

Corbett Realty/Prolyn Corp./Pelham Plaza

v.

Town of Windham

Docket Nos.: 23902-07PT/24299-08PT

DECISION

The “Taxpayers” appeal, pursuant to RSA 76:16-a, the “Town’s” 2007 and 2008 assessments of: Map 11C/Lot 700 - \$1,838,000 (land only – 88.61 acres) (“Lot 700”)and Map 11C/Lot 800 - \$888,000 (land only – 29.00 acres) (“Lot 800”) (collectively, the “Property”). For the reasons stated below, the appeals for abatement are denied.

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. We find the Taxpayers failed to prove disproportionality.

The Taxpayers argued the assessments were excessive because:

- (1) the Town's zoning change in 2000 of the Property to the "Professional, Business & Technology District" ("PBT District") results in the Property being in the most restrictive commercial zone in Town and specifically precludes any development by "big box" stores;
- (2) attempts to change the zoning to a more permissive commercial zone has been voted down by the Town and opposed by the Cobbetts Pond Association out of concern of potential detrimental effects such development could have on the water quality of Cobbetts Pond;
- (3) the estimate of \$25,000 per acre is reasonable if applied to the usable acres of the Property;
- (4) Lot 700 is comprised of approximately 38% wetlands or "Wetland & Watershed Protection District" ("WWPD") setbacks and Lot 800 is approximately 67% wetlands and WWPD setback areas; the size and configuration of these wetlands and wetland buffers significantly affect the development potential of the Property;
- (5) the Town's land assessments models do not adequately reflect the undeveloped nature of the Property and the uncertainty in developing the Property; and
- (6) the land assessment calculations should receive a 50% "condition factor" similar to the "Alonzo Farms" property (Map 11-A-350) for the presence of wetlands.

The Town argued the assessments were proper because:

- (1) the Taxpayers' appeals were filed by Commercial Property Tax Management, LLC ("CPTM") attaching a copy of the 2004 "Charbonneau Appraisal" and 2008 update letter; CPTM did not note, as a basis for appeal, the acreage discrepancies between the assessment-record cards and the Charbonneau Appraisal;

(2) the Town was subsequently provided a recent survey plan (Taxpayer Exhibit No. 7) that indicated the acreages for Lot 700 and Lot 800 were 78.4 acres and 28.229 acres respectively; however the plan has not been recorded;

(3) three opinions of value for the Property: the Charbonneau Appraisal and 2008 update letter, the January 8, 2008 appraisal by Barry Moore, MAI of the New Hampshire Department of Transportation (“DRA”) (relative to a taking of approximately 7.809 acres along Interstate 93 at the rear of Lot 700) (“Moore Appraisal”) and the July 3, 2008 letter from Robert Bramley, an MAI appraiser (“Bramley Letter”), all indicate market value being in the \$23,000 to \$25,000 per acre range for the Property; and

(4) the Taxpayers have failed to carry their burden in providing evidence of the market value of the Property that is in excess of the Town’s equalized assessed value.

The parties stipulated the 2007 level of assessment was 98.8% based on the 2007 median ratio of sales as determined by the department of revenue administration. For the purposes of the hearing and discussion, the Town’s assessor, Mr. Rex Norman, stipulated that the acreages of Lot 700 and Lot 800 were 78.4 acres and 28.229 acres as shown or calculated on a survey (Taxpayer Exhibit No. 7) dated the same day as the hearing, December 15, 2009.

Board’s Rulings

Based on the evidence, the board finds the Taxpayers failed to prove the assessed values for Lot 700 and Lot 800 were disproportionate.

“In an abatement case, the taxpayer has the burden of proving by a preponderance of the evidence that the Property at issue was assessed disproportionately to other property in the Town.” Appeal of Sokolow, 137 N.H. 642, 643 (1993). The Taxpayers did not present any credible evidence of the Property’s market value. To carry its burden, the Taxpayers should

have made a showing of the Property's market value. This value would then have been compared to the Property's assessment and the general level of assessment in the Town. See, e.g., Appeal of Net Realty Holding Trust, 128 N.H. 795, 803 (1986); Appeal of Great Lakes Container Corp., 126 N.H. 167, 169 (1985); Appeal of Town of Sunapee, 126 N.H. 214, 217-18 (1985).

The Taxpayers never presented any evidence of the Property's market value that was contrary to the Charbonneau Appraisal, the Moore Appraisal or the Bramley Letter. Rather, the Taxpayers argued the zoning and the wetlands restricted its use and the Town's assessment models were flawed. Neither, however, carry the Taxpayers burden of proof.

