

Donald R. Croteau

v.

Town of Hillsborough

Docket Nos.: 23559-07PT/24492-08PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2007 and 2008 assessments of \$222,100 (land \$122,200; building \$99,900) on Map 16/Lot 94, a single family home on 0.32 acres at 12 Emerald Drive (hereinafter, the “Property” or “Lot 94”). For the reasons stated below, the appeals for abatement are granted.

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 Property’s assessments were higher than the general level of assessment in the municipality. Id. The Taxpayer carried this burden.

The Taxpayer argued the assessments were excessive because:

(1) he has owned the Property (Lot 94) for over 30 years and it has a water view but no actual water frontage because it is separated from the water by a small (0.04 acre) waterfront strip (Map

16, Lot 313 (“Lot 313”) which was purchased much later from the Town and is in separate ownership;

(2) Lot 313 came into existence only because the original developer of the lakefront properties did not perform the dredging work he had planned to do and went out of business, causing the Town to lien and acquire Lot 313 and then sell it at a tax sale (for \$25) to the Taxpayer and his wife;

(3) instead of assessing Lot 313 separately, as it had done in prior years, the Town, beginning in tax year 2007, imputed its value to the Property, even though Lot 313 does not have a common ownership;

(4) the assessment pertaining to the land component of the Property increased from \$74,600 in 2006 to \$122,200 at a time when land values were either stable or declining, but no dispute exists regarding the assessment of the building component;

(5) the assessments on the Property in each tax year should be abated to \$155,000, reflecting a land value of \$74,600, and Lot 313 should be separately assessed; and

(6) the Taxpayer should be awarded his costs and attorney’s fees in this appeal.

The Town argued the assessments were proper because:

(1) the Town did an update of values in tax year 2007;

(2) the Property is located in the Emerald Lake neighborhood and the Town’s assessor looked at waterfront, water view and non-water sales to develop new assessments for 2007;

(3) the Town did not “merge” the Property and the waterfront strip but they were assessed together based upon the concept of highest and best use; and

(4) the Taxpayer failed to meet its burden of proof.

The parties agreed the level of assessment was 98.9% in 2007 and 107% in 2008, the median ratios computed by the department of revenue administration. The board took a view of the Property and Lot 313 on April 23, 2010 (the “View”) to gain a better understanding of the location and use of the two lots.

Board’s Rulings

Based on the evidence presented, the board finds the proper assessments on the Property to be \$209,900, rounded (land \$110,000; building \$99,900) in each tax year (2007 and 2008).

The appeals are therefore granted for the reasons discussed below.

Some history is helpful regarding the creation and ownership of the lots in question to understand how they caused a somewhat unusual assessing problem to arise. It is undisputed the Taxpayer purchased the Property (Lot 94) over 30 years ago when he was a single man and before Lot 313 even came into existence. At that time, the Property was abutted by a waterfront strip of land owned by a developer, who intended to “dredge” it to create more waterfront. The developer did not follow through on this plan and, some years later, after the Town acquired Lot 313 (due to unpaid taxes), the Taxpayer and his wife purchased it at auction from the Town for \$25. Because the Property and Lot 313 are not in common ownership, they have never been legally “merged,” cf. RSA 75:9, but the Town nonetheless decided to treat them as one lot for assessment purposes in tax year 2007, assigning a “\$0” value to Lot 313 and increasing the assessment on the Property.¹ (Prior to tax year 2007, the Town had separately assessed Lot 313.)

Mr. and Mrs. Croteau filed appeals on Lot 313 for tax years 2007 and 2008 (see Docket Nos. 23560-07 and 24491-08), disputing the Town’s \$0 assessment and contending it should be

¹ The assessment-record card for Lot 313 states: “CAN ONLY BE SOLD TO M16 L94 [the Property]. VALUE OF THIS LOT IS INHERENT TO M/L # 16-94.” This statement may not be technically true, since no evidence was presented that Lot 313 could not be sold to anyone else, even if, for practical purposes, the Taxpayer is likely to be the only interested buyer if Lot 313 is offered for sale.

increased (at the same time the Property assessment is reduced), to reflect the standalone value of Lot 313. Prior to opening the consolidated hearing, the board discussed with the parties that its statutory authority in RSA 76:16-a tax abatement appeals is remedial in nature and therefore the board could not increase (rather than abate) the assessments on Lot 313, as they requested, as part of the corresponding argument for an abatement on the Property. See LSP Assoc. v. Town of Gilford, 142 N.H. 369, 373-74 (trial court lacked authority to increase an assessment in a tax abatement appeal because “[t]he New Hampshire tax abatement statutes are remedial in nature”; and, e.g., McCoy v. Town of Hillsborough, BTLA Docket No. 21609-05 (January 13, 2009). Consequently, the Croteaus, through their attorney, decided to withdraw the appeals on Lot 313 and proceed only with the appeals on the Property, which they believe was overassessed because the Town incorrectly applied at least some of the value of Lot 313 to it.

