Port Wedeln Association, Inc.

v.

Town of Wolfeboro

Docket No.: 23531-07PT

DECISION

On June 22, 2009, the "Taxpayer" filed a Motion for Summary Judgment and Incorporated Memorandum of Law ("Motion"). Within the timeframe provided (Tax 201.18 (d)), no objection was filed by the "Town." The board grants the Motion based on the factual representations and legal arguments contained therein. The August 26, 2009 scheduled hearing has been removed from the board's docket and the appeal is granted.

Because the board finds no taxes should have been assessed against the Taxpayer, any taxes paid shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

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(a). 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(f). 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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Douglas S. Ricard, Member

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Albert F. Shamash, Esq., Member

CERTIFICATION

I hereby certify a copy of the foregoing Decision has been mailed this date, postage prepaid, to: Charles F. Cleary, Esq., Wadleigh, Starr & Peters, L.L.L.C., 95 Market Street, Manchester, NH 03101, counsel for the Taxpayer; Chairman, Board of Selectmen, Town of Wolfeboro, P.O. Box 629, Wolfeboro, NH 03894; and Cross Country Appraisal Group, LLC, 210 North State Street, Concord, NH 03301, Contracted Assessing Firm.

Dated: July 17, 2009

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Melanie J. Ekstrom, Deputy Clerk

Port Wedeln Association, Inc.

v.

Town of Wolfeboro

Docket No.: 23531-07PT

ORDER

This Order addresses the Town's July 22, 2009 Motion to Reconsider Decision ("Reconsideration Motion"). The board denies this motion based on the proceedings summarized below and for the following reasons.

On July 17, 2009, the board issued the Decision granting the "Taxpayer's" June 22, 2009 Motion for Summary Judgment and Incorporated Memorandum of Law (the "Summary Judgment Motion"). No objection was filed by the "Town" before the board decided the Summary Judgment Motion.

The Town later filed an "Objection" (on July 16, 2009), asking the board to "waive" its rules regarding the "10 day objection time limit." (See Tax 201.18(d).) Attached to the Objection is an "Affidavit" from the Town's contract assessor, David C. Wiley of Cross Country Appraisal Group (the "Wiley Affidavit"), containing the Town's substantive arguments for denial of the Summary Judgment Motion.

On July 22, 2009, the Taxpayer filed a "Response" to this Objection and the Town filed the Reconsideration Motion on the same date. In the latter pleading, Mr. Wiley stated the Town had discovered RSA 491:8-A allows a 30 day period for response to a summary judgment motion.

(See Tax 201.18(g).) Mr. Wiley did not make any material additions to the Town's arguments for denial of the Summary Judgment Motion.

Mr. Wiley is correct in his reading of the summary judgment statute, which allows a 30 day period to respond to a motion of this type. The board should therefore have waited 30 days for the Town's response before ruling on the Summary Judgment Motion.

The board finds, however, that this later discovered procedural fact does not warrant granting the Reconsideration Motion because of the largely undisputed facts and case law presented by the Taxpayer. These facts are contained in the Taxpayer's affidavit and attached exhibits. In comparison, the board finds there is an absence of any material facts in the Wiley Affidavit or any citation of law by the Town that would warrant an alternative conclusion. Consequently, the Taxpayer is entitled to summary judgment as a matter of law and no useful purpose would be served by granting the Reconsideration Motion and having a substantive hearing on the same central issue. In other words, a hearing is simply not necessary in circumstances where the Town has presented no disputed material facts or law that might persuade the board that summary judgment was wrongly granted to the Taxpayer in the Decision.

At issue is whether a dock and boat slips owned by the Taxpayer (a non-profit residential homeowners' association) available for rent by all members of the association (based on availability and a waiting list) are general amenities that benefit all of the homeowner properties subject to assessment by the Town and therefore whether this amenity value is reflected in the "bundle of rights" transferred with each homeowner property. This is the Taxpayer's basis for the Summary Judgment Motion. The Town, on the other hand, contends the dock and boat slips have a separable value that can and should be assessed separately to the association.

