

**David L. Winchester, Donald G. Winchester and John R. Winchester**

**v.**

**Town of Tuftonboro**

**Docket No.: 25797-10PT**

**DECISION**

The “Taxpayers” appeal, pursuant to RSA 76:16-a, the “Town’s” tax year 2010 ad valorem assessment on part of Map 40/Lot 2/1, 1 Farm Island (the “Property”). The Property, in its entirety, consists of 13.3 acres of land with limited improvements on an island on Lake Winnepesaukee, assessed as follows: 11.3 acres in current use (“CU”) for \$2,339 (not in dispute in this appeal); and the remaining two acres of land not in current use with a cottage and other improvements (the “NICU Property”) for \$1,574,900 (land \$1,504,900; building \$57,400; features \$12,600), which the Taxpayers claim is a disproportional assessment. For the reasons stated below, the appeal for abatement on the NICU Property is granted.

The Taxpayers have the burden of showing, by a preponderance of the evidence, the assessment was 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 Property’s assessment was higher than the general level of assessment in the municipality.

Id. The board finds the Taxpayers met their burden of proving disproportionality of the ad valorem assessment on the NICU Property.

The Taxpayers argued the assessment was excessive because:

- (1) the Winchester family owned all of Farm Island, consisting of approximately 21 acres, for many years and recently subdivided the land into two parcels;
- (2) they sold one parcel consisting of 7.5 acres (2 Farm Island), leaving them with the remaining parcel (1 Farm Island) with 13.3 acres of land, but only two acres (the NICU Property) is subject to ad valorem assessment [as shown on the Property's assessment-record card ("ARC"), Municipality Exhibit A];
- (3) as shown on the ARC, the Town applied a "500" condition factor to the primary acre of the NICU Property, but no other property in the Town has a factor this high applied to it and the 2 Farm Island now owned by a tax exempt organization has a condition factor of "400";
- (4) the best evidence of the ad valorem value of the NICU Property is the Schubert Appraisal (Taxpayer Exhibit No. 1) and Mr. Schubert concluded it had a market value of \$260,000 in tax year 2010;
- (5) Mr. Schubert considered the fact the sale of 2 Farm Island was to an "abutter," as well as sales of other island and waterfront properties, in reaching his value conclusion and noted that, while the Property as a whole (13.3 acres) had a substantially higher value (about \$2.1 million), much of this value is in the 11.3 acres in CU not subject to ad valorem assessment;
- (6) the Town, through its interrogatory answers (see Taxpayer Exhibit No. 2), expressed no points of "disagreement" with the Schubert Appraisal except for stating the appraisal does not take into account "the influence that the current use portion has on the [land] NICU";

(7) the Town has frivolously maintained its defense of the assessment and the Taxpayers should be awarded its costs; and

(8) the assessment on the NICU Property should be abated to the market value estimated in the Schubert Appraisal adjusted by the level of assessment in the Town.

The Town argued the assessment was proper because:

(1) the Town performed a revaluation in tax year 2010;

(2) the Town considered the sale of 2 Farm Island, which consists of 7.5 acres with 1,437 feet of water frontage, for \$1.25 million to be a “qualified” land sale, even though the purchaser owns land on the mainland directly across from Farm Island, and this sale occurred on June 21, 2010, within three months of the assessment date (see Taxpayer Exhibit No. 7);

(3) for a number of years, the Property was marketed for sale with asking prices well in excess of its assessment [see Schubert Appraisal, p. 9, showing the Property was listed for sale from July 2010 to June 2011 for \$3.1 million and, prior to the 2 Farm Island sale, the entire island was listed for sale for \$5.9 million (from November 2005 to July 2008), \$4.9 million (from July 2008 to February 2009) and \$4.3 million (from February 2009 to June 2010)]; and

(4) the appeal should be denied.

The parties agreed the level of assessment was 99.5% in tax year 2010, the median ratio calculated by the department of revenue administration.

At the hearing, the board noted the Taxpayers have filed a separate appeal for tax year 2011 (BTLA Docket No. 26266-11PT) which has already gone through the Tax 203.07 mediation process. The Taxpayers’ representative (Mark Lutter) stated they did not want to consolidate the two appeals and provided reasons for this position. The board determined the

appeals would not be consolidated and the 2011 appeal will be scheduled and heard separately in due course.

During the hearing of this 2010 appeal, the board noted the evidence presented did not include either the approved CU application for Farm Island or a map [required by RSA ch. 79-A and the present Current Use Board (“CUB”) rules promulgated thereunder] showing the location of the land in CU. The board held the record open for ten (10) days for the Town to submit a copy of the CU application filed with the Town and any recorded documents pertaining to it.

