

Ralph Kirshner

v.

Town of Tuftonboro

Docket No.: 23034-06PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2006 assessments of: Map 26/1-16 - \$301,400 (land \$209,300; building \$92,100), a camp on a 0.33 acre lot on Whortleberry Island; and Map 26/1-17 - \$209,300,¹ a 0.50 acre lot with a garage/shed on Whortleberry Island (the “Appealed Lots”). The Taxpayer also owns, but is not appealing, three 0.50 acre wetland lots (Map 26/1-15, 18 and 19) on Whortleberry Island each assessed at \$8 in current use (RSA ch. 79-A) (the “Non-appealed Lots”). For the reasons stated below, the appeals for abatement are granted.

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 Properties’ assessments were higher than the general level of assessment in the municipality. Id. The Taxpayer carried this burden.

¹ Initially, the Town had incorrectly assessed the garage/shed of \$5,500 on Lot 16 when it is actually located on Lot 17. However, during the abatement process when the Town reduced the land assessments on both Lots 16 and 17, the garage/shed assessment was removed from Lot 16 but was inadvertently not added to Lot 17. Thus the abated value of \$209,300 for Lot 17 is for the land only.

Extensive evidence was submitted in Taxpayer Exhibit Nos. 1 and 2 but the Taxpayer's arguments as to why the assessments were excessive can be summarized as follows:

- (1) the assessments are disproportionate because the assessment procedures were not reasonably and proportionally performed by the Town;
- (2) Lot 16's land area is overstated because the State owns a one rod strip along the frontage which does not belong to the Taxpayer;
- (3) the marketability of the Appealed Lots is affected by: (a) the setback provisions of the Shoreline Protection Act, RSA ch. 483-B; (b) the recent 2005 amendment to RSA 674:41, II-a; and (c) the Tuftonboro zoning provisions that if a building with grandfathered rights ceases to exist for a year, its grandfathered rights are lost;
- (4) the State's management of Lake Winnepesaukee, which results in the water being allowed to rise to the 504.8 foot level, floods significant areas of Lots 16 and 17 and specifically impacts the septic tank and leach field on Lot 16;
- (5) Lot 16 should be assessed as having less than a hundred feet of water frontage due to the loss of land to the State by the State's predecessor in title's acquisition of a one rod flowage easement;
- (6) Lot 17 should essentially be assessed at current use values due to the flooding making it virtually undevelopable and thus having value only as open space; and
- (7) there are no comparable sales for unbuildable, unbridged island properties such as the Appealed Lots.

The Town argued the abated assessments were proper because:

- (1) sales of two vacant and two improved lots on Whortleberry Island analyzed in Municipality Exhibit A indicate there is a market for the island properties;

(2) one unimproved and one improved sale (Lots 2 and 7) also contained the one rod flowage right similar to the Appealed Lots and yet the sales did not indicate any measurable distinction for the impact of that easement; and

(3) the Taxpayer's use of the Appealed Lots for 27 years as his primary residence is some indication as to their utility.

At the close of the Taxpayer's presentation the Town requested the board dismiss the appeal due to the lack of market evidence submitted by the Taxpayer and, thus, failing to carry his burden.

Board's Rulings

The board will first address the Town's Motion to Dismiss ("Motion"). As stated in the second paragraph of the Decision, the statutes, case law and board rules certainly recognize the taxpayer has the burden to show the assessments were disproportionate. Normally the taxpayer can carry this burden by presenting market data from which market value can be established and then comparing that market value to the property's assessment and the general level of assessment in the Town. See, e.g., Appeal of Net Realty Holding Trust, 128 N.H. 795, 803 (1986); Appeal of Great Lakes Container Corp., 126 N.H. 167, 169 (1985); Appeal of Town of Sunapee, 126 N.H. 214, 217-18 (1985). However, when there are factors unique to a property that have a significant impact on its utility and market value (such as the flooding due to the Appealed Lots' low elevation) and where there does not exist sales of similarly impacted properties, the board concludes it would be unreasonable to dismiss out of hand the appeal simply for the lack of comparable market data. The Taxpayer did submit substantial evidence as to factors that could potentially impact the highest and best use and, thus, the value of the Appealed Lots (see Taxpayer Exhibit Nos. 1 and 2). Some of these factors the board finds needed to be considered more in determining the assessment than what the Town did (municipalities have the responsibility to initially consider all factors that may impact a property's value (Paras v. City of Portsmouth, 115 N.H. 63 (1975))). Other factors, for reasons

