

25 Chase Island Trust

v.

Town of Atkinson

Docket No.: 23207-06PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2006 assessment of \$359,900 (land \$247,600; features (shed and two docks) \$5,900; building \$106,400) on Map 22/Lot 20, at 25 Chase Island Road, a single family home on a 0.122 acre lot (the “Property”). 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 board finds the Taxpayer carried this burden, but only to the extent acknowledged by the Town (an abated assessment of \$339,100) at the mediation session described below.

The Taxpayer, through Trustee Bruce A. Cambriello and his representative (Eugene Reed), argued it is entitled to a further abatement because:

- (1) the assessment-record card contains errors and does not accurately reflect his property boundaries and the amount of waterfront land he actually owns (see Taxpayer Exhibit No. 1);
- (2) the Town met with the Taxpayer and offered certain adjustments that would have reduced the assessment to \$339,100 (as shown in Municipality Exhibit B), but the Town improperly took this offer off the table; and
- (3) the board should grant a further abatement and require the Town to reimburse the Taxpayer for its filing fee and other costs.

The Town argued the assessment under appeal was proper because:

- (1) while it proposed certain adjustments to this assessment at the mediation session with the Taxpayer (see Municipality Exhibit B), the Taxpayer did not accept them and therefore they are not binding;
- (2) the Taxpayer failed to provide any market value evidence to establish disproportionality and support a further abatement; and
- (3) neither further abatement nor an award of costs is warranted.

The board heard this appeal on the same day as the appeal on a neighboring property, Gary D. Brownfield v. Town of Atkinson, BTLA Docket No.: 22931-06PT, which involves somewhat similar issues. The parties agreed the board could take judicial notice of the arguments and evidence presented in each appeal to the extent helpful (to simplify and streamline the presentation of evidence and aid in the resolution of issues). The board also noted the level of assessment in the Town for tax year 2006 was 98.7%, the median ratio computed by the department of revenue administration.

Board's Rulings

Based on the evidence, the board finds the Property is entitled to an abatement and the assessment should be reduced to \$339,100 (the amount indicated on Municipality Exhibit B). The appeal is therefore granted.

As in the Brownfield appeal heard on the same day, the Taxpayer argued the Town erred by incorrectly designating the amount of waterfront (50 feet in this appeal) on the assessment-record card. However, as also noted in the Brownfield decision, there is no evidence the land valuation model employed by the Town was not consistently applied and utilized in an effort to arrive at a proportional assessment. Even if the Town's methodology could somehow be shown to be flawed or incorrect, such proof would not entitle the Taxpayer to an abatement. Justice requires that an order of abatement not relieve the taxpayer from bearing his or her share of the common burden of taxation, notwithstanding any errors of law or fact pertaining to how the assessment was made. Porter v. Town of Sanbornton, 150 N.H. 363, 368 (2003). For example, proving the municipality lacked a "sound methodology" when it made the assessment is not sufficient, unless there is proof of disproportionality. Id. at 367-68. Here, the Taxpayer presented no market value evidence to show how, if at all, the Property was disproportionately assessed.

Nonetheless, the board finds the Property is entitled to an abatement to \$339,100 (land \$226,800; features (shed and two docks) \$5,900; building \$106,400) for one distinct reason. According to the evidence presented, the Town met with the Trustee for the Taxpayer (Mr. Cambriello) on May 23, 2008 at a mediation session and the Town proposed reducing the land value (from \$247,600 to \$226,800) to correct certain physical data errors. The board finds this effort by the Town recognized the effect of those factors on the market value of the Property.

For example, and as stated in the notes on the assessment-record card (Municipality Exhibit B), the Town tried to correct for the “septic under road,” “flooding” and other factors mentioned by the Taxpayer as grounds for abatement. The board finds these adjustments are supported and are reflected by the evidence considered as a whole. Therefore, it is not relevant that the Town may have taken its offer “off the table” because of the Taxpayer’s failure to agree to other issues at that mediation session.

The board cannot agree with the Taxpayer, however, that a further abatement (to an unspecified amount) is warranted simply because the Taxpayer contends it does not “own” the waterfront and he believes the Town engaged in “illegal” taxation. (See Taxpayer Exhibit No. 1.) The Taxpayer’s deed identifies the Property as “running southwesterly by said shoreline fifty (50) feet” and therefore it is reasonable for the Town to conclude the taxable estate encompasses this amount of waterfront. As also noted in the Brownfield decision, drawing a straight line boundary between two pins is not a legitimate means of depicting the physical boundaries of the Property. Instead, based on the board’s experience and commonly accepted land survey practices, the property boundary should follow the waterline. It is generally known that, wherever possible, natural monuments are used to demarcate property boundaries and, when property abuts water bodies, the “Natural Mean High Water Mark,” a natural boundary, takes precedence over artificial monuments. Property pins are considered artificial monuments and surveyors set pins close to the shoreline, but at an elevation to avoid safety, navigation, erosion and similar problems. The board further notes this is not a situation where ownership of land is in dispute (such as between two adjoining property owners, for example).

