

**Garabedian Family Trust**

**v.**

**Town of Windham**

**Docket No.: 23074-06PT**

**DECISION**

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2006 assessment of \$1,080,000 (land only) on Map 8/Lot B-500, a 112.67 acre undeveloped parcel of land (the “Property”). (The Taxpayer also owns, but is not appealing, Map 8/Lot B-6100 (“Lot B-6100”), a 17.0 acre undeveloped lot, and the parties stipulated Lot B-6100 was proportionally assessed.) For the reasons stated below, the appeal for abatement on the Property is denied.

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. We find the Taxpayer failed to prove disproportionality.

The Taxpayer argued the assessment was excessive because:

(1) an appraisal prepared by Donald V. Spring, MAI (the “Spring Appraisal,” Taxpayer Exhibit No. 1) estimates the market value of the Property as of the assessment date (April 1,2006) was \$525,600;

(2) the sole point of access to Lot B-500 is off Route 28 and, because of wetlands and zoning regulation restrictions, Mr. Spring estimated 14 residential lots could be developed in Phase I with a possibility of 14 more lots in Phase II, with the latter being “very speculative,” leading him to discount its value by 75%, and a value conclusion of \$420,000;

(3) Mr. Spring then estimated the value of the backland at \$105,560 (87.97 acres x \$1,200 per acre), leading to the total market value estimate stated above;

(4) the Town’s analysis and value conclusion is less credible because the Town used comparables that were superior in quality, including several that already had development approvals in process at the time of sale, and some were conservation land sales to the Town that were not “qualified” sales; and

(5) the Property is entitled to a substantial abatement.

The Town argued the assessment was proper because:

(1) the Town performed a revaluation of all property in tax year 2006;

(2) the Taxpayer’s appraiser, Mr. Spring, assumed over  $\frac{3}{4}$  (78%) of the Property is not developable, but this assumption is not supportable;

(3) the Spring Appraisal included comparables from other towns without adjusting for location and selected comparables that were much smaller in size than the Property;

(4) the Town has allowed development to occur on land with cul-de-sacs longer than 1,200 feet and with loop roads, making it unreasonable to assume part of the Property has only “speculative” development value because of this factor;

(5) a real estate appraisal (the “Norman Appraisal,” Municipality Exhibit A) was prepared by the Town’s assessor, Rex A. Norman, CNHA, and estimates the market value of the Property was \$1,240,000 as of the assessment date;

(6) while the Property has some wetlands and slopes, the land comparables in the Norman Appraisal are all located in the Town, also have wetland, ledge and other development issues, and indicate a range of value of \$11,000 to \$14,000 per acre is reasonable; and

(7) as stated in the Town's "Memorandum," the Taxpayer failed to meet its burden of proof.

The Taxpayer and the Town agreed the level of assessment in the Town was 95.8% in tax year 2006, the median ratio computed by the department of revenue administration.

### **Board's Rulings**

Based on the evidence and for the reasons detailed below, the board finds the Taxpayer failed to carry its burden of providing disproportionality. The appeal is therefore denied.

### **Preliminary Observations**

Before proceeding to the detailed findings, some general observations are helpful to place those findings in context.

First, the board acknowledges valuing such a large tract of land that contains both significant wetlands and slopes is difficult to do with any degree of certainty. The Property's 112.67 acres is accessed via its relatively nominal frontage of 620 feet on Rockingham Road at the westerly-most end of the Property, with most of the acreage lying east of Flat Bed Brook that runs parallel to Rockingham Road. The Property is also diagonally bisected by significant wetlands, as shown in both the aerial photos in the record and the generalized site plans and tax maps included in both the Spring and Norman Appraisals. The eastern portion of the Property (to the east of the wetlands and the diagonal stream) is also on a higher plateau which would have to be accessed through the steep grade to the east of the wetlands as indicated by the plans and Mr. Spring's testimony.

In valuing such a parcel in its undeveloped state, many uncertainties, and thus risks, exist (permitting, construction, marketing, etc.) and therefore any appraiser in estimating its value in

its “raw” state will have to make certain assumptions that may border on being perceived as highly speculative. As such a property goes through the development process, and by the time the lots are available for retail sale or have been built upon, those risks become more identified and reduced. In making its detailed findings, the board is cognizant of those risks and uncertainties but also recognizes that they are inherently part of valuing a property in its raw state and, therefore, are not unusual or unnecessarily speculative factors.

Second, the two witnesses, Mr. Spring and Mr. Norman, are both experienced, credible appraisers/assessors. It is always difficult when the board is faced with having to weigh the assumptions and conclusions two expert witnesses of this caliber have made, especially when they have arrived at such divergent value conclusions as they did in this appeal. Mr. Spring’s written qualifications, in addition to the board’s firsthand knowledge (from his testimony in prior appeals), indicate he has been involved in valuing many diverse types of real estate for many years. However, as cross-examination revealed, this was the first property Mr. Spring has valued in the Town and, thus, he had to familiarize himself, largely for the first time, with the particularities of the local real estate market.

