

**North Walpole Village Housing Associates LP**

**v.**

**Town of Walpole**

**Docket Nos.: 23590-07PT/24650-08PT**

**DECISION**

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2007 and 2008 assessments of: Map 28/Lot 011 - \$300,900 (land \$50,400; building \$250,500), a multi-family building on 0.510 acres (“26 Kiniry Street”); and Map 28/Lot 102 - \$433,700 (land \$32,300; building \$401,400), a multi-family building on 0.070 acres (“Vine/Merchant Street”) (collectively, the “Properties”). The Properties are 1900 – 1920 dwellings that were renovated in 1996 with funds from a \$320,000 Block Grant and \$600,000 from the sale of low income housing tax credits (“LIHTC”) and restricted for thirty (30) years by a Land Use Restriction Agreement (“LURA”) as to the maximum rents and the eligibility of tenants based on income. 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 Properties’ 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) the Properties do not generate any annual net income and, in fact, have needed an infusion of a total of \$75,000 of unrestricted funds since their renovation in 1996 to meet annual expenses;
- (2) the Properties have vacancy rates of 32% – 34%, higher than the average 10% market vacancy for North Walpole, due to the limiting of the tenant pool by the income eligibility requirements and because the managers of the Properties do not tolerate unacceptable tenant behavior;
- (3) the rental and tenant eligibility restrictions embodied in the LURA run another twenty (20) years and thus the only current market value is calculated by the reversionary value of the Properties' market value twenty (20) years out discounted back to 2007 and 2008;
- (4) the tax credits were utilized in the first ten (10) years and thus there is no remaining value of the tax credits to be valued;
- (5) appraisals performed by Susan E. Tierney (Taxpayer Exhibit Nos.: 1 - 4) ("Tierney Appraisals") estimate the 2007 and 2008 reversionary values to be \$42,569 and \$46,557 for 26 Kiniry Street and \$38,754 and \$42,443 for Vine/Merchant Street; and
- (6) the Properties have more negative factors, including being older, fully expended tax credits, negative cash flow and inferior market than the LIHTC units in Deerfield and thus the adjustment applied to the Deerfield units for the LURA restrictions in the board's January 19, 2010 decision in SNHS Deerfield Elderly Housing LP v. Town of Deerfield Docket No. 23597-07PT ("Deerfield Decision") is insufficient.

The Town argued the assessments were proper because:

- (1) the Taxpayer's reliance on the income approach does not reflect the initial motivation of investing in and renovating the Properties as the board found in the Deerfield Decision;

- (2) the LURA restrictions do affect the market value of the Properties but the Taxpayer's evidence does not address the positive benefits to the Properties of the tax credits; and
- (3) an analysis of two to three unit non-LIHTC multi-family sales in North Walpole indicate an average sale price of \$68,000 per unit; reducing the \$68,000 average sale price by 40% due to a loss in value from the LURA restrictions results in indicated values for the Properties that support the assessments.

### **Board's Rulings**

The board has written fairly extensively on the idiosyncrasies of valuing property subject to LIHTCs and the following cite (pgs. 5-6) from the Deerfield Decision reflects much of the board's earlier rulings.

The board recognizes that valuing property subject to LIHTC financing and restrictions is a complex issue and one for which there is no definitive roadmap to follow.<sup>1</sup> However, existing case law provides some guidance as to the factors that must be considered in arriving at a constitutionally proportional assessment.

[It is a] well established rule that 'all relevant factors to property value should be considered when making an appraisal in order to arrive at a just result.' Paras v. Portsmouth, 115 N.H. 63, 67-68, 335 A.2d 304, 308 (1975). To ignore the government regulations and federal subsidies in assessing value also is contrary to the rule that government regulations concerning subsidized financing are a relevant factor for the purpose of determining the market value of federally subsidized housing, see Royal Gardens Company v. City of Concord, 114 N.H. 668, 671-72, 328 A.2d 123, 124-25 (1974) and the rule that 'in estimating the value of property, ... state and federal control of income is taken into account.' Demoulas v. Town of Salem, 116 N.H. 775, 781, 367 A.2d 588, 593 (1976).

Steele v. Town of Allenstown, 124 N.H. 487, 492 (1984).

