Hampton River Marina, LLC

v.

Town of Hampton

Docket No.: 25960-10PT

DECISION

The "Taxpayer" filed an appeal, pursuant to RSA 76:16-a, challenging the proportionality of the "Town's" 2010 assessments on four lots. Three of these lots have a 55 Harbor Road address and consist of a total of 3.38 acres of waterfront land and improvements used to operate a marina (hereinafter, the "Marina Property," sometimes referred to by the parties as "55 Harbor Road"); the Marina Property had a total abated assessment of $4,787,200 in tax year 2010.[1] [At the hearing on the merits of this appeal, the parties stated they no longer dispute the proportionality of the assessment on the fourth lot, Map 295/13, 4 Harris Avenue, a single family home on 5,000 square feet of land assessed at $266,600 (land $196,500; building $70,100).]

The Taxpayer has the burden of showing by a preponderance of the evidence, the total assessment on the Marina Property 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); and Appeal of City of Nashua, 138 N.H. 261, 265 (1994).

[1] The three lots constituting the Marina Property are: Map 295/1/M, assessed for $2,807,100; Map 295/1/28U, assessed for $1,361,300; and Map 295/1/16U, assessed for $618,800.

The Taxpayer argued the total Marina Property assessment was excessive because:

(1) acquired in 2003, the Marina Property consists of an operating marina (the "Hampton River Marina" in Hampton Harbor) with 144 boat slips and other improvements, along with "vested" rights to develop residential condominium units;

(2) the Taxpayer more recently attempted to acquire, without success, an adjacent property (2 Harris Avenue) because of its interest in developing the condominiums;

(3) an appraisal prepared by a certified general appraiser, Charles E. Schubert, Jr., of Applied Economic Research (the "Schubert Appraisal," Taxpayer Exhibit No. 1), estimates the market value of the Marina Property was $3,350,000 as of the April 1, 2010 assessment date and is the best evidence of value;

(4) in his appraisal (see pp. 31-32), Mr. Schubert considered the physical size and "site limits" of the Property (without the acquisition of 2 Harris Avenue), concluded the highest and best use would involve construction of only 28 condominium units (not the approved 44 units) and continued operation of the marina and properly took into account loss of boat storage revenue and certain additional costs; and

(5) the assessments should be abated based on Mr. Schubert's market value estimate of $3,350,000 adjusted by the level of assessment in the Town.

The Town argued the total Marina Property assessment was proper because:

(1) the Town abated the assessment in tax year 2010 (from $5,079,000 to $4,787,200, as shown in Municipality Exhibit A);

(2) an appraisal prepared by an MAI appraiser, John M. Crafts of Crafts Appraisal Associates, Ltd. (the "Crafts Appraisal," Municipality Exhibit F), estimates the market value of the Marina

Property was $4,850,000 as of the assessment date and is the best evidence of value -- a value conclusion that exceeds the equalized value of the total assessment ($4,400,000);

(3) the proportionality of the assessment is further supported by the fact the Taxpayer purchased the Marina Property in August, 2003 for $4,016,200 and reported this was its "fair market value" (see Municipality Exhibit B), even before submittal of a plan in 2005 to develop 44 residential condominiums to augment the value of the Marina Property;

(4) the Town first approved this plan for developing 44 condominium units in 2007, extending the relevant timelines several times to accommodate the Taxpayer (so that the "vested rights" for development would not 'lapse') and granted the Taxpayer's request to confirm those vested rights continue to exist (as a result of infrastructure investments made by the Taxpayer in order to preserve them);

(5) the additional condominium development sale submitted by the Taxpayer (in Taxpayer Exhibit No. 4) is misleading because the seller received additional consideration (ownership of two condominium units after they are constructed) that is not reflected in the stated sale price; and

(6) the appeal should be denied.

After the hearing, each party submitted requests for findings of fact and rulings of law. Tax 201.36(b) limits each party to no more than 25 combined requests and individual requests that contain multiple findings or rulings shall be marked "neither granted nor denied." The Taxpayer submitted a total of 31separate requests, exceeding the 25 combined request limit. The Town submitted a total of 25 separate requests, but certain of them (Nos. 14 and 17, for example) contain requests for multiple findings. The board has therefore responded only to the first 25 requests from each party (as shown in Addendum A).

The parties did not dispute the level of assessment in the Town was 108.8% in tax year 2010, the median ratio calculated by the department of revenue administration. (See Taxpayer Finding Request No.18 and Town Finding Request No. 2.)

Board's Rulings

Based on the evidence presented, the board finds the Taxpayer failed to prove the Marina Property was disproportionally assessed in tax year 2010. The appeal is therefore denied for the following reasons.

The parties recognize the proportionality of an assessment depends on a reasonable estimate of market value adjusted by the level of assessment in the municipality. See RSA 75:1; and, e.g., Porter v. Town of Sanbornton, 150 N.H. 363, 367-368 (2003). There is no dispute the equalized value of the Town's assessment is $4,400,000 ($4,787,200 divided by the 108.8% level of assessment). Therefore, in order to prevail in this appeal, the Taxpayer had the burden of proving the market value of the Marina Property was materially less than $4.4 million in tax year 2010. (See Town Finding Request No. 2.)

In making market value findings, the board considers and weighs all of the evidence presented, applying the board's "experience, technical competence and specialized knowledge" to this evidence. 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, "[w]hen faced with conflicting [expert] testimony, a trier of fact is free to accept or reject an expert's testimony in whole or in part [citation omitted.] . . . [and can] credit the opinion of one expert over the opinions of other experts." LLK Trust v. Town of Wolfeboro, 159 N.H. 734, 740 (2010).

