

David H. Johnson

v.

Town of Nelson

Docket Nos.: 23216-06PT/23405-07PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2006 and 2007 assessments of: Map 1/7/2 - \$602,200 [(land \$530,300, which includes the land value for the 6.01 acres on Map 1/7/2 and the 0.02 acres on Map 1/7/3¹); and a single family house, \$71,900]; and Map 1/7/3 - \$8,200 for the improvements only on a 0.02 acre lot (the “Properties”). For the reasons stated below, the appeals for abatement are denied.

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 failed to carry this burden.

¹ The assessment-record card for Map 1/7/2 appears to capture the total area of the Properties including Map 1/7/3. After subtracting the 0.02 acres for the waterfront area of Map 1/7/3, the remainder equates to 6.01 acres on the card. The board notes the deed (included in Taxpayer Exhibit No. 1) lists the area of Tract II (the house lot) to be 6.1 acres, more or less.

The Taxpayer argued the assessments were excessive because:

- (1) two independent appraisals prepared by Mary-Ann D. Robator (the “Robator Appraisals”) estimated the value of the house with 6.1 acres to be \$293,000 (Taxpayer Exhibit No. 1) and the value of the vacant 0.02 acre waterfront lot to be \$100,000 (Taxpayer Exhibit No. 2);
- (2) on April 1, 2006, the Taxpayer owned the Properties and, because they are identified as two distinct tracts (II and IIA) in the deed, is legally able to sell them together or separately; and
- (3) the Properties are not contiguous and, as a matter of law, the Town should not have combined them for assessment purposes.

The Town argued the assessments were proper because:

- (1) the highest and best use of the Properties is to value them as an assemblage;
- (2) the Taxpayer’s appraisals do not consider whether the Properties have a higher value as an assemblage;
- (3) the Town’s assessment methodology has been consistently applied to all similarly situated properties on Nubanusit Lake which had waterfront lots with noncontiguous home sites; and
- (4) the Taxpayer has not carried his burden to prove disproportionality.

The board’s November 17, 2008 order consolidated these 2006 and 2007 appeals for hearing and the board issues this consolidated Decision. The parties stipulated to the median levels of assessment of 103.7% for tax year 2006 and 121.0% for tax year 2007 as determined by the department of revenue administration.

Board’s Rulings

Based on the evidence, the board finds the Taxpayer failed to prove the Properties were disproportionately assessed.

The Taxpayer's primary contention is because the Properties are described separately as "Tract II" and "Tract IIA" on a single deed and may be transferred individually, they must be assessed individually and should not be considered in aggregate as the Town did during its 2006 revaluation. Further, the Taxpayer asserts as a matter of law, because the two lots may be legally sold separately they must be assessed separately. The Taxpayer submitted the Robator Appraisals, which estimated the value of the Properties individually, and asserted they should be the basis for the Properties' assessments. The board disagrees with the Taxpayer's assertions.

Part I, art. 12 of the New Hampshire Constitution requires each person who is provided the protection of government to contribute his or her share in the expense of such protection. Further, to ensure that each person's share is proportional and reasonable (Part II, art. 5) relative to market value (RSA 75:1), the taxpayer's entire estate, not just a select portion of it, must be considered in determining whether these constitutional requirements have been met. In other words, to prevail in a tax abatement appeal, a taxpayer has the burden of proving by a preponderance of the evidence that he or she is paying more than his or her proportional share of taxes. Porter v. Town of Sanbornton, 150 N.H. 363, 367 (2003). When a taxpayer owns more than one taxable property, an abatement can only be granted if the taxpayer's entire estate within the taxing jurisdiction is shown to be disproportionately assessed even if that taxpayer elects to challenge only a part of the assessment. See Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985). A taxpayer is not entitled to an abatement on any given parcel unless the aggregate valuation placed on the property as a whole ("in its entirety") is disproportional relative to the total assessment in order to obtain an abatement. Appeal of Walsh, 156 N.H. 347, 355-56 (2007).

Assessments must be based on market value and all factors influencing value must be considered. See RSA 75:1; and, e.g., 590 Realty Co., Ltd. v. City of Keene, 122 N.H. 284, 285 (1982) (taxable property is to be valued at its highest and best use).

Market forces create market value, so the analysis of market forces that have a bearing on the determination of highest and best use is crucial to the valuation process. When the purpose of an appraisal is to develop an opinion of market value, highest and best use analysis identifies the most profitable, comparative use to which the property can be put.

The highest and best use of a specific parcel of land is not determined through subjective analysis by the property owner, the developer, or the appraiser; rather, highest and best use is shaped by the competitive forces within the market where the property is located. Therefore, the analysis and interpretation of highest and best use is an economic study and a financial analysis focused on the subject property.

In all valuation assignments, opinions of value are based on use. The highest and best use of a property to be appraised provides the foundation for a thorough investigation of the competitive position of the property in the minds of market participants. Consequently, highest and best use can be described as the foundation on which market value rests. (Emphasis added.)