RSA 73:10, quoted in Taxpayer Exhibit No. 1, authorizes taxation of real and personal

property “to the person claiming the same, or to the person who is in the possession and actual occupancy thereof, if such person will consent to be taxed for the same.”¹ In other words, ownership is not the sole nexus for taxation and therefore it is not necessarily relevant that the Taxpayer now makes no claim to own additional waterfront land, if he has the benefit of being on the waterfront and if the market value of the Property is positively impacted by this location. At hearing, the parties acknowledged that, generally speaking, the waterfront facing the house is private (restricted to use by the Taxpayer and his guests) and that the public in general has no right to access it. In other words, it is considered private property whether or not the Taxpayer chooses to recognize it as such in this tax abatement appeal.

¹ This provision is intended to deal primarily with situations where a lessee, for example, is in possession of land and agrees to be taxed on it in place of the owner of the land. See, e.g., Lin-Wood Development Corp. v. Town of Lincoln, 117 N.H. 709, 711 (1977) (land held under lease from federal government was subject to property taxation):

This court held in Piper v. Meredith, 83 N.H. 107, 109, 139 A. 294, 295 (1927), that for “the purpose(s) of taxation, it is immaterial who is the ultimate owner of the fee. Title is not the test of taxability.” In King Ridge, Inc. v. Sutton, 115 N.H. 294, 299, 340 A.2d 106, 110 (1975), the fact that the taxpayer owned in fee all the land on which the ski facilities were located does not alter our conclusion regarding the taxability of the facilities in the present case. In both cases the taxpayers are in possession and actual occupancy of the premises and clearly have all the benefits of ownership in their use of producing income therefrom. See RSA 73:10.

It cannot be seriously disputed that the Taxpayer here has “all the benefits of ownership” of the waterfront.

In the board's experience, proximity to the water is clearly an amenity that augments market value in most, if not all, circumstances. To claim otherwise, in the circumstances of this appeal, would simply not be credible, either on the facts presented or in light of the relevant statutes and case law.²

The Taxpayer and his representative raised other objections pertaining to the Town and its assessment practices, but did not show how any such alleged errors resulted in disproportionality. "Justice does not require the correction of errors of valuation whose joint effect is not injurious to the appellant." Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985), quoting Amoskeag Mfg. Co. v. Manchester, 70 N.H. 200, 205 (1899).

Assessments must be based on market value. RSA 75:1; see also Appeal of Sokolow, 137 N.H. 642, 643 (1993) ("In an abatement case, the taxpayer has the burden of proving by a

² Although involving a lakeside condominium, Booth v. Town of Gilford, BTLA Docket No. 21101-04PT (September 14, 2007), is instructive to some of these issues and discusses several pertinent statutes. In that appeal, the board ruled against a taxpayer who argued that property should not be taxed because at least a part of it consists of "artificially created land resulting from filling the lake bed of Winnepesaukee" and therefore is owned by the State of New Hampshire, not the taxpayer. As noted in the Booth decision:

The legislature has stated all real estate is taxable, unless otherwise provided, (see RSA 72:6 and RSA 72:7) and such real estate, unless otherwise provided, shall be assessed at market value (see RSA 75:1). RSA 21:21 (footnote omitted) defines real estate as including all tangible and intangible rights associated with real property. While they vary from property to property, these ownership rights are often viewed as a "bundle of rights." Ownership rights include the right to use real estate, to sell it, to lease it, to enter it, to exclude others, 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. IAAO, Appraisal of Real Estate, at 7 (11th ed. 1996).

Here the Taxpayers have real property rights to certain physical areas. . . . As illustrated by this fragmentation of rights through condominium subdivision, the Taxpayers' Property does not break down neatly between "land" and buildings", but rather collectively are those transmissible (footnote omitted) property rights (sticks in the bundle of rights) of situs, occupancy, ability of ingress and egress, right to sell or lease, etc. Situs, in this case, includes close proximity to (indeed directly over) Lake Winnepesaukee. . . . Thus the "land" referred to on the assessment-record card is not particular to the land under the foot print of Unit No. 6 but rather is the residual value for the collective real property rights that is above and beyond the replacement cost value of the improvements.

RSA 21:21 (quoted in footnote 1 in the Booth decision) is also on point and provides: "The words 'land,' 'lands' or 'real estate' shall include lands, tenements, and hereditaments, and all rights thereto and interests therein."

preponderance of the evidence that the property at issue was assessed disproportionately to other property in the town. (Citation omitted.)”); and Porter v. Town of Sanbornton, 150 N.H. 363, 367-68 (2003) (disproportionality requires showing by taxpayer that his or her property is being assessed “at a higher percentage of fair market value than the percentage at which property is generally assessed in the town”).

