Richard Totaro

v.

Town of Wolfeboro

Docket Nos.: 25761-10PT/26269-11PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 2010 and 2011 abated assessments of $2,086,900 (land $1,645,200; building $441,700) on Map 266/Lot 10, 64 Oakwood Road, consisting of ten mostly seasonal hospitality cabins, 13 boat slips, and a detached garage (with a studio apartment on the second floor) on 18.87 acres of land[1] (the "Property"). For the reasons stated below, the appeals for abatement are denied.

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 Property's assessments were higher than the general level of assessment in the municipality. Id. The board finds the Taxpayer failed to prove disproportionality.

[1] The assessment-record card lists 17.5 acres but the parties agreed at the hearing the Property had the higher acreage stated above.

The Taxpayer argued the abated assessments were still excessive because:

(1) the Property, known as "Boulderbrook," was a former boys' scout camp and was then used as a seasonal rental property before being purchased by the Taxpayer for $1.45 million in May, 2003;

(2) the Property is situated at the south end of a cove (as shown in Taxpayer Exhibit No. 4) on Lake Winnipesaukee and has 410 feet of water frontage;

(3) a May 15, 2012 appraisal prepared by Charles F. Schubert, Jr. of Applied Economic Research, Inc. [the "Schubert Appraisal," composed of Taxpayer Exhibit Nos. 1 and 2[2]) determined the Property's highest and best use is as redevelopment into two residential waterfront lots;

(4) Mr. Schubert estimated the market value of the Property was $1,600,000 as of April 1, 2010 and $1,670,000 as of April 1, 2011;

(5) at the Property's highest and best use, the seasonal cabins add no contributory value and Mr. Schubert and the Town reach similar conclusions regarding the land value;

(6) because of its location on the cove, the Property, as noted by Mr. Schubert, has narrow ("rifle barrel," roughly "45 degree") views with shallow water at the beach and no westerly (sunset) views; and

(7) the assessments should be further abated based on Mr. Schubert's market value estimates adjusted by the levels of assessment.

The Town argued the abated assessments were proper because:

(1) the Town performed a revaluation in 2010 and its land chart depicts higher land values on Lake Winnipesaukee, where the Property is located, than on other lakes;

[2] Taxpayer Exhibit No. 2 contains revised pages to Mr. Shubert's original appraisal (Taxpayer Exhibit No. 1). These pages correct the land size (18.87 acres rather than 16.5 acres) and other errors.

(2) the comparable sales shown in Municipality Exhibit A indicate the Property is proportionally assessed;

(3) the Town reviewed Mr. Schubert's comparable sales and determined (as stated in Taxpayer Exhibit No. 3, its responses to the Taxpayer's interrogatories) he failed to make sufficient adjustments for the differences noted by him, including the "estate" size of the Property, and several of his comparables were non-qualified sales not reflecting arm's-length transactions; and

(4) the Taxpayer failed to meet his burden of proving disproportionality in each tax year and the appeals should be denied.

The parties agreed the levels of assessment were 99.5% and 103.1% in tax years 2010 and 2011, the median ratios calculated by the department of revenue administration.

After the hearing, the board directed its review appraiser, Cynthia L. Brown, CNHA, to conduct "an investigation into the condition of sale comparables submitted at the hearing" and to file a report. Ms. Brown filed her report on September 20, 2013 (the "Report") and the parties were given fourteen (14) days to file written comments. The Town filed comments on October 1, 2013 and the Taxpayer's representative filed comments on October 8, 2013. The board will discuss the Report further below.

Board's Rulings

Based on the evidence, the board finds the Taxpayer failed to meet its burden of proving the Property was disproportionally assessed in tax years 2010 and 2011. The appeals are therefore denied for the reasons discussed below.

