Arnold Drouin, Sr.

v.

City of Berlin

Docket No.: 22894-06PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "City's" 2006 assessment of $67,000 (land only) on Map 404/Lot 9, a 1.2 acre lot (the "Property"). The Taxpayer also owns, but is not appealing, a 2.10 acre vacant lot assessed at $14,500. For the reasons stated below, the appeal for abatement is granted.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the assessment was 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 assessment was higher than the general level of assessment in the municipality. Id. The Taxpayer carried this burden.

The Taxpayer argued the assessment was excessive because:

(1) an appraisal prepared by Robert J. Goddard estimated the Property's market value based on comparable sales to be $18,000 as of April 1, 2006;

(2) the Property was on the market for 435 days and was purchased through a real estate agent for $5,500;

(3) the Property was purchased with the intent of making it a buildable house lot yet the Town required him to obtain a gravel permit and the Property is assessed as a gravel pit;

(4) the materials on the lot are "garbage" consisting of silt and clay and are not useful in the construction trade; the materials removed have been given away and the only charge has been for trucking; and

(5) an August 12, 1999 deed depicts the Property as 1.01 acres in size, not 1.20 acres as assessed by the City.

The City recommended an abated assessment of $53,600 and argued this abated assessment was proper because:

(1) after the Property's purchase and excavation activity started, the City requested Ms. Mary Pinkham-Langer, Gravel Tax Appraiser from the department of revenue administration ("DRA") to visit the site; Ms. Pinkham-Langer visited the Property and "observed that excavation and removal of earth is occurring … that a screener was on site, and that trees have been cleared." and she noted the volume of earth to be removed was in "excess of 1000 cubic yards" necessitating an RSA 155-E permit for the incidental excavation;

(2) as a result of the application for abatement, the City met with the Taxpayer and made an adjustment to the condition factor "given to [the] gravel area" based on the Taxpayer's assertion of the inferior quality of the materials being removed; this adjustment resulted in an abated value of $53,600 (see Municipality Exhibit C);

(3) sales of comparable properties support the abated assessment; and

(4) the Property has been treated the same as any other gravel pit and upon such time as the excavation activity has been completed, the Property will be assessed as a single family residential building site.

The parties stipulated the median level of assessment for tax year 2006 was 97.4% as determined by the DRA.

Board's Rulings

Based on the evidence, the board finds the proper assessment to be $22,800.

The Taxpayer argued he purchased the Property with the intent of clearing the land to create a home site. He further stated he was "forced" to file an RSA 72-B:8 notice of intent to excavate based on an inspection by Ms. Mary Pinkham-Langer, who noted he was removing earth without a permit. Based on her observation, Ms. Pinkham-Langer determined the amount of materials being removed from the Property exceeded the RSA 72-B:1(d) exemption from the excavation tax limit. See Municipality Exhibit D. The Taxpayer filed the permit with the Town but argued the amount of materials removed from the site did not exceed 1,000 cubic yards. The Taxpayer did not dispute Ms. Pinkham-Langer's July 7, 2005 observation at the time of her visit to the site that "excavation and removal of earth is occurring upon the property, that a screener was on site, and that trees have been cleared." However, the Taxpayer argued: 1) topsoil and rocks from the site were being used to construct a driveway and the screener processed materials that were used on site to make ditches for erosion control; and 2) the remaining materials were being given away as they were not saleable and were considered "garbage." Thus, the Taxpayer stated the Property should be assessed as a residential site. Mr. Robert J. Goddard, a principal and appraiser of Goddard Associates presented a sales analysis ("Goddard Analysis") (Taxpayer Exhibit No. 1) and testified to a market value of the Property as of April 1, 2007 of $18,000.

The Town argued the sales used in the Goddard Analysis were not comparable for the following reasons: 1) the Riverside Drive comparable (A) is all in wetlands with a brook running through it, is assessed in current use and is not buildable due to setback distances to the river from the road; 2) the Argonne Street comparable (B) is not on a developed roadway and would require a 150 to 200 foot roadway to access any development; 3) the Upper Church Street comparable (C) has limited utility because the lot is mostly fill to a terraced area; 4) the Jericho Road comparable (D) is in current use and was purchased by an investment company; and 5) the Wood Street property does not have city water. The Town submitted three comparable sales to support its revised assessment and photographs of the Property depicting the gravel areas.