Mr. Norman, as his professional resume indicates, has been appraising/assessing property also for many years, with the last ten years as the assessor in the Town. During his testimony, and as also reflected in his appraisal, Mr. Norman exhibited a greater depth of knowledge and experience of the local market than Mr. Spring. As a consequence, where conflicting testimony existed that could not be reconciled definitively by documentary evidence, the board placed more weight on Mr. Norman’s testimony, including his knowledge of market trends, sales, development potential, Town land use regulations and permitting procedures and approval probabilities, neighborhood delineations and, in general, his market value observations. The role of an in-house assessor compels him, on a daily basis, to be aware of the market transaction data

within that taxing jurisdiction and to become knowledgeable of the nuances both of the individual transactions and the market motivations of buyers and sellers. In summary, we find Mr. Norman, based on his testimony and responses to board questions, had more experience with the Windham market and insight regarding its nuances than did Mr. Spring.

#### Detailed Findings

Assessments must be based on market value. RSA 75:1. In order to prevail in a tax abatement appeal, the Taxpayer had the burden of proving the market value of the Property as of the assessment date, April 1, 2006, was less than \$1,125,000, rounded (\$1,080,000 assessed value ÷ 95.8% level of assessment).

In making market value findings, the board considers and weighs all of the evidence, including the respective appraisals submitted for the Taxpayer and the Town, 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, 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 parties agreed the highest and best use of the Property was for residential development and that only a limited amount of land was available in the Town for such development. Mr. Norman further noted the market for such land was "strong." (Municipality

Exhibit A, p. 33.) and Mr. Spring stated the “location is desirable for residential uses and is popular with commuters.” (Taxpayer Exhibit No. 1, p. 21.)

Although both experts used the sales comparison approach, they presented widely conflicting estimates of the market value of the Property. The Taxpayer relied solely on the Spring Appraisal, which estimated market value at \$525,600. The Town rebutted this estimate with the Norman Appraisal, which estimated market value at \$1,240,000.

As a basis for comparison, Mr. Spring estimated there could be a maximum of 28 developable lots. Mr. Norman also considered the number of lots that could be developed, but presented his comparisons on a per acre basis. In effect, Mr. Norman concluded the Property could support a development of 32 lots ( $112.67 \text{ acres} \div 3.5 \text{ acres per lot}$ ). Mr. Spring used a per lot value of \$24,000, whereas the \$11,000 per acre value used by Mr. Norman equates to \$38,500 per lot ( $3.5 \text{ acres} \times \$11,000 \text{ per acre}$ ). As a consequence, the main difference between Mr. Spring’s and Mr. Norman’s estimates is not so much as to the number of potential lots (28 versus 32), but rather the level of risk that those lots could be legally and physically realized and, thus, the present value (as of April 1, 2006) of the Property with that development potential.

The board finds Mr. Spring’s method of bifurcating the development potential in two phases and discounting the second phase by 75% for its “speculative” nature is overly cautious and conservative. As noted above, and as both parties agree, the Windham residential real estate market as of April 1, 2006 was still relatively active and strong (albeit Mr. Spring’s further observation that 2006 was showing some weakness after a strong five year stretch, see Spring Appraisal, p. 19). Windham was, and still is, one of the most desirable residential areas in southern New Hampshire in which to locate. The parties also agreed that the amount of desirable or easily developable land has diminished significantly during the past several decades in Windham as substantial development has continued to occur. Consequently, the diminished

supply of raw land and the desirable market mitigate to some extent the challenges and uncertainties presented by the soil, topography and access issues of the Property discussed at the hearing.

One of the uncertainties about which significant testimony and evidence was submitted related to a provision of the Town's subdivision regulations that limits cul-de-sac roads to a length of no more than 1,200 feet, unless the proposed road may eventually also provide access to an adjacent property. Mr. Norman testified, however, that the Planning Board has fairly regularly granted waivers or extensions to the length requirement in other subdivision proposals and, thus, he did not see it as a significant restriction to the potential of extending a road into the parcel from Rockingham Road to a depth greater than 1,200 feet.

Similar observations and opinion are contained in an appraisal prepared by Rauseo & Associates ("Rauseo Appraisal") for a 2004 eminent domain taking of a portion of the Property (submitted into evidence as Municipality Exhibit F on the limited issue of actual and potential access to the Property). The Rauseo Appraisal (at pp. 40 and 41) noted the Town has frequently approved longer road systems in new subdivisions and, in fact, had "been forced by courts to approve developments with cul-de-sac lengths exceeding 3,600+/- LF where connections were not considered possible." The Rauseo Appraisal did go on to note, however, that the Town would be unlikely to approve a road that would extend fully into the eastern portion of the Property without some second access point. (Id. at p. 41.)

Considering these observations, the board concludes it would be not speculative to assume a road longer than 1,200 feet would be granted to at least fully develop the western areas of the Property (Phases I and II areas in the Spring Appraisal). The uncertainty of obtaining approval for a longer road to access the eastern developable portion of the Property coupled with the substantial cost of such a road crossing the wetlands in the middle of the Property and

negotiating the slopes to the east cause the board to conclude that, without a second access point, it is unlikely it would be financially viable to develop the eastern higher plateau (at least as of the April, 2006 assessment date).

