

**#23945-07PT, Michael H. Sterling and Paula A. Sonnino**  
**#23946-07PT, David S. Speltz 1994 Trust**  
**#23947-07PT, Matthew J. and Patricia M. Gormley**  
**#23948-07PT, Joseph J. Bean and Marsha J. Francis**  
**#23949-07PT, Antje M. Themlitz**  
**#23950-07PT, Myra & William Frain, Jr.**  
**#23951-07PT, Suzanne S. Hamblett Rev. Trust of 1997**  
**#23952-07PT, Constance V. Seery Rev. Trust**  
**#23953-07PT, Barbara W. and Scott P. Simundza Rev. Trust**  
**#23954-07PT, Barbara Ade**  
**#23955-07PT, Nike F. Speltz 1994 Trust**  
**#23956-07PT, Diane M. Durkin Rev. Trust**  
**#23957-07PT, John R. McNair**

v.

**City of Portsmouth**

**DECISION**

The “Taxpayers” appeal, pursuant to RSA 76:16-a, the “City’s” 2007 assessments of:

<b>Docket No.</b>	<b>Taxpayer</b>	<b>Map/Lot</b>	<b>Total Assessment</b>
23945-07PT	Sterling/Sonnino	223/30-77	\$467,600
23946-07PT	David S. Speltz 1994 Trust	223/30-81	\$416,900
23947-07PT	Gormley	223/30-83	\$544,000
23948-07PT	Bean/Francis	223/30-89	\$566,100
23949-07PT	Themlitz	223/30-93	\$206,000
23950-07PT	Frain, Jr.	223/30-98	\$661,800
23951-07PT	Suzanne S. Hamblett Rev. Trust of 1997	223/30-99	\$681,900
23952-07PT	Constance V. Seery Rev. Trust	223/30-100	\$654,100
23953-07PT	Barbara W. and Scott P. Simundza Rev. Trust	223/30-102	\$602,100
23954-07PT	Ade	223/30-103	\$545,100
23955-07PT	Nike F. Speltz 1994 Trust	223/30-108	\$647,500
23956-07PT	Diane M. Durkin Rev. Trust	223/30-109	\$662,900
23957-07PT	McNair	223/30-110	\$652,100

The above appealed “Properties” are all condominium units of “Phase III” of the “Tidewatch Condominium” development. For the reasons stated below, the appeals for abatement are dismissed.

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 City’s assessments were based on sales of the Phase III Tidewatch Development condominium units which included 7-1/2 to 10% developer’s fee to fulfill court ordered financial obligation between the homeowners’ association and the initial developer;
- (2) the “developer’s fee” (also described by the Taxpayers as an “accrued payment obligation” that was negotiated to the benefit of the homeowners’ association) was not disclosed to the purchaser’s of Phase III condominiums;
- (3) the developer’s fee should have been accounted as a separate “special assessment” to the homeowners’ association rather than “sewing it” into the purchase price;
- (4) the developer’s fee once paid over to the association was largely used to cure deferred maintenance on Phase I and Phase II units; and
- (5) consequently, the developer’s fee should not be a taxable property right and 7-1/2 to 10% for the developer’s fee should be deducted from the sale prices and the resulting assessments.

At the close of the Taxpayers' presentation, the City made a motion to dismiss the appeals based on the Taxpayers' failure to prove disproportionality. From the bench, the board granted the City's motion for the reasons that follow.

The parties stipulated to the median ratio of 90.4% as determined by the department of revenue administration as the 2007 level of assessment.

### **Board's Rulings**

As the City correctly noted in its Memorandum of Law filed at hearing:

New Hampshire tax abatement statutes provide the exclusive remedy to a taxpayer dissatisfied with an assessment. Porter v. Town of Sanbornton, 150 N.H. 363, 368 (2003) citing LSP Assoc. v. Town of Gilford, 142 N.H. 369, 374 (1997). In a tax abatement claim, the taxpayers have the burden of proving by a preponderance of the evidence that they are paying more than their proportional share of taxes. Porter citing Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253 (1994). To carry the burden of proving disproportionality, the taxpayer must establish that the taxpayer's property is assessed at a higher percentage of fair market value than the percentage at which property is generally assessed in the town. Porter citing Appeal of Town of Sunapee, 126 N.H. 214, 217, 489 A.2d 153 (1985). See Stevens v. City of Lebanon, 122 N.H. 29 (1982); See Milford Props., Inc. v. Town of Milford, 119 N.H. 165, 167 (1979) (It is well settled that the test in an abatement case is whether the taxpayer is paying more than his [or her] proportional share of taxes.)

