

Charles W. Kalil, Brenda Kalil and Charles D. Kalil

v.

Town of Bartlett

Docket No.: 23482-07PT

DECISION

The “Taxpayers” appeal, pursuant to RSA 76:16-a, the “Town’s” 2007 assessments on twelve (12) condominium units or sites of:

<u>Map/Lot</u>	<u>Land Assessment</u>	<u>Building Assessment</u>	<u>Total Assessment</u>
6WSTSD/268L01	\$155,500 – 3.79 ac.	\$520,800 – cape style	\$ 676,300
6WSTSD/268L02	\$137,000 – 1.22 ac.	\$0	\$ 137,000
6WSTSD/268L03	\$145,900 – 2.23 ac.	\$280,500 – cape style	\$ 426,400
6WSTSD/268L04	\$141,700 – 1.01 ac.	\$0	\$ 141,700
6WSTSD/268L05	\$142,500 – 1.18 ac.	\$0	\$ 142,500
6WSTSD/268L06	\$149,200 – 2.52 ac.	\$139,700 – conventional \$600 – yard items	\$ 289,500
6WSTSD/268L07	\$113,600 – 1.06 ac.	\$0	\$ 113,600
6WSTSD/268L08	\$113,900 – 1.12 ac.	\$13,000 – barn	\$ 126,900
6WSTSD/268L09	\$116,000 – 1.54 ac.	\$0	\$ 116,000
6WSTSD/268L10	\$115,300 – 1.40 ac.	\$0	\$ 115,300
6WSTSD/268L11	\$113,600 – 1.05 ac.	\$0	\$ 113,600
6WSTSD/268L12	\$103,700 – 0.76 ac.	\$0	<u>\$ 103,700</u>
		Total	\$2,502,500

(the “Properties”). For the reasons stated below, the appeals for abatement are granted.

The Taxpayers have the burden of showing, by a preponderance of the evidence, the assessments were disproportionately high or unlawful, resulting in the Taxpayers 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 Taxpayers must show the Properties' assessments were higher than the general level of assessment in the municipality. Id. The Taxpayers carried this burden.

The Taxpayers argued the assessments were excessive because:

- (1) the Properties' land is located in the 100 year floodplain as determined by the Federal Emergency Management Agency ("FEMA");
- (2) for development of the Properties to occur, the land area supporting any improvements must be raised to an elevation above the 100 year floodplain; and
- (3) the Town has not accounted for the costs necessary to develop each of the units such as clearing the trees and stumps, bringing and compacting fill to the Properties to bring them above the 100 year floodplain elevation, spreading loam, fertilizer and grass seed to each of the Properties, constructing an approved access road as well as any legal and engineering fees incurred to finish the project.

The Town acknowledged the assessments should be revised to reflect the cost to complete road access to the Properties and to more accurately reflect the status of the dwelling under construction on Unit 1 and argued those revisions were the only proper adjustments because:

- (1) it is only necessary to bring fill to any of the lots to insure any living area in a dwelling is at or above the 100 year floodplain elevation;
- (2) some of the costs estimated and included by the Taxpayers are purely discretionary and would most likely be paid by the individual unit owners such as: clearing the sites, filling the sites depending on the owner's house design and acquiring and spreading loam, fertilizer and seed;
- (3) the cost estimates provided by the Taxpayers are not supported by any market related data;
- (4) the recorded condominium declaration does not support the Taxpayers' testimony regarding the restrictions on the use of the limited common area designated as "1A";
- (5) most all residential lots in the Town have some issues with topography or wet areas; and

(6) the median selling price of a residential lot in the Town is approximately \$105,000 with the average being approximately \$107,000.