The board has reviewed the Town's zoning ordinance (Taxpayer Exhibit No. 3) and does not agree with the restrictive "picture" Mr. Zohdi was presenting as to the permitted uses of the PBT District. The PBT District includes most of the permitted uses allowed in the "Limited Industrial District" with a few exceptions such as gasoline service stations. It allows thirteen (13) separately enumerated uses (Section 614.2.1 – 614.2.13) including most notably, manufacturing, professional and business offices, medical and research laboratories, wholesale distribution centers and limited retail uses. In fact, three parcels have been subdivided off the Property and developed as a bank, a research and development building and a heavy equipment/construction business, all permitted uses in the PBT District. While the Taxpayers presented testimony as to how the 2000 zoning change precludes "big box" use, it did not show with market evidence how the remaining uses allowed by zoning caused the assessment to be disproportionate.

Wetlands and WWPD buffer areas on both Lot 700 and Lot 800 will have an impact on the extent of development ultimately permitted on the Property. However, again the Taxpayers

did not present any market value evidence, contrary to the appraisals noted above, that the wetlands issues result in market values less than the equalized assessed values. Lot 800 is most impacted by wetlands (according to Mr. Zohdi's estimates, approximately 67% of Lot 800 is either wetland or WWPD buffer) but there remains 9.32 acres of usable area outside the WWPD buffer that given Lot 800's close proximity to Route 111 and I-93 will likely be engineered to permit substantial development. While reaching the usable acres would require crossing some wetland and WWPD buffers, this is not insurmountable as shown by Mr. Zohdi's description of the development planned for the "Alonzo Farms" parcel despite the wetlands along the road frontage (see notes of "Alonzo Farms" assessment record card – "large pond at frontage"). Lot 700 has two large areas of usable land separated by the wetlands that can be developed by the extension of Wall Street and improvement of Pine Hill Road with the possibility, as the parties testified, of connecting the roads/streets to provide an alternative bypass to Route 111. Also, a portion of Lot 700 in the rear and to the east of the wetlands has down sloping exposure to I-93 offering potential visibility from the interstate for ultimate end users. Consequently, despite the presence of the wetlands and the WWPD buffers, the Property has development potential. The Property is of large acreage, well located and in limited supply. The parties noted during hearing it is one of the few large undeveloped parcels in the center of Town with close proximity to Route 111 and I-93. The wetlands and the WWPD buffer areas will direct where development occurs but it is not of nominal value as the Taxpayers argue by asserting the \$25,000 per acre value should be applied to only the usable acreage.

Moreover, all the value estimates and, indeed, the price paid to the Taxpayers for the 7.809 acres by the DOT (based on the Moore Appraisal) are premised upon gross acres, not just usable acres. For example, Mr. Zohdi estimated that approximately 50% of the land acquired by

the DOT involved wetlands or WWPD buffer areas and yet the price paid for this mix of usable and wetland related acres averaged \$25,000 per acre. Further, the board recognizes that the Charbonneau Appraisal provided three estimates of value (all utilizing a correlated value per usable acre of \$23,000) based on certain assumptions as to the number of “usable acres” in the Property. This value however was as of October 2004 and the Charbonneau June 2008 letter acknowledges “some appreciation” has occurred in the market since 2004 but no update in his appraisal was warranted in his opinion because the Moore Appraisal for the condemnation in 2008 had arrived at a \$25,000 per acre value. This conclusion is misplaced, however, because the DOT’s purchase price of \$25,000 per acre for the 7.809 acres (\$195,000 total) was not based on usable acres but based on gross acres including wetlands and WWPD buffers. Said another way, the undetermined appreciation that had occurred between 2004 and 2008 was apparently offset by the different units of comparison used in the Charbonneau Appraisal (usable acres) and the gross acre unit of comparison utilized by the State (Moore Appraisal) in acquiring the 7.809 acres.

Last, the Taxpayers attorney, John G. Cronin, argued the Town’s assessment models were flawed. However, the Taxpayers presented no evidence to support that assertion other than attempting to obtain certain reassessment information at hearing through cross examination of Mr. Norman. Consequently, the board cannot reach the conclusion that the assessment models are inherently flawed and not reflective of the undeveloped market value of the Property. This argument further fails because, even if the Taxpayers had presented evidence that the assessment models were flawed in their creation and application to the Property, such evidence alone does not carry a taxpayer’s burden of proving the assessment was disproportionate. See Porter v. Town of Sanbornton, 150 NH 363,368 (2003).

In brief, the Taxpayers submitted no market evidence or compelling evidence to show why the assessment was disproportionate. The Property contains significant positive attributes of location, size, usable acres, access and exposure to I-93 that supports the assessment notwithstanding the Property's wetlands and undeveloped state. Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1975) (To value property properly, all relevant factors must be considered)

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

Michele E. LeBrun, Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: John G. Cronin, Esq., Cronin & Bisson, P.C., 722 Chestnut Street, Manchester, NH 03104, counsel for the Taxpayer; and Chairman, Board of Selectmen, Town of Windham, PO Box 120, Windham, NH 03087.

Date: December 22, 2009

Anne M. Stelmach, Clerk

Corbett Realty/Prolyn Corp./Pelham Plaza

v.