Appraisal Institute, The Appraisal of Real Estate, at p. 305, 12th ed. (2001). The Robator Appraisals and the testimony provided by Ms. Robator indicated no complete highest and best use analysis of the Properties was performed. Ms. Robator testified the scope of the assignment given to her by her client (the Taxpayer) was to appraise each of the Properties individually and therefore she did not do a highest and best use analysis.

The board finds the lack of a thorough highest and best use analysis in the Robator Appraisals raises questions as to whether their value conclusions are reflective of the Properties' market value. If a thorough highest and best use analysis had been performed, the four criteria that must be met (physically possible, legally permissible, financially feasible, maximally productive) would have been analyzed. A complete highest and best use analysis of the

Properties would have considered, given their common ownership and proximity to each other, whether there was any additional value that may have been attributed to the Properties when considered as an assemblage due to their ability to be sold together to a single purchaser. This would have answered the fourth criteria in the highest and best use analysis: what use would result in the highest (maximally productive) value. Ms. Robator testified she could not say, given the narrow scope of her assignment, whether the market value of the Properties as a combined, single economic unit exceeded the combination of the values determined in her appraisals. Without the necessary highest and best use analysis, the board finds the Robator Appraisals are fatally flawed and provide no support for the Taxpayer's position.

It is the board's experience², having heard other appeals of similarly situated properties which have an improved house lot across the street from some smaller water access lot in common ownership, that there is a synergy between the relationship of the Properties and the value of the waterfront lot is captured in the improved lot with the dwelling.

The Town testified its assessment methodology was consistently applied to all other similarly situated properties surrounding Nubanusit Lake. The assessment-record cards for the Alexander Revocable Trust properties (Map 1/8/0 and 1/8/1) and David J. Birchenough properties (Map 1/7/0 and 1/7/1) support the Town's testimony. Both of these taxpayers own a property improved with a dwelling on the south side of Nubanusit Road and a vacant, waterfront lot on the north side of Nubanusit Road which provides them access to Nubanusit Lake. The assessment-record card for the improved Alexander Revocable Trust property (M1/8/0) includes the notation "inherent land value and acreage of M/L 1-8-1 added." The board finds this

² This board, as a quasi-judicial body, must weigh the evidence and apply its judgment in deciding upon a proper assessment. Paras v. City of Portsmouth, 115 N.H. 63, 68 (1975); see also Petition of Grimm, 138 N.H. 42, 53 (1993) (administrative board may use expertise and experience to evaluate the evidence).

notation coupled with the Town's testimony that the Properties' assessments were arrived at using the same methodology used in assessing other properties in the Town is some evidence of proportionality. See Bedford Development Co. v. Town of Bedford, 122 N.H. 187, 189-90 (1982). As further support of its assessments, the Town submitted a list of Lake Nubanusit sales with a site value analysis and a sale of a similar property (584 Granite Lake Road) on a different lake in Town which included a "sliver" lot which the Town assessed similarly to the Properties.

The Town of Nelson file requests for findings of fact and rulings of law (the "Requests"). The Requests 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, "neither 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 so broad or specific 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.
1. The two properties under appeal are a house parcel and a lakefront parcel with frontage on Nubanusit Lake.

Granted.

2. The two parcels were acquired by David Johnson in one deed.

Granted.

3. The two parcels are in close proximity to each other.

Neither granted nor denied.

4. The appraisals submitted by the Taxpayer of fair market value of the two parcels does not appraise or consider whether the combined parcels have a greater fair market value.

Granted.

5. The Town's assessment of the parcels considers the fair market value of the two parcels as combined.

Neither Granted nor denied.

6. Town are permitted to assess parcels separately or together for tax assessment purposes:

"There is no hard and fast rule that can be applied universally to guide assessors in determining whether [adjoining] parcels of land are to be assessed separately or together. ... No single factor is decisive of the issue. In such a state of the law, there must be good reasons to support a unitary assessment. The following suffice in this case: the properties were historically part of one large parcel and were conveyed as one parcel to the preceding owners, against whom the bank foreclosed." *Appeal of Loudon Road Realty Trust*, 128 N.H. 624, at 628 (1986).

Granted.

7. The doctrine of assemblage is an accepted means of valuation of separate parcels:

"The doctrine of assemblage applies when the highest and best use of separate parcels involves their integrated use with lands of another. Pursuant to this doctrine, such prospective use may be properly considered in fixing the value of the property if the joinder of the parcels is reasonably practicable. If applicable, this doctrine allows a property owner to introduce evidence showing that the fair market value of his real estate is enhanced by its probable assemblage with other parcels." 4 P. Nichols, *Eminent Domain* (3d Ed. Rev. 2000, P. Rohan & M. Reskin, eds.) § 13.02 [9]. *Franc v. Bethel Holding Co.*, 73 Conn. App. 114, at 120-121 (2002).

Granted.