On April 19, 2013, the Town’s assessing clerk mailed to the board a copy of a CU application. This CU application, signed by David Winchester on March 31, 1986 and approved by the Town selectmen on July 14, 1986, indicates 21 acres of land were placed in CU in the “White Pine” category and includes a sketch of the entire island with several notations on it, presumably to show the cottage and other existing improvements. It is not clear, either from the 1986 application or this map, precisely where the CU land and the NICU Property were located. In this regard, the Taxpayers indicated they would advise the board in writing regarding whether they would be willing to submit a new CU map to the Town delineating these areas. By letter dated April 26, 2013, their tax representative (Mark Lutter) did so and this map is discussed in more detail below.

### **Board’s Rulings**

Based on the evidence, the board finds the Taxpayers met their burden of proving disproportionality and the ad valorem assessment of the NICU Property should be abated to \$559,200, rounded (based upon a market value estimate of \$562,000 times the 99.5% level of assessment in the Town). When added to the CU assessment on the remaining land (\$2,339), the

total assessment on the Property for tax year 2010 is abated to \$561,539. The appeal is therefore granted for the reasons stated below.

The parties recognize ad valorem assessments must be based on market value under RSA 75:1. Proportionality is determined by adjusting a reasonable estimate of market value by the level of assessment in the municipality. See, e.g., Porter v. Town of Sanbornton, 150 N.H. 363, 367 (2003.); see also Appeal of Net Realty Holding Trust, 128 N.H. 795, 796 (1986); Appeal of Great Lakes Container Corporation, 126 N.H. 167, 169 (1985); and Appeal of Town of Sunapee, 126 N.H. 214, 217-18 (1985). In determining what is a proportional assessment, all relevant factors affecting market value must be considered. Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1975).

To determine whether the Taxpayers met their burden of proving disproportionality, the board considered and weighed 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” in making a determination of market value. 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. at 68 ; see also Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 256 (1994).

There is no question valuation and assessment of island properties present special challenges for appraisers and assessors and this is reflected in the wide gap between the parties’ respective positions regarding the market value of the NICU Property in this appeal. Property on

an island has distinct advantages (privacy, seclusion and views, for example) and disadvantages (physical access challenges and municipal service limitations, among others) which the board has recognized in prior appeals.<sup>1</sup> The Property is unique because of the relatively large size (13.3 acres) and its location on Lake Winnepesaukee, the largest lake in New Hampshire.<sup>2</sup> All other things being equal, the board finds the island location of the Property has a positive influence on its value.

The primary issue presented in this tax abatement appeal is whether the Taxpayers met their burden of proving the NICU Property was disproportionately assessed in tax year 2010 at \$1,574,900. At the hearing, the Town noted on June 18, 2010, shortly after the April 1 assessment date, the Taxpayers completed the sale of the “southerly portion” of the island (Map 40, Lot 2/2) for \$1,250,000. 2 Farm Island consists of 7½ acres of undeveloped land with 1,437 feet of waterfront and was sold by warranty deed to YMCA Camp Belknap, Inc., which owns property facing the island on the mainland. (Schubert Appraisal, p. 9.)

The Taxpayers’ representative (Mark Lutter) argued this sale to an “abutter” who is a non-profit organization is not indicative of the market value of the remaining land on Farm Island. The Taxpayers’ appraiser (Mr. Schubert), however, disagreed and used the sale of 2 Farm Island in developing his estimate of value, after adjusting for the fact it was sold to an abutter. (See Schubert Appraisal, pp. 54, 57-58). The board finds the sale of 2 Farm Island, which Mr. Schubert calculated had an effective sales price of \$1,375,000 (to reflect payment of

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<sup>1</sup> See, e.g., Spaulding v. Town of Deering, BTLA Docket No. 25656-10PT (January 14, 2013). In many such appeals, there is an ongoing debate as to whether an island location is more valuable than a mainland waterfront location. In Spaulding (p. 5, fn. 1), the board noted: “It is not necessarily true that a comparable island property should be less valuable than a comparable ‘mainland’ waterfront property because each may appeal to a different type of buyer or market segment.”

<sup>2</sup> According to published sources, this lake has over 250 islands, but over half of them are quite small (less than a quarter acre) in size. See, e.g., [http://en.wikipedia.org/wiki/Lake\\_Winnepesaukee](http://en.wikipedia.org/wiki/Lake_Winnepesaukee).

the land use change tax by the buyer), which he then adjusted by 5% because of the “abutter” factor, provides some indication of the value of island property in the market. In fact, the board finds it is most likely the best comparable sale, due to its proximity to the Property and the acknowledged scarcity of large parcels of undeveloped comparable island properties.

