

Bruce J. Connell

v.

Town of Londonderry

Docket No.: 24811-09PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2009 assessment of \$331,800 (land \$116,900; building \$214,900) on Map 13/Lot 71-11, 12 Seasons Lane, a single family home on 1.96 acres (the “Property”). 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 encumbered by a Public Service of New Hampshire (“PSNH”) utility easement which lowered the value of the Property due to an “error” concerning its location;
- (2) this location error was discovered by PSNH in 2009 and meant the easement is actually much closer to the house and the driveway on the Property than believed when the Taxpayer purchased the Property (in 1996);
- (3) following discovery and notification to property owners including the Taxpayer, PSNH proceeded to utilize the easement to construct overhead power lines that now bisect the Property;
- (4) the Property’s lower market value is documented in the appraisal prepared by a certified appraiser (the “Concannon Appraisal,” included in Taxpayer Exhibit No. 1); and
- (5) the assessment on the Property should be substantially abated (to either \$200,000 or \$150,000) in tax year 2009 based on the Concannon Appraisal.

The Town argued the assessment was proper because:

- (1) the Town abated the assessment for tax year 2010 (to \$265,400, as explained in Municipality Exhibit A) to reflect the PSNH easement issue by adjusting both the land and building components by 20%, but no abatement is warranted for tax year 2009 since the Taxpayer did not receive notice of the location error from PSNH until after the assessment date (April 1, 2009);
- (2) notice did not occur until a March 30, 2009 PSNH letter, from an engineering supervisor to property owners (stating “boundary survey” would begin “to determine and stake the edges of the PSNH right of way,” according to the article in The Derry News included in Municipality Exhibit A) and the Taxpayer does not dispute he received notice regarding these facts after April 1, 2009 (when he received the PSNH letter);

(3) the Town disputes the severe impact on market value assumed, without any supporting documentation, in the Concannon Appraisal (which has an effective date of June 1, 2010 and was signed on June 21, 2010);

(4) the appraisal literature included in Municipality Exhibit A conflicts with Mr. Concannon's assumptions (regarding the inevitability and severity of the potential impact of power line easements) when there is no adequate market data to support them;

(5) the Town's own "Comparative Analysis" of three nearby properties, one of which (82 Wiley Hill Road) had a "most similar power line influence," supports the Property's assessment; and

(6) the Taxpayer did not meet his burden of proving disproportionality.

The parties agreed the level of assessment in the Town was 106.8%, the median ratio calculated by the department of revenue administration.

Board's Rulings

Based on the evidence, the board finds the Taxpayer met his burden of proving the Property was disproportionately assessed in tax year 2009 and the appeal is therefore granted.

The board finds the assessment should be abated to \$298,600 (land \$105,200; building \$193,400) for the reasons explained below.

In brief, the board finds the market would have recognized some adverse impact stemming from the PSNH easement, even if the Taxpayer did not obtain an understanding of the location error until after April 1, 2009. The board cannot find, however, the market value impact as of the assessment date was as severe as presumed in the Concannon Appraisal relied upon by the Taxpayer.

The board bases these findings primarily on the following facts. The recorded PSNH easement on the Property is 100 feet in width and effectively bisects the Property. (See the

“survey worksheet” in Taxpayer Exhibit No. 1.) Even before the discovery of the error in 2009, when a boundary survey was conducted by PSNH, and even before the clear cutting of trees for construction of the power lines that occurred in 2010, a property encumbered by the size and location of this PSNH easement would likely have less value to a knowledgeable buyer exercising reasonable due diligence than one that was not so encumbered.

Using its judgment and experience,¹ the board finds a negative 10% adjustment to both the land and building components is warranted as of the April 1, 2009 assessment date. When this adjustment is applied to the assessment under appeal (\$331,800), using the same methodology applied by the Town in tax year 2010 (when it made a more substantial 20% adjustment), the abated assessment for tax year 2009 is \$298,600 (land \$105,200; building \$193,400). An abated assessment of \$298,600 for tax year 2009 corresponds to an indicated market value of approximately \$280,000 as of the assessment date. (\$298,600 abated assessment divided by 106.8% level of assessment = \$279,588.)