Assessments must be based on market value. See RSA 75:1. In making a decision on value, the board looks at the Property’s value as a whole (i.e., as land and buildings together) because this is how the market views value. Moreover, the supreme court has held the board must consider a taxpayer’s entire estate to determine if an abatement is warranted. See Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985). Even if a taxpayer wishes to challenge only one component of the assessment, such as the land value or the building value, he or she still has the burden of proving the aggregate value of the property as a whole is disproportional and the total assessment is excessive in order to obtain an abatement. Appeal of Walsh, 156 N.H. 347, 356 (2007).

Here, however, the Taxpayer’s entire estate for tax abatement purposes does not include Lot 313 because the two lots are not in common ownership. The Town’s position that the two lots should be considered as one for assessment purposes is somewhat understandable, from a

practical or common sense standpoint. See, e.g., Taxpayer Exhibit No. 2 (where the Town assessor gives a rationale for his assessment methodology). Lot 313, so long as it continues to be owned by closely related parties (the Taxpayer and his wife), does provide a benefit and value to the Property, even if what the Town did (placing a zero value on Lot 313 in the process of increasing the assessment of the Property) is not completely consistent with best assessment practices or the law summarized above.

Keeping these legal and practical considerations in mind, the board finds the Town should assess each lot (the Property and Lot 313) separately, rather than attributing the value of one to the other, because they are not in common ownership and do not comprise a single estate for purposes of property taxation. Lot 313 is too small to be a buildable lot, but is not without value: Lot 313's highest and best use is likely to be for sale to the abutter (the Taxpayer who owns the Property in his own name) and the Town should assess the value of Lot 313 on this basis. The Property, for its part, is benefited by its proximity to the waterfront. On the View, the board noted a clear and obvious unity of use shared by Lot 313 and the Property and finds it is very unlikely Lot 313 will be sold or developed for any use that would be inimical or adverse to the Property, at least while the Taxpayer continues to own and occupy it. See also Taxpayer Exhibit No. 2, where the Town's assessor asks one very relevant question² for arriving at proportional assessments.

The supreme court has noted "all relevant factors to property value should be considered when making an appraisal in order to arrive at a just result. (Citations omitted.)" Paras v. Town

² "I would ask the question 'Would you sell these lots together or separately?' The answer would most likely be together. . . . The small waterfront strip enhances the value of the house lot."

of Portsmouth, 115 N.H. at 67-68. Therefore, the location, ownership and use of Lot 313 by the Taxpayer and his wife are relevant factors for the Town to consider in assessing the Property.

Justice requires that an order of abatement not relieve the Taxpayer from bearing his or her share of the common burden of taxation, notwithstanding any errors of law or fact pertaining to how the assessment was made. Porter v. Town of Sanbornton, 150 N.H. 363, 368 (2003). For example, proving the municipality lacked a “sound methodology” when it made the assessment is not sufficient, unless there is proof of disproportionality. Porter v. Town of Sanbornton, 150 N.H. 363, 367-68 (2003).

Thus, while the Town’s approach can be questioned, the board finds the assessments can be adjusted by the 10% factor explained below to result in proportionality. The board calculated the specific abatements it is granting by adjusting the first land line amount shown on the assessment-record card downward by 10% ($\$65,000 \text{ base rate} \times 1.92 \times 85\% = \$106,080$). This 10% adjustment is based on the board’s judgment and experience³ and a finding some allowance should be made for the fact the Property, while close to the water, is not a waterfront lot. This is best accomplished by changing the “condition” factor on the assessment-record card (from 95% to 85%). When this adjusted amount is added to the (unchanged) second land line (\$3,600), the total assessment for the land component is lowered to \$110,000, rounded. (The board has left the building component unchanged because there was no dispute regarding it.)

³ Board members are “learned and experienced in questions of taxation or of real estate valuation and appraisal.” See RSA 71-B:1. To determine whether a tax abatement is warranted, the board considers and weighs all of the evidence presented, utilizing its “experience, technical competence and specialized knowledge.” See former RSA 541-A:18, V(b), now RSA 541-A:33, VI, quoted in Appeal of City of Nashua, 138 N.H. 261, 265 (1994) (the board must employ its statutorily countenanced ability to utilize its “experience, technical competence and specialized knowledge in evaluating the evidence before it”). Further, in deciding the proportionality of an assessment, “judgment is the touchstone.” See, e.g., Appeal of Public Serv. Co. of New Hampshire, 124 N.H. 479, 484 (1984), quoting from New England Power Co. v. Littleton, 114 N.H. 594, 599 (1974) and Paras v. City of Portsmouth, 115 N.H. 63, 68 (1975); see also Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 256 (1994).