The Town emphasized the Taxpayers had recently listed the Property for sale at much higher prices than reflected in the Town’s assessment. The board gave this factor very limited weight, noting Taxpayer David Winchester’s explanation that the multiple owners had some disagreements regarding what price to list the Property for sale and that, in his opinion, the listing prices were not reflective of the Property’s actual value. This testimony was credible and is supported by a lack of evidence that any offers were received to purchase the Property after it was listed (notwithstanding the 2 Farm Island transaction described above).

On balance, therefore, the board finds the Property as a whole, if sold, would likely have the value estimated by Mr. Schubert, the Taxpayers’ appraiser: in the range of \$2.1 million as of the April 1, 2010 assessment date. (Schubert Appraisal, p. 57.). Mr. Schubert used this value indication to derive a much lower \$260,000 market value estimate for the NICU Property. (Id.) Although the board finds this \$260,000 estimate is too low, the evidence supports the Taxpayers’ arguments that the Town’s \$1,574,900 ad valorem assessment is too high. The equalized value of this tax year 2010 assessment is over \$1.5 million for the NICU Property and there is reason to question whether two acres on Farm Island would sell for this much (about 75% of the estimated value of the Property as a whole).

The board looked carefully at the methodology used by Mr. Schubert in arriving at his \$260,000 estimate of value for the NICU Property. The board finds this estimate is not credible for a number of reasons.

First, Mr. Schubert selected comparable sales of both improved and unimproved island properties. He arrived at his opinion of market value by first estimating at a market value for a 13 acre lot (applying upward adjustments to his smaller lot size comparables) and then applying a percentage, assuming he was valuing only a portion of the entire parcel (to attempt to value only the NICU Property consisting of two acres). Instead, he should have compared these comparable properties to a two acre lot with 300 feet of waterfront, which is the NICU Property to be valued. Mr. Schubert's methodology skewed his market value indications downwards.

Second, by estimating the value of the whole, then adjusting the "whole value" by the percentage of land not in current use, Mr. Schubert assumed that each foot of land on the island contributes the same amount to the whole value. The board finds this assumption to be unreasonable. There is no evidence to support the conclusion that market value is correlated in such a linear fashion.

The nonlinearity of land values is clear from other cases the board has heard and decided. In State of New Hampshire v. GCD, Inc., BTLA Docket No. 24732-10ED (June 7, 2011), the board questioned whether a "pro rata" approach, based on calculating average value on a price per acre basis, was appropriate where areas of land within a property can have different utility and value. Such a calculation "can obscure the reality and recognition that not all land is equally useful and that each parcel of land, particularly one that has already been developed, has areas that embody various rights of differing importance and value to the whole." (Id. at pp. 9-10.)

To arrive at a reasonable estimate of market value, additional clarity is needed regarding where the NICU Property is located. The Town has not disputed the Taxpayers' recent

delineation of this land on a map submitted after the hearing (the “Taxpayers’ Map”).<sup>3</sup>

According to the representations in the April 26, 2013 letter, the Town’s assessor has “no problem” with the Taxpayers’ Map and the Taxpayers’ appraiser (Mr. Schubert) does not believe the modifications change his conclusion regarding the market value of the two acres of land NICU.

In its deliberations, the board did its own analysis of the sales in the Schubert Appraisal, looking at both the unimproved and improved lot sales but giving more weight to the improved lot sales. The board found the most reasonable indication of value for the NICU Property is approximately \$1,500 per foot of waterfront. Given the market data presented in this appeal, the board finds a likely buyer of a two acre waterfront lot comparable to the NICU Property could reasonably base value on this metric.

In arriving at this estimate, the board analyzed both undeveloped small island lots and the developed lots from which Mr. Schubert extracted his lot values. (See Schubert Appraisal, pp. 73 and 100.) The board placed more weight on the improved sales because those comparable sale properties were larger in size (more comparable to the two acres NICU) and also had more similar water frontages when compared to the NICU Property.

The board then took into account how the two acres conceptualized by Mr. Schubert differed from these sales. The key difference is the added buffer and privacy afforded by the location on Farm Island. There can be no question the NICU Property is insulated from other development by the remaining 11.3 acres of land owned by the Taxpayers in CU (and indeed the rest of the island.

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<sup>3</sup> See also the Town’s response to the Taxpayers’ Interrogatory No. 5 (Taxpayer Exhibit No. 2) where the Town states it “agrees with the current use map submitted by the appraiser,” which the board understands to mean the sketch and calculations on p. 29 of the Schubert Appraisal.