Town of Windham

Docket Nos.: 23902-07PT/24299-08PT

ORDER

This “Order” responds to the “Taxpayers” January 19, 2010 Motion for Rehearing (the “Motion”) and the “Town’s” January 22, 2010 “Objection.” The board denies the Motion as it did not show how “the board overlooked or misapprehended the facts or the law and such error affected the board’s decision.” Tax 201.37(e).

First, the Motion asserts that the stipulated total acreage of Lot 700 and Lot 800 of 106.629 acres rather than the total acreage on the assessment-record cards of 117.61 acres should be the basis for recalculating the assessment on a \$25,000 per acre basis. Preliminarily, the board would note that while the Town stipulated to that acreage “[f]or the purposes of the hearing and discussion...” Decision at 3, the stipulated acreage was based on an unrecorded survey dated contemporaneously with the date of the hearing of December 16, 2009¹.

Regardless of whether on-site documentation (boundary monuments) had occurred, the surveyed acreage would not have been available to the owner or any prospective purchaser as of either

¹ The decision at page 3 inadvertently had the wrong hearing date of December 15, 2009 rather than December 16, 2009.

April 1, 2007 or 2008 as the survey had not been prepared at that time and parties would have relied on the best information of the total acreage similar to that reflected on the assessment-record cards. More importantly, the Decision noted at page 4 that “[t]he Taxpayers never presented any evidence of the Property’s market value that was contrary to the Charbonneau Appraisal, the Moore Appraisal or the Bramley Letter.” Those three estimates of value indicated a market value range on a per acre basis of \$23,000 to \$25,000. The total assessed values of Lot 700 and Lot 800 was \$2,726,000. That total assessed value divided by either the assessment-record card total acreage of 117.61 or the 106.629 acres provides an assessed value estimate very similar to the three opinions of value noted above. The Objection is correct in that the Decision did not make a definitive per acre value conclusion but rather found the Taxpayers failed to carry its burden of presenting market evidence contrary to the Charbonneau Appraisal, the Moore Appraisal or the Bramley Letter. Consequently, the Taxpayers did not show that these differences in acreage resulted in disproportionality. “Justice does not require the correction of errors of valuation whose joint effect is not injurious to the appellant.” Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985), quoting Amoskeag Mfg. Co. v. Manchester, 70 N.H. 200, 205 (1899).

Second, the Motion at paragraphs 14 and 15 infer the board relied upon “the submission of post hearing papers to arrive at its decision....” The record was not kept open for any documents. Tax 201.27(k). Prior to the submission of the Motion and the Objection, the board was copied by the Town with Attorney Cronin’s January 8, 2010 letter to Mr. Rex Norman (the last paragraph requesting “a copy of the script and other papers you submitted to the BTLA at the close of the hearing”) and Mr. Norman’s January 14, 2010 response with a copy of his “Opening Statement” attached. The board’s staff did not return this correspondence because the

Opening Statement was already part of the record presented at the December 16, 2009 hearing and marked as Municipality Exhibit D. Consequently, there were no documents presented to the board that were not part of the record. Cf. RSA 541-A:31, VI (items that are to be included in the record in a contested adjudicative proceeding).

Last, paragraph 16 of the Motion asserts the board “erred in several other respects.”

1) The board did not err in considering the Moore Appraisal for the State of New Hampshire’s (the “State”) acquisition of 7.809 acres as it indicated that the valuation was done on a gross acre basis (a mix of both usable and wetland related acres) and that the January 2008 acquisition of those acres by the State at \$25,000 per acre was supportive of the Town’s assessed values on a gross per acre basis.

2) The Decision did not find the Alonzo Farms’ property was “comparable to the subject” except for the limited comparison to show that obtaining permits to cross wetlands is not insurmountable. See Decision at p. 5.

3) The mention of the three parcels that had been subdivided from the Property (page 4 of the Decision), regardless of whether the permits were obtained under a prior zoning, was made to indicate such uses continue to be permitted uses in the BPT District, the zoning in place during 2007 and 2008. Generally, as parcels are subdivided and permitted, the value of such parcels increase as those intangible rights are obtained during the land use approval process. The board’s mention of these properties at page 4 of the Decision did in no way infer that the remaining land of Lot 700 and Lot 800 had a value as if fully permitted and developed.

For all these reasons, the board denies the Motion. Pursuant to RSA 541:6, any appeal to the supreme court must be within thirty (30) days of the clerk’s date of this Order, with a copy provided to the board in accordance with Supreme Court Rule 10(7).

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: John G. Cronin, Esq., Cronin & Bisson, P.C., 722 Chestnut Street, Manchester, NH 03104, counsel for the Taxpayers; and Chairman, Board of Selectmen, Town of Windham, PO Box 120, Windham, NH 03087.

Date: January 29, 2010

Anne M. Stelmach, Clerk