

**SNHS Deerfield Elderly Housing LP**

**v.**

**Town of Deerfield**

**Docket No.: 23597-07PT**

**DECISION**

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2007 assessment of \$1,745,900 (land \$288,200; building \$1,457,700) on Map 210/Lot 9-2 at 1 Upham Drive (the “Property”). The Property, known as the “Sherburne Woods Apartments,” consists of 20 apartment units in five ‘four-plex’ apartment buildings and a small clubhouse on 14.65 acres of land. The Property was developed in 2003, financed by the sale of low income housing tax credits (“LIHTC”) to provide affordable elderly low income housing. For the reasons stated below, the appeal for abatement is granted.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the assessment was 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 assessment was higher than the general level of assessment in the municipality. Id. The Taxpayer carried this burden.

The Taxpayer argued the assessment was excessive because:

(1) the Property is enrolled in the LIHTC program, a program enacted by Congress in 1986 which is a departure from prior housing subsidy programs in that it provides a reduction of federal income tax liability for investors in such housing, rather than capital or operating subsidies;

(2) the tax credits were sold to investors in 2003, but are subject to recapture for 15 years, and investors receive the tax credits, depreciation and “paper losses,” but only “minimal cash flow” from their investment in an LIHTC property;

(3) the LIHTC program burdens the housing with other obligations, including restricted rents and a narrowed tenant pool (subject to age and income qualifications), more intensive documentation and processing and higher rehab/renovation standards for the housing units because they must be “durable” for 30 years; these obligations are embodied in a 30 year Land Use Restriction Agreement (“LURA”) (at pages A-17 – A-36 of Taxpayer Exhibit No. 1);

(4) the Property is in a rural area, is the only apartment complex in the Town and has some functional obsolescence, including the lack of dishwashers and heating equipment that is shared by two units;

(5) an appraisal prepared by Charles F. Schubert, Jr., Vice-President of Applied Economic Research dated August 10, 2009 (the “Schubert Appraisal,” Taxpayer Exhibit No. 1) estimated the market value of the Property, as of the assessment date of April 1, 2007, using three “scenarios”: for scenario 1 - \$980,000; for scenario 2 - \$1,300,000; and for scenario 3 - \$770,000;

(6) on page 30 of the Town's appraisal (Municipality Exhibit A), its appraiser used a much higher capitalization rate (10.5%) than the lower capitalization rates used by Mr. Schubert which, all other things being equal, should lead to a lower market value when the income approach is used; and

(7) a substantial abatement should be granted based upon these estimates, such as Mr. Schubert's "best number" of \$980,000 and, in a free market, without restrictions, the market value would not exceed \$1,300,000.

The Town argued the assessment was proper because:

(1) the Town used the market value ordered by the board in the prior appeals for the assessed value in tax year 2007;

(2) the land was purchased by the Taxpayer in 2002 for \$190,000 (Taxpayer Exhibit No. 1);

(3) Mr. Schubert's sales' survey does not include apartment complexes similar to the Property and his approach for estimating market value is inconsistent and not reliable;

(4) the Property is fully occupied because the demand for such housing exceeds the available supply, especially in rural areas like the Town;

(5) an appraisal prepared by Andrew G. LeMay of Real Estate Consultants of New England, Inc. dated July 6, 2009 (the "LeMay Appraisal," Municipality Exhibit A) estimated the Property's market value to be \$1,750,000 as of April 1, 2007;

(6) Mr. LeMay considered the income approach and the sales approach, but used the cost approach to estimate value because of the age of the Property and the lack of sales of any comparable ("similarly restricted") properties;

(7) Mr. LeMay applied some functional obsolescence because of the shared heating units issue noted by the Taxpayer's appraiser, the clubhouse, which is not a typical amenity for this type of

property, and higher expenses because of program restrictions, and also applied physical depreciation (2% per year to the building costs and 1% per year to the site improvement costs) to estimate the Property's market value; and

(8) the Taxpayer did not meet its burden of proving disproportionality.

The parties stipulated the level of assessment in the Town was 104.8% for tax year 2007, the median ratio computed by the department of revenue administration.

Following the August 25, 2009 hearing, the parties were given an additional period of time (until September 18, 2009) to explore the possibility of settlement further and report back to the board. On or about that date, the parties notified the board they were unable to settle their differences and have requested the board to issue its decision in this appeal.

### **Board's Rulings**

Based on the evidence, the board finds the proper assessment to be \$1,477,700 based on a market value estimate of \$1,410,000 (rounded) and the stipulated median ratio for 2007 of 104.8%.

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

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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.

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 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.

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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.

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).

In this case, the board finds the cost approach should be given the most weight as also found in the Prior Deerfield Appeals. The Town used the cost approach to develop its estimate of value for tax year 2007. Mr. Schubert did not as he believed “this approach is not representative of thinking by market participants,” but provided no supportable basis for this belief.