Board’s Rulings

Based on the evidence, the board finds the proper assessments to be as follows:

<u>Map/Lot</u>	<u>Land Assessment</u>	<u>Building Assessment</u>	<u>Total Assessment</u>
6WSTSD/268L01	\$148,400 – 3.79 ac.	\$330,100 – cape style	\$ 478,500
6WSTSD/268L02	\$116,000 – 1.22 ac.	\$0	\$ 116,600
6WSTSD/268L03	\$135,300 – 2.23 ac.	\$280,500 – cape style	\$ 415,800
6WSTSD/268L04	\$120,400 – 1.01 ac.	\$0	\$ 120,400
6WSTSD/268L05	\$121,200 – 1.18 ac.	\$0	\$ 121,200
6WSTSD/268L06	\$142,100 – 2.52 ac.	\$139,700 – conventional \$600 – yard items	\$ 282,400
6WSTSD/268L07	\$ 96,600 – 1.06 ac.	\$0	\$ 96,600
6WSTSD/268L08	\$ 96,900 – 1.12 ac.	\$13,000 - barn	\$ 109,900
6WSTSD/268L09	\$ 99,000 – 1.54 ac.	\$0	\$ 99,000
6WSTSD/268L10	\$ 98,300 – 1.40 ac.	\$0	\$ 98,300
6WSTSD/268L11	\$ 96,600 – 1.05 ac.	\$0	\$ 96,600
6WSTSD/268L12	\$ 88,200 – 0.76 ac.	\$0	<u>\$ 88,200</u>
		Total	\$2,123,500

As of April 1, 2007, the Taxpayers owned 41.9 acres that had received condominium subdivision approval for twelve units as depicted on Taxpayer Exhibit No. 2. Units 1, 3 and 6 were improved with dwellings and Unit 8 contained an existing barn. All other units were unimproved as of April 1, 2007 and the “proposed road” on Taxpayer Exhibit No. 2 was unfinished. In accordance with RSA 674:37-a, I, the Town assessed each unit separately, capturing the rights and value of the common area in the transmissible value of the approved condominium sites.

The Taxpayers prepared a voluminous set of documents, most of them the same and replicated for each unit (the “Unit Document(s)”). Each Unit Document contained a calculation by the Taxpayers of each units’ land market value by deducting from the Town’s assessed value a number of factors including lack of water frontage for some units, properties being located in the floodplain, footpath easement to access the Saco River, indirect and direct costs related to further developing the units’ sites

and the road and deductions for green area and building setbacks. These calculations, contained at pages 10 and 11 of each Unit Document, resulted in the Taxpayers' estimate of the units' site values being nominal or negative. Ms. Nancy Hayes, an appraiser who assisted the Taxpayers, also submitted as part of each Unit Document a number of nearby properties as comparables and utilized either their sale prices or Town assessments as a basis for arriving at market value estimates for the Properties. These estimates, summarized on page 39 of each Unit Document, arrived at nominal values for the 9 undeveloped unit sites (approximately \$2,000 to \$4,000) and \$13,500 to \$45,000 for the 3 improved unit site values. Ms. Hayes's total value estimate for all 12 unit sites is \$131,418.

The board is unable to place any weight on the Taxpayers' or Ms. Hayes's calculations for a number of reasons.

First, the various deductions summarized on pages 9 through 11 of each Unit Document are unsubstantiated and have no relationship to the market value of the units as of April 1, 2007. The fact the units are located in the floodplain is certainly a factor to be considered in arriving at their market value. However, the wholesale deduction the Taxpayers make for this factor based on the cost to raise a 15,000 square foot building envelope above the 100 year floodplain was not shown to be how the market would necessarily react to such lots. The Town testified the unit sites have significant positive attributes including many of them having mountain views and access to the Saco River which to some extent mitigates the negative floodplain factor. The Town also provided evidence, in at least one instance, where the owner had designed the dwelling so that non-living area space was on the ground level (garage, basement, etc.) and with the living space above floodplain level.

Second, the Taxpayers' deduction for the land of each unit contained in various setback areas is without any demonstrated market basis as all lots subject to the Town's zoning or the state RSA Chapter 483 Shoreline Protection Act would have similar police power restrictions on their development. Said another way, because the Town's assessments were derived from recent sales of

property subject to the Town and state police powers, those sale prices inherently reflect any positive or negative affect setbacks have on the marketability of lots.