detailed below, the board finds did not materially impact market value of the Appealed Lots. When there are factors presented that do impact a property's market value but no truly comparable market evidence submitted, the board has the responsibility to consider such factors and to determine a proportionate assessment rather than dismissing the appeal. See Appeal of Sokolow, 137 N.H. 642 (1993). Consequently, the board denies the Motion.

Turning to determining proportional assessments based on the evidence submitted, the board orders abatements as follows: Lot 16 - \$253,400 (land \$161,300; buildings \$92,100); Lot 17 - \$121,500 (land \$116,000; buildings \$5,500).

First, the board finds the Taxpayer's argument that the State's ownership of a flowage right acquired earlier by the State's predecessor in title to Lot 16 impacts the use of the water frontage and its market value is not supported by the evidence submitted. As the Town noted, two of the four sales contained in Municipality Exhibit A have similar historical flowage rights but do not appear to impact their marketability. Further, as the board noted during the hearing, and as contained in the transcribed 1871 deed as part of Taxpayer Exhibit No. 1, the Taxpayer's predecessor in title, while giving up the flowage rights, retained one of the most valuable waterfront rights, that being the right to access the lake.

Second, the board finds the Taxpayer's arguments that the Shoreline Protection Act, RSA ch. 483-B and RSA 674:41, would significantly impact the utility and value of Lot 16 are too speculative for the board to give any significant weight. Lot 16 is improved with a cottage and septic system that create substantial transmissible grandfathered rights that predate either statute. Indeed, the Town of Tuftonboro's zoning ordinance, as do many zoning ordinances, allows the perpetuation of those grandfathered rights even if the cottage burns or is razed as long as it is rebuilt within one year. Thus, for the Taxpayer to argue those statutes significantly impact Lot 16's market value ignores the substantial value associated with the grandfathered rights of the cottage.

Third, certainly this board cannot unravel the historic and legal “can of worms”, as characterized by the Taxpayer, of the impact of historical water levels of the lake and the recent higher levels both unrefuted by the Town and generally supported by the documentation contained in Taxpayer Exhibit Nos. 1 and 2. Nonetheless, the board finds sufficient evidence was submitted to indicate the topography and elevation of the Appealed Lots is shallower or lower than those of the properties that have sold in Municipality Exhibit A and, as thus, the Appealed Lots are impacted to a greater extent due to the higher levels of Lake Winnepesaukee particularly during the spring and early summer months of the year. In particular, the two improved sales in Municipality Exhibit A appear to be of lots with higher elevation and, thus, do not suffer from the same flooding and impacted utility as do the Appealed Lots. The board certainly recognizes, however, the Appealed Lots, as with all Whortleberry Island properties, are by and large seasonally utilized properties due to their island location. The flooding that has occurred on the Appealed Lots has generally been during the spring and early summer months before the height of the summer recreational season has occurred and, therefore, any impact on their marketability is somewhat mitigated due to the typical seasonal use and enjoyment of the Appealed Lots. While the Taxpayer testified he had used the Appealed Lots on a year-round basis for 27 years, this does not appear to be the norm for such properties nor is this generally how they would be marketed.

Consequently, weighing these factors, the board has increased the condition factor adjustment on Lots 16 and 17 to recognize they are more prone to flooding than the other lots on Whortleberry Island that were discussed during the hearing. The Town applied condition factors of “40” (or 0.40), based on sales such as those in Municipality Exhibit A, to the mainland water frontage base rate for all properties on Whortleberry Island to reflect their island location and access. An additional “80” (or 0.80) factor was applied to the “40” factor if the lot was unimproved

for an overall factor of 0.32. While Lot 16 is improved with the cottage, the Town did apply an “80” factor during the abatement process to Lot 16 to address the issues raised by the Taxpayer.

