the Taxpayer through its expert simply because it contained several errors which this expert corrected at the hearing. The board disagrees with this contention and weighed the strengths and weaknesses of all of the expert and other evidence presented before making its own market value findings. The board did not base its findings either on the "RDL Appraisal," prepared in 2003 for bank financing purposes,⁷ or the Waumbek Golf Course sale in 2003, which was not an arm's-length transaction, and the board's discussion of these items of evidence in the Decision was simply intended to be a check on the reasonableness of the board's findings. The board does not agree with Shelburne that adjusting the Waumbek sale price upwards by 50% now provides an indicator of value preferable to the reasoning and market value findings in the Decision.

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

⁷ To the extent Shelburne's rehearing motion relies on three cited board decisions for the proposition that a financing appraisal, like the RDL Appraisal, necessarily results in a lower estimate of market value, this reliance is misplaced for the reasons stated in the Taxpayer's objection and because such generalizations ignore the context and timeframes when those decisions were issued.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Order has this date been mailed, postage prepaid, to: Mark Lutter, Northeast Property Tax Consultants, 14 Roy Drive, Hudson, NH 03051, representative for the Taxpayer; Chairman, Board of Selectmen, Town of Shelburne, 74 Village Road, Shelburne, NH 03581; and Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258, Contracted Assessing Firm.

Date: July 9, 2009

Melanie J. Ekstrom, Deputy Clerk