Third, the board finds none of the comparables submitted, either sales or assessments, are indeed comparable to the Taxpayers' units. Each unit, as of April 1, 2007, had their own intrinsic transmissible rights including the capability of being built on subject to further Town and state review and permits and the enjoyment of any views or access to the Saco River. The Taxpayers' comparison to how the Town assessed condominiums in the area is misplaced as many of the other condominiums do not have a designated lot area but rather undesignated rights in common with others which the Town assessed by a different method. The Taxpayers' assertion that the land of all 12 units only had a market value of \$131,418 is illogical given the ability to transfer each one of the units as separate estates and considering the site improvements (septic systems, driveways, landscaping, etc.) that have taken place to some extent on at least three of the units. Testimony was presented by both sides that a retail lot value in excess of \$100,000 was reasonable for a lot with views and river access and, thus, the total market value opinion of \$131,418 for all 12 units, notwithstanding their floodplain location and unfinished road, is unreasonable.

Fourth, the Taxpayers argued the Town's assignment of a water frontage factor for each of the units is inaccurate as most of the units only have pedestrian access to the Saco River over a common area in the vicinity of Unit 6 and do not have actual water frontage. The board reviewed the "Recorded Condominium Declaration for Kalil's Saco River Estates Condominiums" ("Declaration"), part of Municipality Exhibit A in the Taxpayers' 2008 current use appeal (BTLA Docket No. 23942-08CU)¹ and finds, as the Town asserts, that no specific dedication of limited common area 1A as shown on Taxpayer Exhibit No. 2 has been made to the sole benefit of Unit 1. Consequently, because the Taxpayers own all the units as of April 1, 2007, have not dedicated limited common area to any specific

¹ The parties agreed the board could take official notice of this exhibit in the earlier current use appeal by the Taxpayers. See RSA 541-A:33, V.

unit and have the authority to amend the Declaration (see paragraph 5 of the Declaration), there exists the potential for all lots to have use of the entire river frontage.

In brief, the board finds the Taxpayers' various indications of market value to be unsupported with market evidence and the adjustments made to arrive at those calculations extreme and not reflective of the market.

Nonetheless, the board finds the Town's assessments did not consider all relevant factors that would affect the Properties' market value. See Paras v. Portsmouth, 115 N.H. 63, 67-68 (1975). Specifically, the Town did not consider the fact that all of the remaining nine undeveloped sites are located in the Saco River floodplain and would require either a modification of construction techniques (to construct the living area above floodplain level) or for filling the Properties to some extent to do the same. The board agrees with the Town that the Taxpayers' extensive deduction for assuming that a 15,000 square foot area would have to be filled on each unit's site to raise it above floodplain level is excessive and not necessarily what the market would do. However, as noted earlier, the necessity for modifying the site to some extent by filling or modifying the building plans makes these sites less desirable than sites not in the floodplain. The Town also did not recognize that the proposed road as shown on Taxpayer Exhibit No. 2 has not been completed and approved by the Town. Consequently, the board, utilizing its judgment and experience (see RSA 541-A:33, VI), has adjusted the site values for the improved units (Units 1, 3 and 6) by 5% for the unfinished road and adjusted the undeveloped site values by 15% for the unfinished road and the additional development costs or modifications due to being in the floodplain. These calculations are summarized in the following chart.

Condominium Unit #	“Site” Size	Price per Square Foot	“Water” Influence Factor	“View” Influence Factor	Floodplain/Road Influence Factor	Total of Influence Factors	“Site” Land Value	“Excess” Land Value	Building Value	Assessed Value
1	43,560	\$2.00	1.30	1.25	0.95	1.544	\$134,500	\$13,900	\$330,100	\$ 478,500
2	43,560	\$2.00	1.30	1.20	0.85	1.326	\$115,500	\$ 1,100	\$ 0	\$ 116,600
3	43,560	\$2.00	1.30	1.20	0.95	1.482	\$129,100	\$ 6,200	\$280,500	\$ 415,800
4	43,560	\$2.00	1.30	1.25	0.85	1.381	\$120,300	\$ 100	\$ 0	\$ 120,400
5	43,560	\$2.00	1.30	1.25	0.85	1.381	\$120,300	\$ 900	\$ 0	\$ 121,200
6	43,560	\$2.00	1.30	1.25	0.95	1.544	\$134,500	\$ 7,600	\$140,300	\$ 282,400
7	43,560	\$2.00	1.30	1.00	0.85	1.105	\$ 96,300	\$ 300	\$ 0	\$ 96,600
8	43,560	\$2.00	1.30	1.00	0.85	1.105	\$ 96,300	\$ 600	\$ 13,000	\$ 109,900
9	43,560	\$2.00	1.30	1.00	0.85	1.105	\$ 96,300	\$ 2,700	\$ 0	\$ 99,000
10	43,560	\$2.00	1.30	1.00	0.85	1.105	\$ 96,300	\$ 2,000	\$ 0	\$ 98,300
11	43,560	\$2.00	1.30	1.00	0.85	1.105	\$ 96,300	\$ 300	\$ 0	\$ 96,600
12	33,106*	\$2.41	1.30	1.00	0.85	1.105	\$ 88,200	\$ 0	\$ 0	\$ 88,200
									Total Assessed Value	\$2,123,500