For Lot 17, the board has applied an additional “50” (or 0.50) factor to recognize that undeveloped or minimally developed lots, such as Lot 17, entail greater uncertainty and, thus, risk in bringing them to the developed stage due to many of the reasons the Taxpayer presented, including the police power restrictions contained in the Shoreline Protection Act (RSA 483-B) and RSA 674:41 and, indeed, the shallow elevation of the lot. The board, however, finds the Taxpayer failed to present compelling evidence that Lot 17 is indeed a “wetland” lot similar to the Non-appealed Lots. Lot 17 is improved with a garage/shed that is used in association with Lot 16 and is the point of boat access for Lot 16. Thus, even if Lot 17 has uncertain development potential as a stand alone lot, it contributes more than just a wetland lot value to the Taxpayer’s entire estate. The board has applied a “50” (or 0.50) additional factor, for the reasons noted above, to the “40” “island” factor and the “80” (or 0.80) undeveloped factor (because Lot 17 is only minimally improved with a garage/shed, the board finds the undeveloped factor of “80” should remain) resulting in a revised land assessed value of \$116,000. The \$5,500 value for the garage/shed, which the Taxpayer did not contest and which the Town had inadvertently neglected to add to Lot 17 when it abated it off Lot 16, is added to the revised lot value of \$116,000.

For Lot 16, the board has increased the “80” factor to “60” (which multiplied by the island factor of “40”, results in an overall condition factor of “24”) to account for the lot also being of lower elevation and more prone to flooding than the sale lots. This results in a revised lot value of \$161,300 and total value for Lot 16 of \$253,400.

The Taxpayer argued Lots 16 and 17 (and indeed the three Non-appealed Lots) legally could be sold as separate estates because they are described as separate lots. While the board does not disagree that they are perhaps legally separate estates, the board finds the integrated use of Lots 16

and 17 and, indeed, Lot 15 (which the Taxpayer testified contains the beach utilized in conjunction with Lots 16 and 17) is some evidence that it is likely two or three (and likely all five) lots would be marketed and conveyed as one estate to maximize their aggregate potential and value. Thus, as a test of reasonableness and to gauge the amount of the abatement, the board considered the combined assessments of at least the Appealed Lots of \$374,900 (Lot 16 - \$253,400; Lot 17 - \$121,500) and compared it to the two improved sales contained in Municipality Exhibit A. Those two properties sold at \$390,000 and \$426,300, involved smaller camps, had larger lots (more similar in size to the combined area of Lots 16 and 17) but entailed superior lots with more slope and elevation where the improvements were located. Therefore, noting the somewhat related unity of use of Lots 16 and 17 (and, indeed, one of the Non-appealed Lots, Lot 15), but partially offset by the less desirable aspect of being more prone to flooding, the board finds the total assessed value of \$374,900 appears to be reasonable and proportional to market value.

The “Requests” received from the Taxpayer are replicated below, in the form submitted and without any typographical corrections or other changes. The board’s responses are in bold face.

With respect to the Requests, “nether granted nor denied” generally means one of the following.

- a. the request contained multiple requests for which a consistent response could not be given;
- b. the request contained words, especially adjectives or adverbs, that made the request overly broad or narrow so that the request could not be granted or denied;
- c. the request contained matters not in evidence or not sufficiently supported to grant or deny;
- d. the request was irrelevant; or
- e. the request is specifically addressed in the decision.

**TAXPAYER'S REQUESTS FOR FINDINGS OF FACT
AND RULINGS OF LAW**

1) Assessments of land on Whortleberry Island in Tuftonboro are not "proportional and reasonable" as required by Article 5 of the NH Constitution.

Neither granted nor denied.

2) Landowners cannot be assessed for the value of land they do not own or otherwise hold an interest in; such valuation is neither proportional nor reasonable. Land abutting shorefront property cannot be assessed as if it has shorefrontage in the absence of legal rights to that shorefrontage. Since the appellant in this case does not have deeded or other rights or pay taxes on the abutting state-owned shorefrontage, the abutting land on Tuftonboro lot 26-1-16 can not be used to calculate the shorefrontage distance.