As a preliminary matter, the board reviewed the written comments submitted by the parties in response to the Report. Ms. Brown was asked by the board simply to confirm the facts pertaining to certain sales in light of the disagreements stated at the hearing regarding whether

some were arm's-length sales indicative of the market. Ms. Brown did so and it is not necessary to address the parties' other comments regarding the Report given the board's overall findings, discussed below, regarding the highest and best use of the Property. The parties' comments regarding the comparables reviewed by Ms. Brown in the Report and whether she should have inspected each comparable are not material to the board's conclusions.[3]

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, in making market value findings, the board must determine for itself issues of credibility and the weight to be given each piece of evidence because "judgment is the touchstone." 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). In arriving at a proportionate assessment, all relevant factors affecting market value must be considered. Paras v. City of Portsmouth, 115 N.H. at 67-68.

[3] The board spent considerable time sorting through the many assessment-record cards and other documents presented by the parties, including those in Municipality Exhibits A and C. These documents were not well organized, which led to part of the confusion inherent in the parties' comments in response to the Report. The board expects parties, especially when they are represented by professional tax representatives and assessors, to insure any documents presented are more coherent and intelligible to the fact finder.

The Property consists of 18.87 acres of land with 410 feet of waterfront on Lake Winnipesaukee and approximately 1,200 feet of frontage on Oakwood Road. The Property has "a large sandy beach" and is served with electricity, telephone and cable, a seasonal municipal water system and sewer provided by an on-site septic system. (Schubert Appraisal, p. 18.) "Lake views are predominate [sic] to the north into South Wolfeboro. While the views are pleasant ones, they are limited on long views and restricted by the narrowness of the cove. The backland area contains some slopes and wetlands." (Id.) The improvements consist of "ten mostly seasonal cabin/cottages (consisting of a total of 7,267 square feet), 13 boat slips, and a detached garage with second floor studio apartment." (Id., p. 7.)

The Schubert Appraisal (p. 1) describes the use of the Property as a "[s]easonal limited service cottage colony with lake frontage on South Wolfeboro Bay (Lake Winnipesaukee)." Although the prior owner rented the cottages, the Taxpayer testified he presently uses the Property for family vacations and to accommodate friends.

A key issue in these appeals is the highest and best use of the Property. The question of highest and best use requires determination of the "the reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value."[4] Mr. Schubert concluded the cabin buildings do not provide a return that is maximally productive to the Property and it is likely a knowledgeable buyer would subdivide the parcel to realize a higher value. Mr. Schubert

[4] The Appraisal Institute, The Appraisal of Real Estate, 11th ed. (1997), p. 297.

assumed a two lot subdivision, after considering the significant slopes to the east and referencing the Shoreline Protection Act restrictions and zoning.[5] He concluded the most likely buyer would remove the cabins[6] and redevelop the Property into two lots. In his appraisal (pp. 34-37), Mr. Schubert performed an income analysis for cabin rentals and a discounted cash flow analysis if the cabins were converted into condominium cottages and concluded the values estimated for these alternate uses were both lower than in the Property's highest and best use.

While removal of the cabins to attain the Property's highest and best use is plausible, the board finds the Taxpayer did not meet his burden of proving the most likely buyer of the Property would subdivide it into two lots. Based on the evidence presented, the board, like the Town, does not agree with this key assumption used by Mr. Schubert to estimate market value.

Upon considering the evidence as a whole and using its judgment and experience,[7] the board finds a waterfront property of this size (18.87 acres) located in the Town would likely have a higher value if sold as a single estate-sized lot. The ability to subdivide a lot can influence its value but it is not the sole factor affecting value in its highest and best use. Privacy in certain circumstances and settings is highly valued as a more important factor than the ability to subdivide. The board has observed properties involving conservation easements that limit or preclude any further subdivision or development of most of a parcel, but where that very

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[5] "Minimum dimensional requirements for the Shorefront Residential zone are one acre lot size, 150 feet of lot frontage, and 150 feet of shore frontage measured in fifty-foot straight-line increments." (Id., p. 20.)

[6] Mr. Schubert estimated the demolition and removal of the improvements to be $5.00 per square foot or $36,000 (7,267 square feet x $5.00 per square foot). (Id., pp. 22, 23.)

