

DDM Living Trust

v.

Town of Loudon

Docket Nos.: 24011-08PT/24765-09PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2008 and 2009 assessments on the following two lots with frontage on Clough Pond (collectively, the “Properties”):

Map 58/Lot 17, 20 Berry Road (“Lot 17”) - \$161,300 (land \$135,500; building \$25,800) in 2008; and \$156,000 (land \$130,200; building \$25,800) in 2009; and

Map 58/Lot 20, 24 Berry Road (“Lot 20”) - \$100,400 (land \$98,900; building \$1,500) in 2008; and \$99,900 (land \$98,400; building \$1,500) in 2009.

(The Taxpayer also owns, but did not appeal, a single family home on a one acre lot, Map 58/ Lot 21, 31 Berry Road, assessed at \$270,800 for each year, but the parties stipulated that property was proportionally assessed.). For the reasons stated below, the appeals for abatement on the Properties 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 consist of two adjacent, contiguous waterfront lots on Clough Pond that are narrow and quite steep from the road to the water;
- (2) the steep topography on these lots is worse than on other lots that received a topography adjustment of 10% as shown in Taxpayer Exhibit No. 5;
- (3) the Taxpayer tried to develop Lot 20 but the lot has been damaged, due to "bad" contractor's work on a retaining wall and a "site accident" (involving concrete blocks for a retaining wall that collapsed and damaged the foundation of a house the Taxpayers were constructing) that occurred in September, 2007, decreasing the market value of the Property;
- (4) on Lot 17, the photographs in Taxpayer Exhibit No. 3 show the "camp" structure is below the road grade and slopes down sharply to the water;
- (5) Lot 17 only had a market value of \$40,000 to \$45,000 and Lot 20 only had a market value of \$25,000 based upon "broker professional opinions" or "BPO's" (see Taxpayer's Exhibits Nos. 4 and 5) and the Taxpayer's own analysis;
- (6) Lot 17 was sold to an investor in October, 2009 for \$45,125 after being marketed by Coldwell Banker for four months;
- (7) the Town's broker estimate of the value of Lot 17 (\$135,000) contains errors and is not credible and this broker (Steve Jackson) never inspected the building since it was boarded up and locked; and

(8) the assessments on each lot should be substantially abated.

The Town argued the assessments, with the adjustments explained below, are sufficient because:

(1) the Town reduced the original assessment on Lot 20 from \$130,400 to \$100,400 (to correct for an expired building permit assessed at \$30,000);

(2) the Taxpayer's own photographs show Lot 20 has a level area down by the water, mitigating the Taxpayer's claim of excessively steep topography, but the Town agrees the Taxpayer's two lots are the steepest on Clough Pond and some adjustment for this factor may be appropriate;

(3) regarding the Taxpayer's BPO's, they are inconclusive and deserve no weight because the first broker (Andrey S. Majkut, Century 21 Highview Realty) provided no comparables and the second broker (Jen Whalley of Coldwell Banker) used comparables that are not reliable because two were foreclosures on properties with water access (beach rights), not waterfront (65 Scott Drive, Alton and 51 Meredith Drive, Barnstead), and the third was an estate sale with much needed work, also with water access only, not waterfront (4 Dunbarton Drive, Barnstead);

(4) the Taxpayer's estimates for repair costs are not supported with adequate documentation and the Town never assessed the Property for the retaining wall and foundation on Lot 20 which need repair because of the site accident;

(5) during the Town's 2006 revaluation, the sales reflected properties in the Town with building permits were selling for \$30,000 to \$50,000 more than properties without permits;

(6) in contrast to the Taxpayer's broker, the Town's broker (Mr. Jackson) relied on three waterfront properties (124 Atha's Way, Henniker, 75 Heath Drive, Gilmanton and 75 First Road, Salisbury) to arrive at his \$135,000 estimate of value, which is more reliable than the Taxpayer's lower estimate (see Municipality Exhibit B);

(7) the Town's comparable sales (also in Municipality Exhibit B) show four sales of waterfront property on Clough Pond (with three on Berry Road) of similar acreages selling in the range from \$199,000 to \$329,000 and two current listings for properties on Berry Road (both for \$289,900) which indicate the general level of value on Clough Pond has not fallen;

(8) the Town treated the sale of Lot 17 as an "unqualified" sale because the PA-34 (in Municipality Exhibit B) indicates there were special circumstances involved in the sale and the buyer (Mr. White) told the Town's assessor he made a 'good deal' with the bank in lieu of foreclosure;

(9) the most realistic estimate for cleanup costs as it affects the assessments on Lot 20 is \$8,000 (provided to the Taxpayer from Sam Mahoney Construction, as shown in Municipality Exhibit B), not the higher \$63,100 claimed for reconstruction of the retaining wall and other items the Town did not assess; and

(10) no higher abatements are warranted.

The parties stipulated the levels of assessment were 101.8% in tax year 2008 and 99.2% in tax year 2009, the median ratios computed by the department of revenue administration. At the hearing, the board informed the parties that one of its review appraisers (Theresa M. Walker) would perform an independent investigation and analysis and submit a report and each party would be given a copy of the report and an opportunity to file comments regarding it (within 20 days). The Taxpayer filed written comments on September 14, 2010 to Ms. Walker's August 27, 2010 report (the "Report").