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

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Mark D. Fernald, Esq., Fernald, Taft, Falby & Little P.A., PO Box 270, Peterborough, NH 03458, counsel for the Taxpayer; Chairman, Board of Selectmen, Town of Nelson, 7 Nelson Road, Nelson, NH 03457; and Cross Country Appraisal Group, LLC, 210 North State Street, Concord, NH 03301, Contracted Assessing Firm.

Date: 10/16/09

Anne M. Stelmach, Clerk

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v.

Town of Nelson

Docket Nos.: 23216-06PT/23405-07PT

ORDER

The board has reviewed the “Taxpayer’s” November 3, 2009 Motion for Reconsideration (the “Motion”) of the board’s October 16, 2009 Decision as well as the “Town’s” November 6, 2009 Objection to Motion for Reconsideration (the “Objection”) and the Taxpayer’s December 1, 2009 Response to Objection to Motion for Reconsideration (the “Response”). The suspension order entered on November 12, 2009 to allow the board more time to consider the Motion is hereby dissolved and the Motion is denied.

Reconsideration motions are governed by RSA 541:3 and Tax 201.37. The board finds no “good reason” to grant the motion. Resolving disputed facts and the application of facts to the law is clearly within the purview of the board. See, e.g., Appeal of Land Acquisition, 145 N.H. 492, 494 (2000), citing RSA 76:16-a, V and Appeal of Andrews, 136 N.H. 61, 64 (1992). The Taxpayer has failed to meet its burden of establishing the board overlooked or misapprehended either the facts or the law and such error affected the board’s ultimate decision. See Tax 201.37(e), cf. Tax 201.37(g). Although the Motion is largely a restatement of the

Taxpayer's arguments raised at the hearing which the Decision sufficiently addressed, the board finds the following brief comments are warranted.

The Taxpayer misstates the reason the board found the Robator Appraisals to be "fatally flawed." The board concluded the lack of a complete highest and best use analysis in either of the appraisals is their fatal flaw and they provide no support for the Taxpayer's position. In determining proportionality, a taxpayer's entire estate within a taxing jurisdiction must be considered and the taxable property must be valued at its highest and best use. See 590 Realty Co, Ltd. v. City of Keene, 122 N.H. 284, 285 (1982). When a taxpayer, as in this case, owns more than one taxable property, an abatement can only be granted if the taxpayer's entire estate within the taxing jurisdiction is shown to be disproportionately assessed. See Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985).

As addressed in the Decision, "[a]ssessments must be based on market value and all factors influencing value must be considered" (Decision at p. 4). The appraisers did not consider all the factors which affect the Properties' values as they were given specific instructions to value them separately. Under the "Scope of Work" heading in each appraisal, the appraisers wrote "[a]ll pertinent economic factors were analyzed." The board finds these statements misleading because no highest and best use analysis was performed where all economic factors should and would have been considered. For all the reasons discussed above and in the Decision, the board finds the Taxpayer's appraisals, and the testimony of the appraisers who prepared them, provide no probative evidence of the Properties' market values and, therefore, underestimates the market value

of the Taxpayer's "entire estate" and, consequently, cannot be a basis for the Properties' assessments.

In the Motion, the Taxpayer argued the application of RSA 75:9 requires the Town to separately appraise the Properties. Assessment-record cards were created for each of the Properties. Because of the Properties' common ownership, proximity, location and sizes, the Town determined there is a synergy between them that adds value which was accounted for in the assessment process. The Town's assessment methodology for similarly situated properties (small, undevelopable waterfront lots separated by a road from improved lots in common ownership) was consistently applied to all similarly situated properties around Nubanusit Lake and the assessments of the similarly situated Alexander and Birchenough properties support this methodology. The board finds the Town's consideration and assessment of the two lots as one economic unit is appropriate given the facts in this case. See, e.g., Appeal of Loudon Road Realty Trust, 128 N.H. 624, 628 (1986); "There is no hard and fast rule that can be applied universally to guide assessors in determining whether [adjoining] parcels of land are to be assessed separately or together...[N]o single factor is decisive of the issue." (Citations omitted; brackets in original.) See also RSA 75:9

For the reasons previously discussed, the board finds no good reason to grant the Taxpayer's Motion and it is denied.

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

Michele E. LeBrun, Member

Douglas S. Ricard, Member

CERTIFICATION

I hereby certify a copy of the foregoing Order has this date been mailed, postage prepaid, to: Mark D. Fernald, Esq., Fernald, Taft, Falby & Little P.A., PO Box 270, Peterborough, NH 03458, counsel for the Taxpayer; Chairman, Board of Selectmen, Town of Nelson, 7 Nelson Road, Nelson, NH 03457; Gary J. Kinyon, Esq., Bradley & Faulkner, PC, 50 Washington Street, PO Box 666, Keene, NH 03431, counsel for the Town; and Cross Country Appraisal Group, LLC, 210 North State Street, Concord, NH 03301, Contracted Assessing Firm.

Date: January 5, 2010

Anne M. Stelmach, Clerk