[7] This board, as a quasi-judicial body, must weigh the evidence and apply its judgment in deciding the proportionality of an assessment. Paras v. City of Portsmouth, 115 N.H. 63, 68 (1975); see also Petition of Grimm, 138 N.H. 42, 53 (1993) (administrative board may use expertise and experience to evaluate evidence).

restriction significantly enhances the value of the unrestricted building site and the value of the Property as a whole.

The Schubert Appraisal indicates the Property, if "split" into two lots, would have a good sandy beach on one lot but the other lot would have a steep, wooded shoreline where the "slopes appear to be significant in the waterfront area to diminish its development potential." (Id., pp. 18 and 34.) Further, this appraisal notes the backland area contains some slopes and wetlands. The board finds Mr. Schubert did not satisfy all four criteria in determining his highest and best use (legally permissible, physically possible, financially feasible and maximally productive). Rather, the board finds the Property's highest and best use is as one estate lot which would offer more privacy and building options, making it more desirable and valuable to the likely buyer.

The Town presented credible evidence that estate size lots on Lake Winnipesaukee sell for substantially more than the equalized value of the assessments under appeal.[8] While the Taxpayer indicated some of the Town's comparable sales (in Municipality Exhibit A) had better views and better locations, the board finds any reasonable downward adjustments to the sale prices would not be of sufficient magnitude to change the conclusion the Property had a market value of at least $2.1 million in 2010 and 2011, at or above the equalized values of the assessments in those years.

For these and other reasons, the board finds Mr. Schubert's market value estimates ($1,600,000 in 2010 and $1,670,000 in 2011) to be too low. The Taxpayer is a knowledgeable real estate professional whose family owns nearby lots. He purchased the Property for $1.45 million in 2003 from sellers who were operating the Property as a summer camp, which his own expert (in the Schubert Appraisal) states was not its highest and best use. Allowing for even a

[8] For 2010: $2,086,900 assessed value divided by the 99.5% level of assessment = $2,097,387; for 2011: $2,086,900 assessed value divided by the 103.1% level of assessment = $2,020,151.

modest amount of appreciation for a large, waterfront property in a good location would yield a value well in excess of Mr. Schubert's estimates, even after taking into account the real estate downturn in 2008 and 2009.

Mr. Schubert derived his market value estimates by making quantitative adjustments to land sales shown in his corrected sales grids (in Taxpayer Exhibit No. 2) for his two hypothetical subdivided lots (of 9.435 acres each). The board notes the sales chosen in the Schubert Appraisal are not very comparable to the Property, requiring Mr. Schubert to make very large net adjustments (as much as 90% and 110% in several instances) that diminish the weight that can be attached to his value conclusions.

A review of just one of these adjustments raises additional questions regarding whether they are reasonable and market-based. For example, for the size adjustment in his 2010 analysis, Mr. Schubert applies a 10% positive adjustment to two sale properties that are quite a bit smaller (1.19 acres and 0.92 acres) and a 20% positive adjustment to two sales that are even smaller (0.57 acres and 0.74 acres) than his hypothetical lot size (9.435 acres). His stated justification for these relatively small adjustments is an assumption (stated on p. 44 of the Schubert Appraisal) that the market would only value additional land for a waterfront property as "surplus land," but the board finds there is no support for this assumption in his appraisal or the other evidence presented. If higher, more realistic adjustments for additional land on an estate size waterfront lot are applied to Mr. Schubert's comparables (say 25% and 40%), then the market value indication (using the methodology in Mr. Schubert's sales grid) goes up by approximately a quarter million dollars. This single adjustment closes much of the gap to the indicated equalized values of the assessments under appeal, leaving aside any other appropriate modifications to the remaining factors in his sales grid.

For all of these reasons, the board finds the Taxpayer failed to meet his burden of proving disproportionality. The appeals are therefore denied.

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 t 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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Michele E. LeBrun, Chair

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Albert F. Shamash, 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 Wolfeboro, PO Box 629, Wolfeboro, NH 03894; and David C. Wiley, PO Box 40, Melvin Village, NH 03850, Contracted Assessing Firm.

Date: 11/26/13

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Anne M. Stelmach, Clerk