Mobile Courts, Inc.

v.

Town of Salem

Docket No.: 23281-06PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 2006 assessment of $2,229,800 (land $1,624,300; improvements $605,500) on Map 99/Lot 940, a manufactured home park on a 7.70 acre lot (the "Property"). For the reasons stated below, the appeal for abatement 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, represented by Glenn N. Gidley, its business manager, argued the assessment was excessive because:

(1) the Property has approximately 90 manufactured home sites and, since the 1950's, has been operated as a manufactured home park;

(2) the Taxpayer has owned the Property for approximately 40 years and many of the residents of the park are elderly people on low incomes who have lived there for decades;

(3) valuing the Property based on its commercial development potential, as the Town attempts to do, is highly speculative and not proper because, under the statutes regulating such parks (see RSA ch. 205-A), it would be time consuming and difficult to cease operating the Property as a manufactured home park and converting it to another use;

(4) the Property should be valued at its present use as a manufactured home park and at a value of about $20,000 per site, for a total value of $1,800,000, based on a comparison to the assessment on another park (Cole's Mobile Homes Inc.) in the Town (see Taxpayer Exhibit No. 2);

(5) the Town has the total assessment of the Property, including the manufactured homes on it (assessed separately, as shown in Taxpayer Exhibit No. 1), at over $6 million, which is excessive;

(6) the Town's comparables are unfair and not all of the 7.7 acres are usable because of wet areas; and

(7) a substantial abatement should be granted.

The Town, represented by its assessor, Normand Pelletier, argued the assessment was proper because:

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

(2) the Property's assessment reflects its highest and best use as vacant land suitable for commercial development because of its location on Broadway (Route 28) in a very heavily traveled retail strip;

(3) comparable properties in the same area (listed on Municipality Exhibit A) have sold for much higher values that support the assessment; and

(4) the Taxpayer did not meet its burden of proof.

The parties stipulated the level of assessment in the Town was 98.2% for tax year 2006, as measured by the median ratio computed by the department of revenue administration.

Board's Rulings

Based on the evidence, the board finds the Taxpayer failed to meet its burden of proving the Property was disproportionally assessed. The appeal is therefore denied for the reasons discussed below.

The Taxpayer did not present an appraisal or any other market value evidence to support its claim for an abatement. (Its request to continue the hearing date, submitted just two weeks before the hearing, to allow it additional time ("8 – 9 weeks") to obtain an appraisal was denied by the board because, as the Town correctly pointed out, it was untimely.)

Instead of preparing and presenting market value evidence on a timely basis to support a lower assessment, Mr. Gidley, the Taxpayer's representative, relied on one assessment of another manufactured home park, "Cole's" on Lowell Road, consisting of seven acres and 59 mobile home sites, which had a lower assessment ($1,186,700). Mr. Gidley calculated this assessment equates to $20,114 per site, as shown in Taxpayer Exhibit No. 2, and therefore the assessment on the Property should be abated to $1.8 million (90 sites x $20,000 per site).

Mr. Pelletier disagreed, pointing out that Cole's is but one of a number of manufactured home parks in the Town and is located in a different area (on Lowell Road, near interstate highway noise) where land values are much lower. Comparing assessments simply on the basis of value per manufactured home site could be misleading, especially since, in addition to

location, such parks can differ in the extent and age of infrastructure development and park amenities, as well as their overall desirability and income potential. Mr. Pelletier stated the Town has a number of manufactured home parks. For unknown reasons, Mr. Gidley elected not to present comparative assessment data for any of these other parks located in the Town or to make any location or other adjustments for the one assessment he relied on.[1]

The Town further indicated the assessment on the Property reflects its highest and best use as commercially developable land in a heavily traveled retail area on Broadway (Route 28). While Mr. Gidley objected to this assessment approach, the board finds it is reasonable, based in part on the board's review of Taxpayer Exhibit No. 3. According to these income statements, the Property is losing money (incurring an unsustainable negative profit margin amounting to 30% of rental revenue) and there is reason to question the continued financial feasibility of operating it as a manufactured home park. There is some evidence that use as a manufactured home park is not the Property's highest and best use.