Consequently, we know one of the routes in the roadmap to arriving at a proportional assessment must be the consideration of the effect of governmental regulations. However, different from the older US Department of Housing and Urban Development subsidized housing programs, a property financed by the

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<sup>1</sup> The board is cognizant of the fact that effective July 1, 2008 the legislature enacted RSA 75:1-A which does provide a formulaic method for owners of such property to request municipalities to calculate the assessment. However, because its effective date is subsequent to the year under appeal, it is not applicable to this appeal.

LIHTC program has, in addition to the rental controls and other provisions of the LURA, the potential positive factor of the value of the tax credits which must also be considered in valuing the total bundle of rights of a LIHTC property. Because there is no precedential case law on the valuation of low income housing tax credits, the board in earlier decisions has looked to other jurisdictions and embodied our conclusions in earlier holdings of Epping Senior Housing Associates LP v. Town of Epping, BTLA Docket Nos.: 19135-01PT/19855-02PT/20263-03PT (March 18, 2005) (“Epping Order”). The board also looks to its decisions in earlier appeals in three prior years of the Property in BTLA Docket Nos.: 21178-04PT/21919-05PT/23057-06PT (June 25, 2008) [collectively, the “Prior Deerfield Appeals”<sup>2</sup>]. The board is mindful that neither the Epping Order nor the Prior Deerfield Appeals were appealed to the supreme court. Nonetheless, the board must look to prior case law, including its own rulings, even if the taxpayer did not appeal them and even if it still does not agree with them.

Without quoting extensively, but incorporating by reference, the board notes its Epping Order found LIHTC can and should be considered by the Town in making ad valorem assessments on the Property under New Hampshire law. Epping Order at p. 4. Consequently, for the Taxpayer to prevail it must provide evidence of market value in which it considers the positive and negative effects of the LIHTC and the LURA.

While there are three approaches to value (cost, sales and income), not all three approaches are of equal import in every situation. Appraisal Institute, The Appraisal of Real Estate, 50 (12<sup>th</sup> ed. 2001); International Association of Assessing Officers, Property Appraisal and Assessment Administration, Ch. 4, p. 108 (1990). In New Hampshire, the supreme court has recognized that no single method is controlling in all cases, Demoulas v. Town of Salem, 116 N.H. 775, 780 (1976), and the tribunal reviewing the valuation is authorized to select any one of the valuation approaches based on the evidence. Brickman v. City of Manchester, 119 N.H. 919, 920 (1979).

Similar to the board’s findings in the Prior Deerfield Appeals and the Deerfield Decision, the board finds the income approach, largely employed by the Taxpayer, does not reflect the market motivations to own properties such as those under appeal. Further, the sales utilized by the Taxpayer in the Tierney Appraisals and the Town in its submission are all of unrestricted

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<sup>2</sup> In the Prior Deerfield Appeals, the Taxpayer presented no appraisal of its own to meet its burden of proof and the board found the best evidence of the market values of the Property to be the estimates of value in the Town’s appraisal prepared by Mr. LeMay (\$1,750,000, \$1,780,000 and \$1,800,000 for tax years 2004, 2005 and 2006, respectively). At the hearing, one of the Town’s assessors (Loren Martin) testified the Town used his estimated market value as the basis for the assessment under appeal for tax year 2007.

properties and would require some adjustment to reflect the restricted bundle of rights that relate to the Properties. Consequently, as in the past, the board finds the cost approach with significant modifications for both physical condition and LHITC restrictions is the best approach to valuing such a limited market property in that it captures both the positive affects of the tax credits and the negative affects of the LURA restrictions. As the Town candidly observed, because these Properties are older and renovated, it is more difficult to value them by the cost approach than the recently constructed property in the Deerfield Decision. Nonetheless, the board still concludes that with the judicious depreciation, the cost approach captures both the positive and negative affects of LHITC Properties.

The board is unable to give any significant weight to the Taxpayer's reversionary value conclusions for the Properties that range in value from approximately \$38,000 to \$46,000 for a couple of reasons.