Board's Rulings

Based on the evidence, the board finds the proper assessments (rounded) in tax years 2008 and 2009 to be:

Lot 17 - \$137,400 and \$133,900 respectively; and

Lot 20 - \$86,500 and \$84,300 respectively.

These assessments are based upon market value estimates of \$135,000 for Lot 17 and \$85,000 for Lot 20, adjusted by the agreed level of assessment in each year.

The central question in dispute is, of course, the market value of each lot in tax years 2008 and 2009, because assessments must be based on market values adjusted by the level of assessment in the Town. See RSA 75:1. The Taxpayer has the burden of proof on this issue. Her representative, Dianne Maratea (who later revealed during her rebuttal testimony that she has a real estate broker's license), chose not to submit an appraisal but to rely instead on estimates in what she called BPO's. The board cannot place weight on these estimates because they are not appraisals and none of the individuals who prepared them came to the hearing to testify to answer questions regarding their opinions. Further, the BPO's either did not mention any comparable sales or used comparables that were non-waterfront, including some that were water access only.

The board finds waterfront properties command higher values than water access properties. Ms. Maratea noted there was a lack of waterfront sales. "It should be noted that the lack of available waterfront sales does not indicate a lack of demand for this property type; in fact, it indicates a scarcity of available lots." (See Report at p. 14).

The board finds the Taxpayer's own estimates of value of each lot to be too low. In brief, the Taxpayer, in responding to the Report, contended Lot 17 had a value range of only \$40,000

to \$55,000 and Lot 20 had a value range of \$25,000 to \$30,000. The board disagrees the values are this low for many of the reasons stated in the Report, which was prepared by an independent and highly competent appraiser. As noted above, the Properties are waterfront lots, not water access. The fact that many of the properties on Berry Road have been renovated and expanded or razed and redeveloped further corroborates the value of waterfront property to potential buyers, see Report at p. 5, notwithstanding the condition of the existing improvements on the two lots.

The Town analyzed each property referred to in the BPO's and discredited them because these properties were not waterfront properties but had water access and the sales were foreclosure or estate sales. The board shares the Town's reservations regarding the comparability of such properties for the purpose of estimating the market value of Lot 17 and Lot 20. See also Report at p. 16, where Ms. Walker describes these properties and the BPO's.

The board considered the sale of Lot 17 in October, 2009 to Mr. White but was not persuaded it was an arm's-length, market transaction providing a reliable indication of market value. While the Taxpayer's representative indicated she tried to sell the Properties for four months with a "broker," she acknowledged the lots were not on the "MLS" (multiple-listing service) system and Mr. White purchased Lot 17 as an "investment," allowing the Taxpayers to continue to store their possessions from the time of sale to the present. The Town's assessor testified he spoke with Mr. White about the sale and was told by him he got a 'good deal' from the bank in lieu of foreclosure. The Town pointed to the PA-34 which indicates there were "special circumstances" pertaining to this sale. The Report (p. 15) also describes this sale and concludes "the lack of market exposure contributed to the low sales price." For all of these reasons, the board cannot place evidentiary weight on this sale.

The board has considered all of the evidence presented, including the Report and the Taxpayer's comments in response to it. 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, "judgment is the touchstone" for deciding a tax appeal. 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). The board finds the Report is generally the best evidence of the market value of the two lots, except for the following additional adjustments.

On Lot 17, the board has adjusted the \$150,000 market value estimate in the Report by an additional 10% to reflect the undisputed steepness issue, resulting in a \$135,000 market value finding for each year. The board notes this estimate is also supported by the \$135,000 value conclusion of the real estate broker (Steve Jackson) contacted by the Town.

On Lot 20, the board included an additional 5% adjustment for the problems associated with the clean-up of the retaining wall debris and questions regarding whether the wall's collapse has compromised the integrity of Berry Road because the market is likely to recognize these factors. Applying a total 15% adjustment to the market value estimate of \$100,000 in the Report results in a market value finding of \$85,000 for each tax year.

There was no credible evidence that the market value of these waterfront lots changed between tax year 2008 and tax year 2009. Thus, the board has adjusted these two market value findings (\$135,000 and \$85,000) by the agreed level of assessment for each tax year.

If the taxes have been paid, the amount paid on the value in excess of \$137,400 for tax year 2008 and \$133,900 for tax year 2009 for Lot 17 and \$86,500 for tax year 2008 and \$84,300 for tax year 2009 for Lot 20 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 tax year 2009 for subsequent years. RSA 76:17-c, I and II.

Any party seeking a rehearing, reconsideration or clarification of this Decision must file a motion (collectively "rehearing motion") 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

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Dianne D. Maratea, DDM Living Trust, 8816 Balfour Road, Tampa, FL 33635, Taxpayer; Chairman, Board of Selectmen, Town of Loudon, PO Box 7837, Loudon, NH 03307; and David C. Wiley, Cross Country Appraisal Group, LLC, 210 North State Street, Concord, NH 03301, Contracted Assessing Firm.

Date: 10/22/10

Anne M. Stelmach, Clerk