In this case, the lack of development is a positive influence on value and the board has so found in other cases involving land NICU which is buffered by CU or other undeveloped land. See, e.g., Brady v. City of Dover, BTLA Docket Nos. 21076-04PT/21944-05PT /22914-06PT (January 11, 2008). Brady (pp. 4-6) cited and discussed prior board decisions.<sup>4</sup> While, on the one hand, the value of land in CU is “veiled” for assessment purposes (gaining the benefit of reduced taxation while it remains in CU), on the other hand land NICU can have an augmented market value (subject to a higher ad valorem assessment) due to the value enhancing effects of being situated adjacent to CU land that has not yet been developed. Keeping these factors in mind and applying its judgment and experience, the board finds the most reasonable estimate of the value of the NICU Property requires a 25% premium to the \$1,500 base value estimated above, resulting in a valuation of the NICU Property at \$1,875 per waterfront foot. Applying this estimate leads to a market value finding of \$562,000, rounded.

A \$562,000 market value for the NICU Property correlates to a reasonable degree with Mr. Schubert’s market value estimate of the Property as a whole (about \$2.1 million). The remaining value, of course, is veiled for so long as the additional 11.3 acres of land remain in CU.

The board further notes the Taxpayers’ Map modifies the areas shown in the Schubert Appraisal (p. 29) to some degree. The Schubert depiction of the two acres NICU consists of a triangular shaped inland area designated as the “Cottage Improvements,” a 10 feet x 720 feet “Utility Line,” a 10 feet x 300 feet “Water Line Area” and, most importantly, a rectangular (300 feet x 200 feet) building ‘envelope’ of 60,000 square feet showing 300 feet of waterfront. The

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<sup>4</sup> Ford v. Town of Durham, BTLA Docket Nos. 19576-02PT/20391-03PT (March 29, 2005); Maine v. Town of Deering, BTLA Docket No. 21111-04PT (June 13, 2007); and Arnold v. Town of Frankestown, BTLA Docket No. 0871-90PT (December 8, 1994). See also Lydia v. Scott 2002 Trust v. City of Dover, BTLA Docket Nos. 21074-04PT/21943-05PT/22918-06PT (January 11, 2008), decided on the same date as the Brady appeals.

board notes the Taxpayers' Map moves the building envelope somewhat, shifts the waterfront location and omits the "Utility Line Area" entirely, but leaves the size of the building envelope (60,000 square feet with 300 feet of waterfront) unchanged.

CU regulations, as presently enacted by the Current Use Board ("CUB"), contain more specific requirements regarding the map required with an "Application for Current Use" (Form A-10). In particular, CUB 309.01 (b), effective February 18, 2006, now provides:

Form A-10 shall be accompanied by:

- (1) A map or drawing of the entire parcel that includes:
  - a. Current use and non-current use land, clearly identified, oriented to establish its location, and sufficiently accurate to permit computation of acreage;
  - b. The interior boundaries;
  - c. The acreage of farm, forest and unproductive land which the applicant is seeking current use assessment;
  - d. The forest type category for any forest land; and
  - e. All portions of land not to be classified under current use."

[See also CUB 302.01 (Applying for Current Use) which references CUB 309.01.] The board finds it is reasonable to require the Taxpayers, as a condition for obtaining an abatement on the NICU Property, to provide the Town a map complying with these specific requirements. Such a map will be of benefit to the parties if and when additional land on the Property is taken out of CU.

Finally, the board considered the Taxpayers' arguments that costs should be awarded against the Town. The basis for this argument appears to be the Town's refusal to agree with the Taxpayers that the ad valorem value of the NICU Property should be as low as \$260,000. The board has discretionary authority to award costs under RSA 71-B:9 and Tax 201.39. The Taxpayers have not made the requisite showing for an award of costs under the board's rules; indeed, while their arguments for a tax abatement were successful, the board has found the market value of the NICU Property was considerably higher than the value the Taxpayers

claimed in this appeal. For these reasons, the board does not agree the Taxpayers are entitled to an award of costs.

In summary, the board finds the Taxpayers shall submit to the Town a revised map to comply with the CUB rules cited above and the Town shall abate the assessment on the Property to \$561,539 for tax year 2010. If the taxes have been paid, the amount paid on the value in excess of \$561,539 shall be refunded with interest, pursuant to RSA 76:17-a, at six percent per annum from date paid to refund date.

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

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Albert F. Shamash, Member

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Theresa M. Walker, 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 Tuftonboro, PO Box 98, Center Tuftonboro, NH 03816; and R.B. Wood & Associates, 116 Fort Ridge Road, Alfred, ME 04002, Contracted Assessing Firm.

Date: 9/16/13

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Anne M. Stelmach, Clerk