First, a discounted cash flow of twenty (20) years into the future is inherently difficult to utilize to produce a definitively reliable value. Both the estimated market value that is appreciated out twenty (20) years and the discount rate to revert the value to current reversionary values are always subject to speculation. It is often a question if the various assumptions that have to be made in any discounted cash flow analysis accurately reflect future market actions, especially when it is for a long term such as twenty (20) years as calculated in the Tierney Appraisals.

Second and more importantly, the board finds the Tierney Appraisal methodology results in such *de minimis* indications of value that they call into question whether this approach is a reasonable basis for producing proportional assessments. Ms. Tierney admitted that, while she assumed an annual zero net operating income ("NOI") in her analysis, if the actual negative NOI's were utilized, the indicated value would be less and possibly zero or negative. Such a

value conclusion for Properties that received \$920,000 of public funds for renovations in 1996 and are, as the parties described, in good condition during the years under appeal is not logical. Further, such a *de minimis* value conclusion (and in fact a potential zero value conclusion) raises a constitutional quandary whether such a small value estimate is tantamount to an exemption without legislative decree. (“The existence and extent of exemptions depends on legislative edict.” Christian Camps and Conferences v. Town of Alton, 118 N.H. 351, 353 (1978)). Part I, Article 12 of the New Hampshire Constitution requires that all members of society must contribute towards the protection government provides them for the use and enjoyment of their property. To have assessments approach zero for such substantial Properties, substantial from both an investment and utility perspective, raises the question whether such assessments comport with the New Hampshire constitutional requirement under pt. I, art. 12, without an overt exemption by the legislature. Indeed, as mentioned in footnote 1, the legislature did subsequently provide a specific basis for assessing LIHTC properties subject to long term LURA restrictions by enacting RSA 75:1-A.

Also, it is difficult to believe if the Properties were to be taken by eminent domain, the Taxpayer would accept compensation at such nominal amounts as the reversionary values of the Tierney Appraisals suggest. The supreme court has held the definition of market value is the same for both taxation and eminent domain purposes. Amoskeag-Lawrence Mills v. State, 101 N.H. 392, 399 (1958). The supreme court has also held that to determine the market value of a limited market property (such as electrical generating facilities), the cost of obtaining substitute property can be the basis for estimating its value. Public Service Co. of New Hampshire v. Seabrook, 126 N.H. 740, 743 (1985). Consequently, we find the Taxpayer’s reversionary values would not be reasonable compensation to make the Taxpayer whole in the event condemnation (eminent domain) requires substitute property to be identified as a basis for value estimation. By

extension and application of Amoskeag-Lawrence, therefore, if the reversionary values would not be adequate compensation if the Properties were condemned, they are not proportionate bases for taxation.

Third, the reversionary values do not reflect a reasonable value of the Properties because they focus solely on the negative restrictive affects of the LURA agreement and do not consider the positive effects of the LIHTCs. The Taxpayer argued because the tax credits have been expended in years 1-10, no benefits remain. We disagree. While the ability to value the benefits of the tax credits may be difficult, they nonetheless accrue intangible benefits and rights to the Properties that must be considered in arriving at proportional assessments. See Epping Order. One obvious benefit is that without such tax credits, the Properties would not have been renovated and been made available to provide affordable housing to the extent they are today.

For all these reasons, the board finds the Taxpayer's reversionary values are not reliable market value estimates for arriving at proportionate assessments.

However, a review of all the evidence, including the Town's presentation and analysis of two and three unit property sales in Municipal Exhibit A, indicates the Town's assessments do not adequately account for the negative effects of the LURA restrictions. While the Town did adjust those market sales by 40% to attempt to make them comparable to the LURA restricted Properties, the Town did not adjust the comparable sales' correlated average selling price per unit of \$68,000 for the difference in value (on a per unit basis) between two and three unit properties and larger properties of five to nine units more similar to the Properties under appeal. The sales contained in the Tierney Appraisals of 5 - 8 unit multi-family properties indicate a market value generally in the \$30,000 to \$50,000 per unit.<sup>3</sup> This approximately 25% to 50%

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<sup>3</sup> No adjustment for the Claremont and Keene location of the most applicable Tierney Appraisals comparables has been made because Ms. Tierney testified the locations were similar and no evidence to the contrary was submitted

difference of value on a per unit basis is consistent with the board's general knowledge and experience of the variation in value per unit between smaller frequently owner-occupied rental properties and multifamily properties with more units that are more commonly purchased for investment and cash flow purposes. Adjusting the Town's sales by even the lower end of the range (25%) indicates the Properties are overassessed.

