

Juniper Fells, LLC

v.

City of Concord

Docket Nos.: 23355-07LC/23356-07LC/23357-07LC/23358-07LC

ORDER

After the board's April 15, 2009 "Decision" in which it ordered an abatement from \$10,500 to \$8,000 of each of the "City's" four land use change taxes ("LUCTs"), the City filed a timely Motion for Reconsideration or Rehearing ("Motion"). In its June 2, 2009 Order, the board granted the request for rehearing with such rehearing to be "limited to the issues raised in the Motion". After granting an Assented to Motion to Continue the hearing, the board ultimately held the rehearing on September 8, 2009 attended by representatives from the City, but no individual representing the "Taxpayer" attended.

At the rehearing, the City presented testimony from its City Planner, Mr. Doug Woodward, and its Director of Real Estate Assessments, Ms. Kathryn Temchack, relative to the Motion's assertion of substantive errors contained in the Decision.

As one of the precedent conditions of recording the Phase IV of Juniper Fells plat on September 13, 2006 (see Municipality Exhibit D), the Taxpayer obtained a letter of credit in the amount of \$200,000 from Southern New Hampshire Bank and Trust Company (see Municipality Exhibit C) which guaranteed the construction of the public improvements of Phase IV of Juniper

Fells. The City argued the full and true value of the lots was \$105,000 (based on sales of lots at nearby Becky Lane) because the plat had been recorded and the public improvements were guaranteed by the letter of credit. The City asserted that, with the plat recorded, the Taxpayer had the authority to market the lots pursuant to RSA 674:36, III(b) and the board's discounting of the betterment improvements in the Decision was inappropriate because the letter of credit guaranteed those improvements would be constructed. The City argued the fact the betterments had not been constructed as of the September 13, 2006 date of change was immaterial to determining the four lots' full and true value as separate lots with the ability to be marketed.

Board's Rulings

As was the case at page 8 of the Decision, the board's analysis begins with the requirements of RSA 79-A:7, I that LUCTs be assessed at "10% of the full and true value..." of the property at the time the land is disqualified from current use. The board ruled in the Decision the date of disqualification was either September 13, 2006 when the plat was recorded or subsequently the spring of 2007 when construction on Swan Circle was initiated by the Taxpayer. Regardless of which date, the four lots became disqualified from current use prior to the initiation of any physical changes to the land. (See RSA 79-A:4, I and RSA 79-A:7, IV(c)).

The board finds the City's assessing of the lots as if all the betterments had been constructed (roads, drainage, underground utilities) is contrary to the statute and rules and results in a value that is in excess of full and true value.

In general, administrative rules are to "implement, interpret, or make specific a statute enforced or administered..." by an agency. (RSA 541-A:1, XV). To provide specific direction as to how to value land disqualified from current use, Cub 308.02(b) states: "[t]he full and true value of the land being disqualified pursuant to RSA 79-A:7, shall be based upon the highest and

best use of the land, including the value of all betterments to the land.” (Emphasis added). Cub 301.01 defines the term “betterment” as “the installation or construction of improvements which influence the value of land such as: (a) roads; (b) waterlines; (c) sewage lines; (d) utility lines; or (e) other physical improvements.” (Emphasis added).

Because there had been no installation or construction of improvements (“betterments”) as of the date of change, the Decision concluded the City was incorrect to value the lots at full retail value. The City presented no evidence at the rehearing that the board was incorrect in finding the \$105,000 assessment represented a retail market value of lots. The City argued the lots had that value as of the date of change even without the installation or construction of betterments because the lots were available for sale at that time. We disagree. Inaccessible lots, such as the four on appeal, do not have a market value as high as lots that have full accessibility and utility. As of the date of change, the four lots under appeal could not be physically accessed as no trees had been cut to construct Swan Circle. Consequently, if any purchaser were to have a choice of a Swan Circle lot which they could not physically access to begin their construction of a dwelling versus one on an existing public way, the market value for the Swan Circle lot would be less, all other factors being equal.

The existence of a letter of credit does reduce the risk and uncertainty that the public improvements to provide access and facilitate development will occur at some time in the reasonably near future. It is a guarantee supplied by the Taxpayer to the City that the public improvements will be constructed either by the Taxpayer or the funds, secured by the letter of credit, will be available for the City to have them constructed. However, it does not change the reality that, as of the date of change, the improvements had not been constructed and none of the lots under appeal could be accessed for residential construction. The board finds the letter of

credit is not a transmissible property right (see paragraph 6 of Municipality Exhibit C - “this letter of credit is not transferable or assignable.”). While it does reduce risk and enhance the value of the four lots as of the date of change, the letter of credit is no substitute for the transmissible property rights that accrue to the four lots after the actual investment of direct and indirect costs to construct the public improvements. (See cases cited at page 9 of the Decision that stand for the proposition that transmissible property rights and the transmissible value thereof are key in determining a proportional assessment).