To test the reasonableness of the Spring Appraisal value of \$525,600, the board equated the estimate to a per lot basis or approximately \$19,000 per lot ( $\$525,600 \div 28 = \$18,771$ ) and compared that value to an estimated market value of a finished retail lot. (As noted in the preliminary observations above, the board placed more weight on Mr. Norman's testimony and evidence as to the final retail lot value in this neighborhood than Mr. Spring's because of Mr. Norman's historical and Town-wide knowledge of residential property sales (see e.g., p. 82 of Norman Appraisal)). Based on Mr. Norman's testimony and evidence, in particular the sale of a lot in the adjacent Aladdin Road development just to the south of the Property for \$200,000 and three other sales in close proximity to the Property selling for \$225,000 to \$230,000, the board concludes the finished per lot value would be in the \$200,000 to \$230,000 range. The board recognizes the western portion of the Property would have lots that do not have any long distance views, but nonetheless concludes the demand for residential property in Windham was sufficiently strong to support a \$200,000 to \$230,000 lot value for an average lot. Comparing Mr. Spring's \$19,000 per lot value for the undeveloped parcel to a finished lot value results in the value per undeveloped lot being less than 10% of its finished value (in fact, 8%-9%).

The board finds Mr. Spring's estimated value for the raw undeveloped land on a per lot basis is low, both based on the limited market evidence in the record from which to extract such a percentage and the board's general experience. A review of the evidence indicates the record contained only one sale of an undeveloped tract that could be compared with a latter sale of a subsequently subdivided lot from that tract: Spring Appraisal comparable No. 1 (and Norman Appraisal comparable No. 5) of 42.7 acres ("Terra Bella" subdivision) sold for \$600,000 in

October, 2004 or for \$33,333 per lot based upon the ultimate approval of 18 lots; subsequently one of the 18 lots sold in April, 2008 for \$250,000 (Norman Appraisal p. 61). A simple comparison of the two sale prices on a per lot basis indicates the undeveloped land sold on a per lot basis for 13.33% of its ultimate retail lot value. This indication may also be low because, as testified to by Mr. Spring and noted at page 44 of his appraisal, comparable No. 1 was purchased from an estate and, despite one of the grantor legatees being involved in commercial real estate, it is possible the \$600,000 sale price (acquired through two partial interest deeds) was below market value.

Also, it has been the board's experience that the value on a per lot basis for raw land is generally in the 15%-20% range of the final retail value of the lots. Obviously, this relationship will vary to some extent depending on the strength of the real estate market and the associated development and marketing costs associated with bringing a specific property to its retail marketing state. Nonetheless, even simplistically multiplying 15% of a final lot value range of \$200,000 to \$230,000 times 30 lots (the average of the Spring and Norman Appraisal estimates) results in market value indications much closer to the Town market value estimate than the Taxpayer's estimate ( $0.15 \times (\$200,000)$  or  $(\$230,000) \times 30$  lots = \$900,000 to \$1,035,000). Consequently, the fact the Spring Appraisal \$19,000 per lot estimate at 8%-9% is below both the market evidence in the record and the board's general experience is a significant basis for the board giving the Spring Appraisal valuation conclusion little weight.

Additionally, as the Town noted, only two of the five Spring Appraisal sales comparables were in Windham with the balance being in Hudson, Derry and Salem. The Spring Appraisal made no direct comparison for location but addressed location by a "qualitative adjustment summary chart" and a relative ranking of the sales. The board does not dismiss this methodology out of hand, but given the testimony and evidence as to the high desirability of

Windham for residential development, the board concludes that such adjustment may not have adequately accounted for the locational differences, forming another basis for the board giving little weight to the Spring Appraisal value conclusion.

In brief, while the board recognizes the difficulty in definitively valuing such a Property, the board finds the Taxpayer's assertion that a 112.67 acres in Windham with 620 feet of frontage, notwithstanding its development challenges, is only worth the \$525,600 is not adequately supported by the Spring Appraisal. As noted, several of the assumptions contained in the Spring Appraisal are overly conservative and the Town has presented other market evidence that generally supports the reasonableness of the assessment, even if the stage of design and permitting of some of the sales is adjusted for and Town's conservation sales (Norman Appraisal comparables Nos.: 8, 9 and 10) are given less weight. Thus, the board finds the Taxpayer has not carried its burden of proving disproportionality and the appeal is denied.

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

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Paul B. Franklin, Chairman

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Albert F. Shamash, Esq., Member

**Certification**

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Russell F. Hilliard, Esq., Upton & Hatfield LLP, 159 Middle Street, Portsmouth, NH 03801, counsel for the Taxpayer; Chairman, Board of Selectmen, Town of Windham, PO Box 120, Windham, NH 03087; and Bernard H. Campbell, Esq., Beaumont & Campbell Prof. Assn., 1 Stiles Road - Suite 107, Salem, NH 03079, counsel for the Town.

Date: August 28, 2009

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Anne M. Stelmach, Clerk