The board finds the Taxpayer's position is well supported by the Affidavit of Mark Hichar, a director of the association, and the attached exhibits. The Hichar Affidavit is probative

in establishing that the dock and boat slips are available for use by all homeowners (on a "wait list" basis) and indicating how a residential unit is marketed noting this generally available amenity which may augment value. (See Exhibit 2 to Hichar Affidavit, mentioning "mooring/dock wait list" as a marketing feature in a sample real estate listing.)

The By-Laws attached as Exhibit 1 to the Hichar Affidavit confirm the property at issue owned by the association and assessed separately by the Town (consisting of the dock and 19 boat slips) is held for the benefit of all members, with membership in the association expressly restricted only to "present and future lot owners." The By-Laws further state "[a]ll members shall have the same rights and privileges" with respect to property owned by the association. The dock and boat slips are rented on an annual basis, but only to members and based on a "seniority list." Further, each boat slip rented by a member cannot be assigned, either on a temporary or permanent basis. Rental fees for the slips are set by the association and collected by the "Dock Master" and are likely used to pay maintenance and other costs of the association.

On these undisputed facts, the board is unable to conclude the boat slips have an independent transmissible value to the Taxpayer subject to separate assessment. "'[T]ransmissible value' is material for assessment purposes." Cf. LSP Assoc. v. Town of Gilford, 142 N.H. 369, 379 (1997) (Horton, J., dissenting), citing Public Service Co. v. New Hampton, 101 N.H. 142, 147 (1957). There is no dispute between the parties that the dock and boat slips have amenity value, but this value is of benefit to all of the homeowners in the development. Therefore, in the absence of evidence to the contrary, the market should reflect the value in the selling prices of these homes. LSP, 142 N.H. at 379.

The Town has presented no cognizable facts, but only suppositions, to support a different conclusion (i.e., that the property rights reflected in the dock and moorings should be subject to separate valuation and assessment against the Taxpayer). The Wiley Affidavit indicates the wait

list for a boat slip can be as long as "8-15 plus years." Mr. Wiley goes on to state it would be "impossible for the town to recognize a market difference from the sales."

This is true, but only because the market is not differentiating value for this feature since the boat slips are not transferable from the seller to the purchaser of a home in this development. In other words, it appears the new owner must 'start over' on the waiting list for a rented boat slip, regardless of whether the seller of the home had rented a slip at the time of sale and the value of all units includes the amenity value of the boat slips recognized by the market. In brief and on balance, the board finds the Taxpayer has met its burden of proof on these questions and has met the standards for granting summary judgment set forth in RSA 491:8-a, III.

Further, the Town has cited no case law or other authority in support of its position and has not attempted to rebut or distinguish the case law cited by the Taxpayer in support of the Summary Judgment Motion. The board agrees that the facts and issues in this appeal are quite similar to the decisions in several consolidated 1992 cases cited by the Taxpayer: Laconia Investment Properties, Inc. v. City of Laconia, BTLA Docket Nos. 4782-88, 7391-89 and 9946-90; and South Down Recreation Assn. v. City of Laconia, BTLA Docket Nos. 4781-88, 7395-89 and 9940-90 (collectively "South Down"). As recognized in South Down, boat slips owned by an association and rented to members (even at "commercial rental rates" and when there is a scarcity of such spaces relative to the demand for them) are reflected in the "general enhancement value of all units and lots." Consequently, to assess the association for their value (as the Town here attempted to do with the Taxpayer) "would lead to double taxation as their value was already accounted for in the [individual] lot and condominium assessments." Id.

In light of South Down and the additional authorities cited by the Taxpayer, the board finds no "good reason" exists to grant the Reconsideration Motion and prolong this appeal. See RSA 541:3 and Tax 201.37. The Reconsideration Motion is therefore denied.

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

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Michele E. LeBrun, Member

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Albert F. Shamash, Esq., Member

CERTIFICATION

I hereby certify a copy of the foregoing Order has been mailed this date, postage prepaid, to: Charles F. Cleary, Esq., Wadleigh, Starr & Peters, P.L.L.C., 95 Market Street, Manchester, NH 03101, counsel for the Taxpayer; Chairman, Board of Selectmen, Town of Wolfeboro, PO Box 629, Wolfeboro, NH 03894; and Cross Country Appraisal Group, LLC, 210 North State Street, Concord, NH 03301, Contracted Assessing Firm.

Dated: August 13, 2009

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Melanie J. Ekstrom, Deputy Clerk