*(Because Unit #12 is less than a full acre, the Patriot assessing system and assessment-record card, utilized by the Town, appear to contain a “land curve” factor to reflect the market phenomenon of smaller lots having a greater value on a per unit basis. While not enumerated on the assessment-record card for Unit 12, it can be calculated by dividing the total adjustment factor of 1.567 by the only other factor, the “water” factor of 1.30. This calculation indicates a land curve factor of 1.205 was applied to the 33,106 square feet of the site. To account for this, the board has multiplied the \$2.00 square foot price by 1.205 and inserted the adjusted square foot price of \$2.41 in the spreadsheet. Also the board removed the waterfront and view influence to the “excess” land on the assessment record card for Unit 3 as no evidence was submitted as to why the excess land would be similarly influenced as the primary building site.)

Further, while not the primary focus of the Taxpayers’ appeal, it was clear from the testimony of Charles D. Kalil that the dwelling on Unit 1 was significantly less complete as of April 1, 2007 than noted on the assessment-record card. Testimony and notations on the assessment-record card indicated the assessor had not gained entrance to the Property when visited in July, 2007. Charles D. Kalil testified that as of April 1, 2007 the dwelling was finished on the outside except for the siding and was

rough wired and plumbed and insulated on the inside but sheetrock had not been installed.

Consequently, the board has applied a 50% total depreciation to the Town's undepreciated replacement cost new of \$652,878 which results in an indicated assessed value of the dwelling of \$326,400 to which the \$3,700 gazebo is added for total improvements on Unit 1.

As discussed above, the board finds all the units have the ability of accessing the Saco River water frontage due to the undedicated nature of limited common area in 1A and the common area further to the south on the Saco River. Thus, the board finds the Taxpayers failed to prove the Town's 1.30 factor for water frontage is disproportionate. Testimony by the Town's representative indicated (and some of the sales entered into evidence) water frontage on and access to the Saco River is a desirable trait that needs to be considered in valuing property. Similarly, the board finds no evidence to modify the Town's 1.25 view factors applied to the site values of Units 1 - 6 as both the testimony and, in a limited fashion, the photographs submitted with the Taxpayers' appeal indicates those lots have mountainous views.

Thus, adjusting for the floodplain, unfinished road and incomplete stage of the dwelling on Unit 1, the board finds the total assessed value for the 12 units is \$2,123,500.

If the taxes have been paid, the amount paid on the value in excess of \$2,123,500 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Until the Town performs a good faith reappraisal or general reassessment, the Town shall apply these abated assessments in subsequent years with modification for any subsequent construction or completion of construction on the Properties. 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

Paul B. Franklin, Chairman

Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Charles W. Kalil, Brenda Kalil and Charles D. Kalil, PO Box 188, North Conway, NH 03860, Taxpayers; Chairman, Board of Selectmen, Town of Bartlett, RFD 1, Box 49, Intervale, NH 03845; and Ellis B. Withington, Patriot Properties, 330 Lynnway, Lynn, MA 01901, Contracted Assessing Firm.

Date: September 10, 2009

Anne M. Stelmach, Clerk

Charles W. Kalil, Brenda Kalil and Charles D. Kalil

v.