Further, the Taxpayer submitted an August 12, 1999 survey (Taxpayer Exhibit No. 2) of the Property which indicated the lot is actually 1.01 acres, not the 1.20 acres assessed. The Town agreed the acreage should be corrected and an opportunity was allowed for the Town to submit a revised assessment-record card which was received by the board on April 14, 2009 reflecting a revised assessment of $53,500.

In valuing property, all real estate rights, tangible and intangible, are assessed. RSA 21:21, I defines land and real estate as "[t]he words 'land', 'lands' or 'real estate' shall include lands, tenements, and hereditaments, and all rights thereto and interests therein." Further, RSA 72:6 provides that "[a]ll real estate, whether improved or unimproved, shall be taxed except as otherwise provided."

While they vary from property to property, ownership rights are often viewed as a "bundle of rights" and include the right to use real estate, to sell it, to lease it, to enter it, to give it away or to choose to exercise all or none of these rights. The bundle of rights is often compared to a bundle of sticks, with each stick representing a distinct and separate right or

interest. International Association of Assessing Officers, Appraisal of Real Estate, 7 (11th ed. 1996). When appraising a property that has no restrictions of rights (beyond being subject to taxation, eminent domain, police power and escheat), these rights are normally viewed collectively (as a bundle) and valued after a highest and best use analysis is performed of the entire property.

The Property under appeal has, as part of its bundle of rights, the potential, albeit limited, for the extraction and sale of sand and other aggregates. This right, while inherently interrelated to the balance in the Property's bundle of rights, can be, and at times is, separately transferred (similar to timber rights) to an entity that is distinct and separate from the owner of the underlying real estate. RSA 72-B:1, II[1], exempts "earth" from being valued for taxation in combination with the balance of the bundle of rights as normally occurs pursuant to RSA 72:6. The legislature in 2002 specifically provided that "earth" should be taxed when extracted. Such tax shall be assessed at the rate of at $.02 per cubic yard of earth excavated (see RSA 72-B:1, I). Thus, in valuing the Property, it must be done without considering one of its rights (sticks) in its bundle of rights, the sand and gravel (aggregate) value.

Thus, the exercise of determining the proper and proportionate assessment under the applicable statutes is reduced to the question of what is the market value of the Property without considering its "earth" or aggregate value and must be appraised "at its full and true value" (RSA 75:1) and at its highest and best use. 590 Realty Co., Ltd. v. City of Keene, 122 N.H. 284, 285 (1982). Based on the evidence and testimony presented at the hearing, the board finds the highest and best use of the Property is as a single family residential building site.

[1] RSA 72-B:1, II. Excavations, as defined in RSA 155-E:1, II, and excavation areas as defined in RSA 155-E:1, VI, shall be taxed as real property pursuant to RSA 72:6 independent of any earth contained therein.

In making its determination of the proper assessment, the board has considered the evidence presented in the Goddard Analysis and the Town's sales. The board finds some adjustments would be appropriate to the Goddard sales given the issues raised by the Town regarding their comparability. Upon questioning by the board at the hearing, the Town testified the assessed value of the Property would be $22,800 "if gravel was not a factor." The board finds this to be the best evidence of value and therefore finds the proper assessment to be $22,800.

If the taxes have been paid, the amount paid on the value in excess of $22,800 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Until the City undergoes a general reassessment or in good faith reappraises the property pursuant to RSA 75:8, the City 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

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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 Decision has this date been mailed, postage prepaid, to: Arnold Drouin, Sr., 159 Jericho Road, Berlin, NH 03570, Taxpayer; Chairman, Board of Assessors, City of Berlin, 168 Main Street, Berlin, NH 03570; and David S. Woodward, Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258, Contracted Assessing Firm.

Date: June 17, 2009

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Melanie J. Ekstrom, Deputy Clerk