The board gives little weight to the value conclusions of the three scenarios presented by Mr. Schubert which relied largely on the income approach. The income approach is reflective of market value when the property being analyzed is bought by investors for its income stream and return on investment. Here, the restrictions of the LURA and the primary motivation to build the Property to provide low income housing (where it was not financially feasible for the general market to provide such housing) undercut the validity of the income approach in valuing the

Property. The testimony was clear that the Property would not be constructed but for the existence of the LIHTC program. The parties testified there was no rental housing in Deerfield and that market rents were inadequate to encourage the free market players to construct such housing. While the income approach may capture the negative restrictions of the LURA through the reduced rent and increased administrative accounting costs, it does not inherently reflect the motivations of the parties involved and it does not capture any potential positive effect of the tax credits that the Epping Order requires be considered.

Because a LIHTC property is not developed to attain a return on investment and because they do not frequently sell, such a property can be considered a “limited market property.” “A limited market property is a property that has relatively few potential buyers at a particular time.” Appraisal Institute, The Appraisal of Real Estate, 25 (12<sup>th</sup> ed. 2001). Of the three approaches to value, the cost approach is therefore the best suited for estimating the market value of a limited market property. See, generally, id. at 353-354. Further, the cost approach has good applicability when the property is new or relatively new and where an estimate of land value is readily discernable from the market. Id. at 354. In this case, the Property can be considered a limited market property due to the lack of sales of any truly comparable rental properties both encumbered by the LURA and benefited by the LIHTC. The Property is also relatively new as it was constructed in 2003 and its site value can be readily estimated from its 2002 purchase price of \$190,000.

Therefore, on balance, the board finds a cost approach can be employed to develop a reasonable estimate of market value for assessment purposes while recognizing, as it did in the Prior Deerfield Appeals, that “cost, of course, does not always equal value.” The board examined Mr. LeMay’s use of the cost approach and finds, based on cross-examination and other

evidence submitted by the Taxpayer (see, e.g., Taxpayer Exhibit No. 3), that a reasonable estimate of market value using the cost approach is \$1,410,000. The board’s calculations are summarized in the chart below.

	2007	Notes
Replacement cost new	\$1,437,048	From LeMay Appraisal, p.30.
Site improvements	\$550,000	From LeMay Appraisal, p.30.
Subtotal	\$1,987,048	
Developer's Profit	\$0	None warranted.
Sum of Costs	\$1,987,048	
Less:		
Physical Depreciation	\$158,964	2% per year for 4 years
Functional Depreciation	\$619,124	Schubert 8.9% cap rate applied to net operating income differential (\$55,102) resulting from considering 40% and 70% expense ratios applied to 2006 estimated effective gross income (\$183,673)
Depreciated cost of improvements	\$1,208,961	
Land value	\$200,000	
Market value estimate	\$1,408,961	
-- Rounded	\$1,410,000	

The board has relied upon the trended replacement costs for the building and site improvements as contained in the LeMay Appraisal. However, the board applied 2% per year physical depreciation to both the site improvements and the building improvements as some of the site improvements, particularly the septic system, would likely depreciate similar to buildings.

The board has not added the 2% developer’s or entrepreneurial profit<sup>3</sup> contained in the LeMay Appraisal as it is not appropriate for this type of property. The developer, the general

<sup>3</sup> Entrepreneurial profit is defined as: “A market-derived figure that represents the amount an entrepreneur receives for his or her contribution to a project and risk; the difference between the total cost of a property (cost of development) and its market value (property value after completion), which represents the entrepreneur’s

partner and the limited partnership, did not have “profit motive” as a purpose for developing this project. Rather, the motivation was to provide low income housing for the 30 year term of the LURA financed through the sale of tax credits.

The board’s functional depreciation is calculated in the same manner as in the LeMay Appraisal by comparing the differential between the increased expense ratios for the higher management and reporting requirements and the specialized design items such as the common clubhouse that would not occur in market based properties. The board considered the capitalization rates employed by the two appraisers and finds the 8.9% capitalization rate employed in the Schubert Appraisal (p. 73) to be better supported than the 10.5% rate used by Mr. LeMay in his analysis of functional depreciation (LeMay Appraisal, p. 30).

The board also concurs with the LeMay Appraisal land value estimate of \$200,000 based on the purchase of the Property in 2002 for \$190,000.

In conclusion, the board recognizes the inherent difficulty (some might say, the impossibility) of reliably valuing LIHTC properties by any of the three accepted approaches that are all based on market data that does not encompass the restrictions of the LURA and the financing benefits of the LIHTC. However, given the evidence submitted, the young age of the Property and the fact that it is a limited market property, the board concludes a cost approach calculation provides the best estimate of determining the proportionate assessment. The board’s calculation, while starting with market data (improvement replacement and land acquisition costs) attempts to recognize the limitation of the LURA agreement through the calculation of functional obsolescence as suggested in the LeMay Appraisal. We conclude this is the best

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compensation for the risk and expertise associated with development.” Appraisal Institute, The Appraisal of Real Estate, 360 (12<sup>th</sup> ed. 2001).

estimate of a proportional assessment. It balances both the restrictions of the LURA and the potential benefits of the tax credits as the board held in the Epping Order.

If the taxes have been paid, the amount paid on the value in excess of \$1,477,700 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 assessment 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.

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 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 Deerfield, PO Box 159, Deerfield, NH 03037; and Loren J. Martin, Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258, Contracted Assessing Firm.

Date: January 19, 2010

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Anne M. Stelmach, Clerk