Finally, the board has considered but must deny the Taxpayer's request for costs and attorney's fees. That request is governed by RSA 71-B:9 and Tax 201.39, which requires a finding that the assessments were "frivolously" defended by the Town. The board has reviewed the Town's rationale for reducing the assessment on Lot 313 to zero and increasing the assessment on the Property and finds the Town acted in good faith and did not raise a frivolous defense. Cf. Conklin v. Town of Waterville Valley, BTLA Docket No. 23624-07 (February 11, 2010) (denying taxpayer's request for costs against municipality even though taxpayer prevailed on appeal and an abatement was granted). In addition, the Taxpayer sought a larger abatement (reversion back to the 2006 assessment) than was warranted by the facts presented and the Town's revaluation in 2007. In the future, of course, the Town should modify its assessment practices to take into account that Lot 313 has value (and therefore should not be assessed at "\$0").

If the taxes have been paid, the amount paid on the value of the Property in excess of \$209,900 in tax years 2007 and 2008 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Until the Town undergoes a general reassessment or in good faith reappraises the property pursuant to RSA 75:8, the Town shall use the ordered assessments for the Property for subsequent years. RSA 76:17-c, I and II.

The board has responded to the Taxpayer's "Requests for Findings and Rulings" in Addendum 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. 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 with a copy provided to the board in accordance with Supreme Court Rule 10(7).

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Michele E. LeBrun, Member

Albert F. Shamash, Esq., Member

ADDENDUM A

The “Requests” received from the Taxpayer 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.

TAXPAYER’S REQUESTS FOR FINDINGS AND RULINGS

1. Appellant Donald Croteau is the owner of real estate in Hillsborough, N.H , parcel 016-094.
Granted.
2. That parcel has 0.32 acres of land.
Granted.
3. The land component of that lot was assessed at \$74,600 for 2007.
Denied. (The \$74,600 assessment was for tax year 2006.)
4. For 2008 and 2009, the land assessment was increased to \$122,200.
Denied. (The \$122,200 assessment was for tax years 2007 and 2008, the years under appeal.)
5. This was an increase of \$47,600 or about 64 % of the prior year’s assessment.
Granted.

6. The tax assessment on the building on parcel 016-094 remained substantially the same and is not challenged.

Granted.

7. The increase of the land assessment from 2007 to 2008 and 2009 is not justifiable, or in accord with law.

Neither granted nor denied.

8. The Appellant's parcel 016-094 is over assessed, and not in accord with N.H. laws.

Neither granted nor denied.

9. The value of the land component for 016-094 for 2008 and 2009 should be \$74,600, or \$155,000 for whole parcel.

Denied.

10. Parcel 016-094 is not waterfront property.

Neither granted nor denied.

11. The Town of Hillsborough illegally combined parcel 016-094 with parcel 016-313 for assessment purposes for 2008 and 2009.

Neither granted nor denied.

12. Neither Appellant nor owners of parcel 016-0313 consented to the merger of these two parcels by the Town of Hillsborough.

Granted.

13. Under N.H. law, all real estate shall be taxed. N.H. RSA 72:6.

Denied (because the statute states: "All real estate, whether improved or unimproved, shall be taxed except as otherwise provided.")

14. The Town of Hillsborough unreasonably merged two parcels, 016-094 and 016-0313 for assessment purpose contrary to N.H. laws.

Neither granted nor denied.

15. The Town of Hillsborough assessor's agent acknowledged that fact in his letter to Town.

Neither granted nor denied.

16. Town of Hillsborough based upon that letter knew the merger of two parcels with different ownership was illegal.

Neither granted nor denied.

17. Appellants are entitled to an award of their costs and attorneys fees because of Town of Hillsborough's actions in this case, under N.H. RSA 71-B:9.

Denied.

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Charles A. Russell, Esq., 5 South State Street - PO Box 2124, Concord, NH 03301, counsel for the Taxpayer; Chairman, Board of Selectmen, Town of Hillsborough, PO Box 7, Hillsborough, NH 03244; and Cross Country Appraisal Group, LLC, 210 North State Street, Concord, NH 03301, Contracted Assessing Firm.

Date: May 17, 2010

Anne M. Stelmach, Clerk