Town of Bartlett

Docket No.: 23482-07PT

ORDER

The board has reviewed the “Taxpayers” and the “Town’s” October 9, 2009 Motions for Rehearing in the above appeal (the “Motions”). In accordance with RSA 541:5 and Tax 201.37(d), the board issues this suspension Order until it rules on the Motions.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Douglas S. Ricard, Member

Certification

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Date: October 22, 2009

Anne M. Stelmach, Clerk

Charles W. Kalil, Brenda Kalil and Charles D. Kalil

v.

Town of Bartlett

Docket No.: 23482-07PT

ORDER

This Order addresses the “Taxpayers’” October 9, 2009 Motion for Rehearing (“Taxpayers’ Motion”) and the “Town’s October 9, 2009 Request for Rehearing (“Town’s Request”). Consequently, the board’s October 22, 2009 suspension order is dissolved. For the following reasons, the board denies both parties’ rehearing requests.

The bases for granting a rehearing is contained in Tax 201.37(e).

“Rehearing motions shall only be granted for ‘good reason,’ pursuant to RSA 541:3, and a showing shall be required that the board overlooked or misapprehended the facts or the law and such error affected the board’s decision. Rehearing motions shall not be granted for harmless error, meaning errors that, if corrected, would not challenge the board’s ultimate decision.”

The Taxpayers’ Motion is largely a restatement of the arguments presented at hearing. It also contains several misrepresentations as to what occurred at the hearing that are unnecessary to address as the board’s September 10, 2009 Decision contains sufficient and clear findings based on the evidence received. (See Appeal of City of Nashua, 138 N.H. 261, 263-64 (1994). The Taxpayers’ Motion also does not present any facts or law that the board overlooked or misapprehended in the Decision.

The Taxpayers' Motion's claims of "Regulatory Taking/Inverse Condemnation" and municipal official wrongdoing were neither raised during the hearing nor are they within the board's jurisdiction and therefore are not addressed in this Order. (See RSA 71-B:5 the board's authority and duties.)

Last, the Taxpayers' Motion also contained a request for attorney fees and costs. The Taxpayers' request is denied because the board finds the Town did not frivolously defend the appeal. See Tax 201.39.

The Town's Request focused on the board's increase in the unfinished factor to 50% for the new house on Lot #1 based on testimony of Charles D. Kalil as to its state of completion as of April 1, 2007. The Town submitted photographs dated March 29, 2007 with the Town's Request and asserted those photographs indicate the house was sided as of April 1, 2007 contrary to the testimony of Charles D. Kalil.

Tax 201.37(g) requires parties present all evidence at the hearing unless "the evidence was newly discovered and could not have been discovered with due diligence in time for the hearing...." While the board appreciates the Town's argument that it may not have been prepared to address the stage of completion because it was not specifically raised as a Taxpayers' argument on the appeal, the municipality should be prepared to defend the Taxpayers' entire estate on appeal. (Attending the hearing on behalf of the Town was Ellis Withington of Vision Appraisal and Lynn Jones the Administrative Assistant to the Selectmen. Thus, the photographs and any other evidence relative to the completion of the house on Lot #1 should have been available to either the Town's assessing contractor or its Administrative Assistant.)

Even if the board were to grant the Town's Request, we find the photographs submitted are so distant and blurred, they are inconclusive as to the stage of the siding as of March 29, 2007. Further, even assuming the siding was on, the board finds the 50% incomplete adjustment would have been the

same or only slightly different and, therefore, would have resulted in no or nominal change to the total assessed value. Consequently, the board finds the Town's Request does not warrant a rehearing.

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

Paul B. Franklin, Chairman

Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing Order has this date been mailed, postage prepaid, to: Charles W. Kalil, Brenda Kalil and Charles D. Kalil, PO Box 188, North Conway, NH 03860, Taxpayers; Chairman, Board of Selectmen, Town of Bartlett, RFD 1, Box 49, Intervale, NH 03845; and Ellis B. Withington, Patriot Properties, 330 Lynnway, Lynn, MA 01901, Contracted Assessing Firm.

Date: November 6, 2009

Anne M. Stelmach, Clerk