The board has reviewed the market data submitted by the Town to support the proportionality of the assessment. (See Municipality Exhibit A.) Considering the evidence as a whole, the board finds a further abatement to the amount suggested by the Town is reasonable and warranted in the circumstances of this appeal. An abatement is therefore granted to \$339,100.

Finally, the board does not find the Taxpayer is entitled to an award of costs under the standards prescribed in Tax 201.39.

If the taxes have been paid, the amount paid on the value in excess of \$339,100 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, 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

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Eugene T. Reed, 8 Michela Way, Nottingham, NH 03290, representative for the Taxpayer; Chairman, Board of Selectmen, Town of Atkinson, 21 Academy Avenue, Atkinson, NH 03811; and Brett S. Purvis & Associates, Inc., 3 High Street, 2A, PO Box 767, Sanbornville, NH 03872, Contracted Assessing Firm.

Date: December 5, 2008

Anne M. Stelmach, Clerk

25 Chase Island Trust

v.

Town of Atkinson

Docket No.: 23207-06PT

ORDER

The board has further reviewed the “Taxpayer’s” Motion for Rehearing (the “Motion”) filed on January 5, 2009 in this appeal (along with a rehearing motion filed on the same date raising the same issues in another appeal, Brownfield v. Town of Atkinson, BTLA Docket No. 22931-06PT). The board rescinds its February 2, 2009 suspension order and denies the Motion for the reasons discussed below.

The Motion attempts to raise a number of issues with respect to the board’s December 5, 2008 Decision. The Decision contains the board’s detailed findings and the basis for denying the appeal for abatement, finding the Taxpayer had failed to meet the requisite burden of proving a disproportional assessment for tax year 2006 by a preponderance of the evidence. While the Taxpayer’s disagreement with the Decision is plain, the Motion fails to meet the standards for granting a rehearing set forth in RSA 541:3 and Tax 201.37.

The Motion begins by requesting a “Default” be entered against the “Town” because the Town’s representative at the hearing (Rod Wood) allegedly had “no standing.” This assertion is

untimely and without merit. If the Taxpayer's representative wished to object to Mr. Wood's participation, such objection should have been made at or before the October 17, 2008 hearing, not for the first time months later after the board issued the Decision. Further, Mr. Wood is employed by Brett S. Purvis and Associates, Inc. ("Purvis"), the Town's assessing company, and properly appeared on the Town's behalf to defend the proportionality of the challenged assessment.

The Motion's reliance on "the January 28, 2008 minutes of the NHAAO [New Hampshire Association of Assessing Officials]" mentioning the filing of appearances by municipal contract assessors is misplaced: in fact, the Purvis firm did respond to a December 17, 2007 letter request from the board's Clerk seeking information regarding "Municipal Representation for 2004-2006" by indicating it represented the Town as well as a number of other municipalities. The fact that Mr. Wood, a Purvis employee, did not fill out and file a separate "appearance form" for this docket is unavailing to the Taxpayer's appeal rights.³ No loss of "standing" occurred and no "default" can be entered against the Town based on the facts presented.

The Motion then goes on to note the Taxpayer raised two sets of issues in its appeal (waterfront and septic) but has decided to make arguments only challenging the board's rulings on the waterfront issue. Each of the multiple arguments pertaining to the waterfront issue presented in the Motion has been carefully reviewed and the board finds no "good reason" has been established to change its rulings in any respect. In brief, and without discussing each detail, the board does not agree with the Taxpayer's characterization of the import or weight of the

³ See also the Report of Settlement Meeting on file in this appeal, which indicates that the Taxpayer and his representative attended a settlement meeting on May 23, 2008 with Mr. Wood present (along with a Town selectman), dispelling any potential claim of surprise or unfairness that Mr. Wood would be representing the Town's interests in the appeal heard by the board five months later.

evidence presented or that the board “overlooked or misapprehended” either the facts or the law pertaining to this appeal. See Tax 201.37(d) and (f). Finally, the Town, not the Taxpayer, was the prevailing party in this appeal, making the Taxpayer’s claim that it is entitled to costs (because the Town allegedly maintained a “frivolous defense”) untenable. See Tax 201.39(a).

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

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Order has this date been mailed, postage prepaid, to: Eugene T. Reed, 8 Michela Way, Nottingham, NH 03290, representative for the Taxpayer; Chairman, Board of Selectmen, Town of Atkinson, 21 Academy Avenue, Atkinson, NH 03811; and Brett S. Purvis & Associates, Inc., 3 High Street, 2A, PO Box 767, Sanbornville, NH 03872, Contracted Assessing Firm.

Date: February 12, 2009

Anne M. Stelmach, Clerk