This abated assessment is supported by the market evidence presented by the parties. The board finds the 82 Wiley Hill Road sale provides the most reliable indication of value and was offered as a comparable by the Town. The Town’s “Comparative Analysis” grid indicates 82 Wiley Hill Road sold in June, 2009 (close to the April 1, 2009 assessment date) and is impacted by a power line easement in close proximity to the house and other improvements, as shown by the Town’s photographs (in Municipality Exhibit A). When adjustments are made to

¹ See RSA 71-B:1 and 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 has the ability, recognized in the statutes, to utilize its “experience, technical competence and specialized knowledge in evaluating the evidence before it.”) Further, in making market value findings, the board must determine for itself the weight to be given each piece of evidence because “judgment is the touchstone.” Appeal of Public Serv. Co. of N.H., 124 N.H. 479, 484 (1984), quoting from New England Power Co. v. Littleton, 114 N.H. 594, 599 (1974), and Paras v. 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 \$250,000 sale price for location, size and a fireplace using the numbers in the Town's grid, this sale provides an approximate market value indication of \$282,600, rounded, for the Property, close to the market value indicated by the abated assessment noted above.

33 Seasons Lane, located on the same street as the Property (at 12 Seasons Lane, just one-quarter mile away), is closer to I-93 but is not encumbered by a power line easement and was used as a comparable both by the Town and the Taxpayer (as the first comparable in the Concannon Appraisal). This property sold for \$305,000 in October, 2009, but both the Town and Mr. Concannon made adjustments that resulted in market value indications of approximately \$295,000 for the Property. (\$295,420 using the specific adjustments in the Town's grid and \$294,500 as adjusted in the Concannon Appraisal.) The board finds, however, that one further adjustment is necessary to the Town's grid because the power line influence on the Property is likely to have a more significant negative impact on market value than closer proximity to Route 93, making the Property inferior to 33 Seasons Lane based on this factor. Applying a net \$15,000 adjustment for this influence in the Town's grid (rather than concluding these factors offset each other) results in a modified indication of value from the 33 Seasons Lane sale that is also about \$280,000.

30 Shasta Drive, the third and last comparable presented in the Town's grid, also lends support to a value indication of \$280,000 for the Property. 30 Shasta Drive sold for \$310,000 in September, 2009. Using the adjustments in the Town's grid results in a calculated \$287,000, rounded, indication of value for the Property, but the Town made only a negative \$5,000 adjustment when it compared the power line influence on the Property versus the power line "proximity" of 30 Shasta Drive. The aerial photograph of 30 Shasta Drive (in Municipality Exhibit A) shows that two properties separate it from the PSNH right of way and the house and

driveway are located much further away from the right of way, providing an additional buffer which the market would likely recognize as a value influencing factor in comparing the two properties. The board finds it would not be unreasonable to increase the Town's negative adjustment for this difference somewhat. Applying an additional \$7,000 negative adjustment would result in an indication of value of approximately \$280,000 for the Property, in line with the indications of value from the Town's other two comparables.

The board could not give much weight to the substantially lower alternate estimates of value stated in the Concannon Appraisal for the effect of the PSNH easement. Before consulting Mr. Concannon in 2010, the Taxpayer learned more about the PSNH easement and he asked Mr. Concannon to develop alternate market value estimates to support his belief a tax year 2009 abatement was warranted. Mr. Concannon did so, first estimating a \$285,000 market value,² which is quite close to the \$280,000 estimate arrived at by the board. Mr. Concannon then stated alternate estimates of \$200,000 ("with the easement closer to house/driveway with the potential for the PSNH to build power lines") and \$150,000 ("with easement closer to property and added PSNH power lines"). In making these alternate estimates, Mr. Concannon stated he was "factoring a rough estimate of 40% diminished utility and value." Mr. Concannon used four comparable sales (including 33 Seasons Lane) and, at the request of the Taxpayer, added "two current listings" (not sales), which is not a commonly accepted appraisal practice.