Further, at the rehearing, the City did not present any evidence (other than its argument that no deduction should be made) to refute the board’s estimated reduction of approximately 25% of the retail value reasonably reflects the property rights yet to be obtained through the installation and construction of the betterments. In fact, the \$200,000 letter of credit, even if one assumes a significant contingency factor was part of that estimate, supports the board’s total reduction (if extended to the entire five lots of Juniper Fells Phase IV) of approximately \$125,000.

Moreover, the board finds its analysis is consistent both with several supreme court decisions and prior board decisions dealing with the valuation of developable land.

First, the court held in Woodview Dev. Corp. v. Town of Pelham, 152 N.H. 114 (2005) that the existence of betterments required the municipality to assess the value that the lots were enhanced by the presence of those betterments. The case at hand, however, is different from Woodview in that no betterments had been constructed as of the date of change, only promised and guaranteed by the letter of credit. Thus, the inverse logic applies in this case of not valuing for betterments yet to be constructed, as the Decision did, by deducting the estimated cost of the betterments from the retail value of the lots.

Second, the board's ruling in this appeal is consistent with the Appeal of Town of Hollis, 126 N.H. 230 (1985) in that it does consider the "potential for development" of the Property. The board's reduced assessments of \$80,000 per lot reflects the significant value that the permitting process enhanced the land as of the date of change and, in fact, gets it to 75% of its final retail value.

Third, while not as directly on point, the court's holdings in Appeal of Sawmill Brook Dev. Co., 129 N.H. 410 (1987) and City of Manchester v. Town of Auburn, 125 N.H. 147 (1984) support the concept that in valuing land having development potential, the subdivision development method is an appropriate analysis to estimate a property's market value that is not at its fully marketable status.

Several board decisions are also generally consistent with the board's holdings in its Decision including Tanguay Homes, LLC v. City of Concord, BTLA Docket No. 23962-08LC (May 5, 2009); Carolyn Bedford v. Town of Barrington, BTLA Docket Nos. 22677-06PT and 23533-07PT (February 4, 2009); Rockywold-Deephaven Camps v. Town of Holderness, BTLA Docket Nos. 20317-03PT, 21102-04PT and 22042-05PT (August 25, 2008); and John Weigler v. Town of Hooksett, BTLA Docket No. 19472-02LC, et al. (June 18, 2004). All these decisions utilized the subdivision development method in estimating the value of either partially or fully undeveloped properties as of the assessment dates.

Last, the City's argument that the lots have achieved their full and true value once they have the legal ability to be marketed regardless of whether any betterments have occurred runs contrary to the general appraisal valuation technique known as the subdivision development analysis and discussed in Appraisal Institute, The Appraisal of Real Estate, pp. 343 – 347, 12th ed. (2001). If the board were to accept the City's premise, much of the subdivision development

analysis that is performed on a routine basis by appraisers in conformance with this common and accepted practice would be unnecessary because, under the City's argument, approved lots would have achieved their full and true value before the construction, marketing and holding costs are incurred during the typical construction of and sell-out of a subdivision.

In brief, we find the City's argument is contrary to the current use statutes and rules and contrary to accepted appraisal procedures which attempt to mirror market value.

The Motion referenced and attached its earlier December 1, 2008 Motion for Reconsideration. The board's December 19, 2008 Order addressing that earlier Reconsideration Motion is hereby referenced and incorporated.

SO ORDERED.

BOARD OF TAX AND LANDAPPEALS

Paul B. Franklin, Chairman

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: James Mullaney, Sole Member, Juniper Fells, LLC, 152 Snow Pond Road, Concord, NH 03301, Taxpayer; Chairman, Board of Assessors, City of Concord, 41 Green Street, Concord, NH 03301; H. Bernard Waugh, Jr., Esq., Gardner, Fulton & Waugh, PLLC, 78 Bank Street, Lebanon, NH 03766, counsel for the City; and Current Use Board, c/o Department of Revenue Administration, 109 Pleasant Street, Concord, New Hampshire 03301, Interested Party.

Date: 10/9/09

Anne M. Stelmach, Clerk