Denied.

3) Island lots in Tuftonboro such as lot 26-1-17 without road access in accordance with RSA 674:41 cannot be taxed as developable lots, since the town has not passed a warrant article excepting such lots from the required road frontage as required by RSA 674:41 II-A.

Neither granted nor denied.

4) Undevelopable Lake Winnepesaukee unbridged island land such as Tuftonboro lot 26-1-17 cannot be assessed as having a development value when there is virtually no market for it. In accordance with RSA 75:1, open space land must be assessed pursuant to RSA 79-A:5.

Denied.

5) Tuftonboro lots 26-1-16 and 26-1-17 have been improperly assessed due to the use of irrelevant factors such as acreage, and the lack of adequate application of relevant information. Formulas for determining assessment values must be based on actual market factors affecting such values, in accordance with RSA 75:1 that assessments be at market value. Lake Winnepesaukee unbridged island lots are generally marketed by the amount of shorefrontage, so assessment formulas can not use factors such as acreage that are not part of how island land is marketed, while ignoring factors that are, such as beach frontage, boat accessibility, and wetlands.

Neither granted nor denied.

6) Assessors must physically inspect land being assessed, including boundaries, and not assign valuations based only on "windshield assessments" or tax maps and records. This was not done properly on Tuftonboro lots 26-1-16 and 26-1-17, and the assessor misplaced a building and a beach on the wrong lots, as the town has admitted.

Neither granted nor denied.

7) The shorefrontage of Tuftonboro lot 26-1-16 is less than 100 feet. It is approximately 103.6' from boundary pin to pin, however the state owns a one-rod strip above the natural mean high water level that overlaps the northern and northwestern pins on the shore. Tuftonboro Zoning Regulation 2.1.22 states that "In the case of shore lots, Frontage shall mean the dimension on the body of water only and shall be measured in fifty (50) foot chords."

Neither granted nor denied.

8) The value, usability, and desirability of Tuftonboro lots 26-1-16 and 26-1-17 are detrimentally impacted by frequent flooding as a result of the state's operation of the Lakeport dam to allow the level of Lake Winnepesaukee to rise well in excess of the flowage rights the state owns. While lot 26-1-17 currently has a house, if it is destroyed and not rebuilt within a year, this lot will be unbuildable due to its narrow triangular configuration with water on two sides, making a 50' building setback and septic system setbacks impossible. None of these facts were factored into the assessments of these lots.

Neither granted nor denied.

9) The value of Tuftonboro lots 26-1-16 and 26-1-17 are further severely impacted since the flooding also changes the setbacks required by RSA 483-B, the Comprehensive Shoreland Protection Act. According to RSA 483-B:4 XVII (b), the "reference line" for building setbacks and other restrictions is as follows: "...for water bodies without established flowage rights, the waterline at full pond as determined by the elevation of the spillway crest." NH DES intentionally allows the lake to rise to at least 504.8' above sea level. At 504.8' and above, both lots are substantially inundated and unusable. If the reference line is at 504.8' or above, the 50' setback required by RSA 483-B makes lot 26-1-17 unbuildable. While there is an exception in RSA 483-B:10 to allow a single dwelling on a pre-existing nonconforming undeveloped lot, lot 26-1-17 has an existing storage structure, and there is no provision in RSA 483-B for "undeveloping" a lot.

Neither granted nor denied.

10) The comparable properties submitted by Tuftonboro are not comparable. They do not flood when the lake is at at 504.8'.

Neither granted nor denied.

If the taxes have been paid, the amount paid on the value in excess of \$253,400 for Lot 16 and \$121,500 for Lot 17 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 properties pursuant to RSA 75:8, the Town shall use the ordered assessments 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

Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Ralph Kirshner, 742 Straits Road, New Hampton, NH 03256, Taxpayer; Chairman, Board of Selectmen, Town of Tuftonboro, PO Box 98, Center Tuftonboro, NH 03816; and Joseph Lessard, Municipal Resources, Inc., 295 No. Main Street, Salem, NH 03079, Contracted Assessing Firm.

Date: February 10, 2009

Anne M. Stelmach, Clerk