The basis of proportional assessment is market value. RSA 75:1. Further, RSA 72:6 and RSA 21:21<sup>1</sup> require all real estate rights, tangible and intangible, be assessed a tax. Consequently, to arrive at proportional assessments, municipalities must consider sales and other market data to arrive at an estimate of market value which then is adjusted by the municipality's level of assessment. Appeal of Andrews, 136 N.H. 61, 63 (1992) (municipalities must utilize a single

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<sup>1</sup> RSA 72:6. Real Estate.

"All real estate, whether improved or unimproved, shall be taxed except as otherwise provided."

RSA 21:21. Land; Real Estate.

"I. The words 'land,' 'lands' or 'real estate' shall include lands, tenements, and hereditaments, and all rights thereto and interests therein.

II. Manufactured housing as defined by RSA 674:31 shall be included in the term 'real estate.'"

factor to adjust market value to arrive at proportional assessments reflective of same level of value).

Here, the City presented extensive evidence in its pre-hearing statement that the 2007 assessments of the appealed Properties were based upon their sales that occurred late 2004 through 2007. The Taxpayers argue that these sales are inflated by 7½ to 10% for the developer's fee and thus the assessments are similarly inflated and thus disproportionate. We disagree. Regardless of whether the Taxpayers were aware or not that a portion of the agreed upon sale prices was to fulfill a prior "accrued payment obligation," the Taxpayers agreed to pay the sale prices to acquire the tangible and intangible benefits (and liabilities) inherent in ownership of a Tidewatch condominium. The Taxpayers, as the City pointed out, were not coerced into paying the total consideration price, but rather were freely able to choose between the real estate rights of a Tidewatch condominium and any other similar or competing property. The fact that some of the proceeds received by the seller (a subsequent developer of the Tidewatch complex) were obligated to be paid over to the Tidewatch homeowners' association to fulfill financial obligation of the original developer does not result in a portion of the sale prices being exempt from taxation. All properties have associated beneficial rights of use, enjoyment, privacy, financial income, etc. which commonly have concomitant liabilities of maintenance, security, taxes, fees, etc. The Taxpayers, in purchasing their units at Tidewatch, were receiving substantial real estate tangible rights of situs, housing and maintenance benefits customary to residential condominium ownership while at the same time they were committing to certain liabilities of limited maintenance of their individual units, condominium association fees for maintenance of shared real estate rights and, as always, annual property taxes. All of these positive and negative tangible and intangible rights and liabilities are factors that influence both the buyer and seller in arriving at a negotiated selling price. Here, the developer (seller)

knew it had certain financial obligations commonly described as direct and indirect costs (See Appraisal Institute, *The Appraisal of Real Estate*, 358-360 (12<sup>th</sup> ed. 2001) to meet when arriving at an acceptable sale price just as the buyers had certain expectations of acquiring a residence in a desirable seacoast setting with the benefits of reduced direct maintenance that a condominium form of ownership provides. The developer's fee is one of many indirect costs that the developer needed to be mindful of when arriving at a selling price for the units. Regardless, however, the Taxpayers' purchase prices reflect the total market value for all the taxable real estate rights being acquired and are the proper basis for the City to base its assessments. This is further supported by the RSA 78-B transfer tax being paid on the full consideration price, the inventory of property transfer form filed with the department of revenue administration (PA-34 form) and the Taxpayers' appraisals for financing all indicating the sale prices were inclusive of only real estate rights.

In conclusion, the board finds the Taxpayers' argument is not supported by any market evidence to warrant an abatement; in fact, all the market evidence submitted supports the conclusion that the City's assessments are generally proportional to market value.

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: Richard N. Seery, 579 Sagamore Avenue - #100, Portsmouth, NH 03801, representative for the Taxpayers; and Robert P. Sullivan, Esq., City Attorney, 1 Junkins Avenue, Portsmouth, NH 03801.

Date: May 27, 2010

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Anne M. Stelmach, Clerk