In Municipality Exhibit A, the Town presented eight comparable sales of commercial/ industrial properties in the same neighborhood to indicate that the Property's assessment was supported by the substantially higher market values reflected in these sales. Mr. Gidley criticized this comparable sales approach as being too speculative given the time and uncertainty factors that would be involved in converting the manufactured home park to another use. The board reviewed the statutes cited by him, which do indicate some tenant notice and first refusal rights need to be addressed in selling a manufactured home park under the statutory framework contained in RSA ch. 205-A. For example, if an owner receives an offer to purchase, it must

[1] If, for example, the location of the Property was 25% better than Cole's and a per site value comparison was appropriate, then the indicated value of the Property ($25,000 times 94 mobile home sites) would support the assessment. See also Taxpayer Exhibit No. 1 (which indicates there are a total of 94, rather than 90, sites on the Property).

give tenants sixty (60) days notice (to allow them a period of time to make their own purchase offer) and 18 months notice to terminate a tenancy due to a change in use of the manufactured home park. See RSA 205-A:21, RSA 205-A:3, III and 205-A:4, VI. The board finds these time periods would not necessarily deter or dissuade a potential purchaser of the Property sophisticated in the process of acquiring land and changing its use because it is not uncommon for land development to consume a time period of two or more years for all the requisite state and local zoning and permit approval processes to play out.

At the hearing, there was conflicting testimony regarding how much usable land was available on the Property for a commercial development due to the existence of some wetlands and whether such wet areas could be used to satisfy density requirements. On balance, the board finds the Taxpayer did not meet its burden of proving this factor would adversely affect the market value of the Property to a degree sufficient to make the assessment disproportional. The comparables presented in Municipality Exhibit A reflect land values that are substantially higher than the value indicated by the assessment of the Property, even if the usable acreage is adjusted for wet areas. Mr. Gidley also argued the Town's comparable sales were generally in better locations than the Property. Again to the extent that may be true, the Town's assessment on a per acre basis of approximately $290,000 per acre is substantially below the per acre value range of $404,200 to $1,010,400 indicated by the Town's comparable sales.

Another argument made by Mr. Gidley is that the total assessment (for the Property and the manufactured homes situated on it) is excessive. No abatement appeals pertaining to the manufactured homes have been filed and the Taxpayer is not a "person aggrieved" with standing to appeal those assessments. See RSA 76:16 and RSA 76:16-a. More importantly, the tax statutes contemplate separate assessment of the land and the manufactured homes and the Town

properly did so. See, e.g., RSA 72:7-a and RSA 72:7-b (Manufactured Housing), which authorize the separate assessment of such structures, RSA 73:10 (Real Estate) and RSA 73:16-a (Personal Property on Land of Another).

Moreover, it is not uncommon for fragmented property rights to be worth more in the aggregate than what their value would have been if the property rights had not been separated. Examples of this market phenomena include an undeveloped parcel of land that has been successfully subdivided, condominium developments and time share resorts. Thus, the board is unpersuaded by Mr. Gidley's argument that the aggregated assessments of the manufactured homes situated on the Property (see Taxpayer Exhibit No. 1) should somehow influence the analysis of whether the Property is proportionally assessed.

Mr. Gidley also made a constitutional argument the Property should be assessed on its 'current use' as a manufactured home park rather than its highest and best use, an argument he based on Part II, Article 5 of the New Hampshire Constitution. While Part II, Article 5 has provided for real estate to be valued at its 'current use,' the legislature must designate by statute what type of property is eligible for current use assessment. Notable examples where 'current use' assessment is permitted include: land devoted to the preservation of open space under RSA ch. 79-A (Current Use Taxation); land with conservation restrictions under RSA ch. 79-B (Conservation Restriction Assessment); and land in an industrial or commercial zone used by the owner as a "residence" under RSA 75:11 (Appraisal of Residences).[2] This statutory framework, where property is taxed at its highest and best use except as otherwise provided, has repeatedly met the test of constitutionality. Cf. N. Country Envtl. Servs. v. State of N.H., 157 N.H. 15, 17, 19 – 25 (2008) (discussing and upholding the constitutionality of a statutory amendment to

[2] At the hearing, the Taxpayer's representative, Mr. Gidley, acknowledged his awareness of RSA 75:11 and that the Property did not qualify under its provisions because the owner does not use it as a "residence."