This review and analysis of both parties' evidence again indicates the difficulty (and as was noted in the Deerfield Decision, perhaps the impossibility) of valuing such properties in a definitive market derived basis. However, the board must arrive at an assessment that is in keeping with the board's rulings in Epping Senior Housing Associates LP v. Town of Epping, BTLA Docket Nos.: 19135-01PT/19855-02PT/20263-03PT and the constitutional requirements that assessments be proportional and the pt. I, art. 12 requirement that taxpayers contribute for the support and benefit it receives from society.

Consequently, the board has reviewed the assessments and determines the Town's functional obsolescence needs to be increased from 10% to 20% to reflect the LURA restrictions and the higher vacancy. Because the Town's assessment model depreciation of the building's replacement cost is calculated in an additive manner, the increase in an absolute 10% results in a total adjustment for the LURA restrictions of 30% to 40%, similar to the adjustments in the Deerfield Decision. As the Town noted, the taxpayer's appraiser in the 2007 Deerfield appeals had utilized a 40% adjustment to account for the LURA restrictions. Also, the board in the Deerfield Decision estimated the "functional obsolescence" of the LURA restrictions to be approximately 30% utilizing the methodology as suggested by the Town's witness, Mr. LeMay by estimating the additional expenses attributable to operating such properties subject to LURA restrictions.

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by the Town despite noting the locational differences. Based on the board's general knowledge of the North Walpole, Claremont and portions of Keene markets, the lack of a locational adjustment does not seem unreasonable.

Consequently, the board finds the assessments should be revised as follows to reflect the LURA restrictions of the Properties but also the on-going tax credit benefits that have been inured to the Properties.

**26 Kiniry Street**

Replacement Cost New		\$565,917
Physical Depreciation	26%	
North Walpole Economic Depreciation	20%	
LURA Restrictions and Vacancy	<u>20%</u>	
Total Depreciation	66%	= <u>    x .34</u>
Depreciated value of the multi-family dwelling		\$192,400
Shed		\$ 1,500
Land		\$ <u>50,400</u>
<b>Total 26 Kiniry Street Assessment</b>		<b>\$244,300</b>

**Vine/Merchant Street**

**17 Vine Street**

Replacement Cost New		\$458,514
Physical depreciation	19%	
North Walpole Economic Depreciation	20%	
LURA Restrictions and Vacancy	<u>20%</u>	
Total Depreciation	59%	= <u>    x .41</u>
Depreciated value of the multi-family dwelling		\$188,000
Shed		\$ <u>800</u>
<b>Total Assessment</b>		<b>\$188,800</b>

**10 Merchant Street**

Replacement Cost New		\$340,318
Physical depreciation	21%	
North Walpole Economic Depreciation	20%	
LURA Restrictions and Vacancy	<u>20%</u>	
Total Depreciation	61%	= <u>    x .39</u>
Depreciated value of the multi-family dwelling		\$132,700
Land		\$ <u>32,300</u>
<b>Total Assessment</b>		<b>\$165,000</b>

**Total Vine/Merchant Property Assessment: \$353,800**

If the taxes have been paid, the amount paid on the value in excess of \$244,300 and \$353,800 for 26 Kiniry Street and Vine/Merchant Street respectively 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 Properties pursuant to RSA 75:8, the Town shall use the ordered assessments for subsequent years. 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 with a copy provided to the board in accordance with Supreme Court Rule 10(7).

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Michele E. LeBrun, Member

**Certification**

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Mark Lutter, Northeast Property Tax Consultants, 14 Roy Drive, Hudson, NH 03051, representative for the Taxpayer; Chairman, Board of Selectmen, Town of Walpole,

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PO Box 729, Walpole, NH 03608; and Loren J. Martin, Avitar Associates of New England, Inc.,  
150 Suncook Valley Highway, Chichester, NH 03258, Contracted Assessing Firm.

Date: March 24, 2010

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Anne M. Stelmach, Clerk