On the one hand, the board does not agree with the alternate estimates in the Concannon Appraisal, which are based on an assumed "40% diminished utility," because they appear to be excessive and are not adequately supported. In a well-supported appraisal, "The first step in any

² As noted by the Town, the Concannon Appraisal has an effective date of June 1, 2010, 14 months after the assessment date. Mr. Concannon's market value estimate would likely have been different as of April 1, 2009, the relevant date for this appeal.

comparative analysis is to identify which elements of comparison affect property values.... The appraiser must not assume that an element of comparison affects value unless its influence is indicated by the market data.” (The Appraisal Institute, The Appraisal of Real Estate 415 (11th ed. 1996)). The Concannon Appraisal contains no market data to support a 40% diminished utility adjustment. The appraisal literature included by the Town in Municipality Exhibit A suggests the impact of power lines on market values is by no means so clear or “systematic” and, as one article concludes “a presumption of material negative effects . . . on property values is not warranted.” (See the Chalmers article in the Summer, 2009 issue of The Appraisal Journal). Mr. Concannon did not attend the hearing and therefore was not available to answer questions regarding his assumptions and methodology.³

On the other hand, the board finds the Town’s grid, presented in support of the argument the assessment under appeal is proportional for tax year 2009 and no abatement is necessary, to be somewhat confusing and not actually supportive of such conclusions. The Town’s grid appears to add the impact of the 106.8% level of assessment in tax year 2009 (on the “Ratio 1.068” line) to calculate an indicated range of *assessed values* rather than *market value* indications.⁴ In any event, the range calculated by the Town (\$301,625 to \$315,509) is lower

³ Municipality Exhibit A includes an October 23, 2009 email from a real estate broker (John Conley) titled “Power Line Impact” and estimating the market value of the Property to be somewhat higher than the estimates in the Concannon Appraisal. Mr. Conley states a “selling price” range of “\$309,500 - \$313,500” for the Property would be warranted, with reductions in value of either “15-20%” (when the easement path is ‘staked out’) or a “minimum 35% reduction” (when “trees are removed and construction begins”). Neither party, however, presented testimony regarding this document or the estimates contained in it and the board could give it no weight except to note the points of divergence with the Concannon Appraisal, reflecting the uncertainties inherent in each estimate.

⁴ There is some ambiguity on this point because the Town’s grid also includes an “ADJ SP” line on the bottom which might mean the Town intended to estimate adjusted *selling prices* (SP) rather than a range of indicated *assessed values*. The Town’s two representatives at the hearing did not provide sufficient testimony to clarify the meaning of this grid or its intended purpose.

than the assessment under appeal (\$331,800), even if the board were to accept the Town's grid at face value.

In making a negative 10% adjustment to the assessment under appeal (\$331,800), the board took into consideration the larger negative 20% adjustment for "easement" made by the Town in tax year 2010 (resulting in a \$265,400 assessment for that year). The board finds some adjustment for the PSNH easement is warranted for tax year 2009. Given the market value evidence discussed above, the board finds a negative 10% adjustment is more reasonable than either the Town's zero percent adjustment or the Taxpayer's proposed 40% negative adjustment for that year, resulting in an abated assessment of \$298,600.

For all of these reasons, the board finds the assessment should be abated to \$298,600 for tax year 2009. The appeal is therefore granted.

If the taxes have been paid, the amount paid on the value in excess of \$298,600 for tax year 2009 shall be refunded with interest at six percent per annum from date paid to refund date. (As noted above, the Town abated the tax year 2010 assessment of the Property to \$265,400 and the Taxpayer did not appeal that assessment.)

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

Bruce J. Connell v. Town of Londonderry

Docket No.: 24811-09PT

Page 9 of 9

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, Chair

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Bruce J. Connell, PO Box 474, Londonderry, NH 03053, Taxpayer; and Londonderry Assessor's Office, 268B Mammoth Road, Londonderry, NH 03053.

Date: 12/9/11

Anne M. Stelmach, Clerk