RSA 72:12-a making an exemption for pollution control facilities inapplicable to privately-owned landfills).

Mr. Gidley's remaining arguments are also without merit. While the challenge of providing affordable housing for elderly and financially needy persons is recognized and is affected, to some degree, by property taxation practices, the remedy lies with the legislature to enact whatever tax relief may be appropriate. Cf. Epping Senior Housing Associates LP v. Town of Epping, BTLA Docket Nos. 19135-01PT/19855-02PT/20263-03PT (March 18, 2005 Order) at p. 12. In Epping, the board discussed and resolved related constitutional and highest and best use issues, as follows:

> [T]he supreme court has identified three constitutional provisions that insure taxation is "just, uniform, equal, and proportional." See Smith v. New Hampshire Dept. of Revenue Admin., 141 N.H. 681, 685-86 (1997) (citations omitted). Part I, Article 12 of the New Hampshire Constitution requires "[e]very member of the community . . . . to contribute his share" of the expense of government. Part II, Article 5 authorizes the Legislature "to impose and levy proportional and reasonable assessments, rates, and taxes." Part II, Article 6 permits the Legislature to distinguish "classes of property" for taxation purposes.
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> With respect to the constitutional authorization for "classes of property," the Legislature has done so, for example, with respect to property qualifying for exemption under RSA 72:23, et seq. and for current use under RSA Ch. 79-A, but no analogous statutory provisions exist for property built by a for profit entity to promote affordable housing, such as the Property in this case. Cf. The Housing Partnership v. Town of Rollinsford, 141 N.H. 239, 240 (1996) (reversing property tax exemption granted to nonprofit corporation devoted to providing '"decent, safe, and affordable housing for low and moderate income persons'" where it failed to meet statutory requirements for an exemption).
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> Consistent with this broad taxing authority under the Constitution, RSA 72:6 prescribes that "[a]ll real estate, whether improved or unimproved, shall be taxed except as otherwise provided." RSA 21:21, I further provides: "[t]he words 'land,' 'lands' or 'real estate' shall include lands, tenements, and hereditaments, and all rights thereto and interests therein." (Emphasis added.) Property is therefore commonly referred to as involving ownership of various "sticks" in a bundle of rights. Cf. Opinion of the Justices (Public Use of Coastal Beaches), 139 N.H. 82, 94 (1994). . . .

> So long as the specific rights ('sticks in the bundle') are inseparable from real estate ("an interest therein"), they are subject to ad valorem property taxation. Thus, for example, factors as disparate as favorable zoning . . .can increase the market value of real estate and therefore its assessment. . . .
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> Unless excepted as noted above, RSA 75:1 requires the Town to "appraise all taxable property at its full and true value in money as they would appraise the same in payment of a just debt due from a solvent debtor, and shall receive and consider all evidence that may be submitted to them relative to the value of property . . . ." This formulation is commonly referred to as "market value." See Appeal of Town of Newmarket, 140 N.H. 279, 285 (1995).
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> When addressing market value, it is, of course, "transmissible value," not "worth to the owner alone" that is the proper focus. 590 Realty Co. Ltd. v. City of Keene, 122 N.H. 284, 286-87 (1982). Any "specialized features," such as, for example, "special architectural features and equipment" in a building (other than personal property, of course), must be considered in a tax system based on the market value of real estate. Id.
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> A related requirement is that property must be assessed at its "highest and best use," id. at 285, which means the "use which will most likely produce the highest market value, greatest financial return, or the most profit." Steele v. Town of Allenstown, 124 N.H. 487, 490 (1984) (quotation marks and citation omitted).

Id. at pp. 5–8. While the focus in Epping Senior Housing was on low income housing tax credits (LIHTC's) rather than manufactured home parks with elderly and lower income tenants, the constitutional principles and statutes guiding the board must be consistently applied.

For all of these reasons, the appeal for abatement 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: Glenn N. Gidley, PO Box 54, Salem, NH 03079, representative for the Taxpayer; and Chairman, Board of Selectmen, Town of Salem, 33 Geremonty Drive, Salem, NH 03079.

Date: February 25, 2009

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Anne M. Stelmach, Clerk