Comparing the $3,350,000 estimate in the Schubert Appraisal with the $4,850,000 estimate in the Crafts Appraisal, it is evident this appeal involves a $1.5 million disagreement regarding market value (cf, Town Finding Request No. 5) stemming from two key issues:

(1) the contributory value of the vested rights to develop residential condominium units on the Marina Property (due largely to a dispute about whether a total of 44 or 28 units can or will be developed and, to a much lesser degree, due to a different per unit value estimates); and

(2) the value of the operating marina (depending largely on whether it is reasonable to make the sizable deductions in the Schubert Appraisal for loss of boat storage revenue and several other items).

The board agrees with the reasoning in these appraisals that a reasonably prudent and well-informed buyer in an arm's-length transaction is likely to add credible value estimates for each of these two components to arrive at a reasonable market value for the Marina Property as a whole. The board's findings with respect to each value component are therefore detailed below (in Sections 1 and 2).

1. Contributory Value of the Vested Rights (to Develop Residential Condominiums)

With respect to the contributory value of the vested rights, the board finds the key piece of evidence is the Taxpayer's detailed site plan approved by the Town in January, 2007 and recorded by the Taxpayer. (See Exhibits D and O.) This site plan depicts the development of two buildings on the Marina Property: one building located near the waterfront with 28 residential condominium units and 60 parking spaces; and one building located between the boat slips and the boundary of the Marina Property with 16 residential condominium units and 34

parking spaces. The Taxpayer contends the second proposed (16 unit) building should add no contributory value, but the weight of the evidence presented does not support this contention.

It is important to note this approved site plan shows all of the development occurring on the three lots that constitute the Marina Property and are the focus of this appeal, not on the fourth lot owned by the Taxpayer (4 Harris Avenue) or the adjacent lot (2 Harris Avenue) the Taxpayer recently tried and failed to acquire. (See Town Finding Request Nos. 15 and 17.b.) From a potential development standpoint, nothing of substance changed between the time the Taxpayer submitted this site plan for 44 units to the Town in 2005 (approved by the Town in 2007) and the 2010 assessment date. The site plan and the other evidence presented indicates the Taxpayer knew, or should have known, development of both the 28 unit building and the 16 unit building would likely entail relocation of several improvements and some loss of "dry" boat storage space (arising from the increased density of development) and these changes are depicted on the approved site plan. It is reasonable to conclude the Taxpayer weighed both the benefits and the costs of developing 44 condominium units on the Marina Property before presenting this site plan to the Town for approval and thereafter.

As the Town emphasized, the Taxpayer was careful to preserve its development rights for 44 residential condominium units on the Marina Property after the site plan was approved in 2007 by making additional, substantial infrastructure investments in 2009, including "construction of sewer and water lines and reconstruction of seawalls" to accommodate the 44 units. (See Town Finding Request Nos. 14.a. – 14.h.) These investments were made to persuade the Town to recognize the Taxpayer had vested rights to develop 44 units (not just 28 units).

At the Taxpayer's request, the Town Planner issued a December 1, 2011 letter confirming the Taxpayer "has achieved active and substantial development" with the approved

project plan, thereby confirming the Taxpayer's vested right to develop 44 units on the Marina Property. (See Town Finding Request Nos. 14.f. -14.g. and Municipality Exhibit C.) To this date, the Taxpayer has made no attempt to submit any modification to the approved site plan, such as one that would result in the construction of fewer condominium units. (Town Finding Request No. 14.h.) Consequently, the board is not persuaded by the Taxpayer's arguments that the contributory value of approvals for only 28 units impact the Marina Property.

Both appraisers used the sales comparison approach to estimate the contributory value of the vested rights to develop the residential condominiums and their per unit estimates are within about 10% of each other: a $40,000 per unit estimate by Mr. Crafts and a $35,813 per unit estimate by Mr. Schubert. (See Crafts Appraisal, pp. 27-31 and Schubert Appraisal, pp. 33-46.) Each identifies the same two sales (375 and 429 Ocean Boulevard), each references several other listings in the vicinity of the Marina Property and then makes somewhat different adjustments for time of sale, size and other differences.[2] The board finds Mr. Crafts' $40,000 per unit estimate to be better supported by the evidence presented and therefore more credible.

These findings blunt most, if not all, of the force of the Taxpayer's contentions that the Marina Property was disproportionally assessed. As shown in Municipality Exhibit R (prepared by the Town's attorney during the hearing), even if the board were to accept Mr. Schubert's lower $35,813 per unit value (applied to 44 units rather than 28 units) and his "Capitalized Value 'As Is'" of the marina, the resulting total market value is $4,855,772 ($3,280,000 plus $1,575,772), which is substantially above, not below, the $4.4 million equalized value of the

[2] At the hearing, the Taxpayer presented (in Taxpayer Exhibit No. 4) a third sale (83-91 Ocean Boulevard) as a comparable, but its usefulness as a value indicator is weak: as noted by the Town, the sale price shown in this exhibit and relied upon by the Taxpayer omits the fact that additional consideration was received by the seller (the right to receive two of the units to be constructed by the buyer/developer).

assessment noted above. By this reckoning, the Town's attorney argued the Taxpayer failed to meet its burden of proving disproportionality. The board, while agreeing the evidence as a whole supports a finding that no disproportionality has been shown, finds this comparison is somewhat simplistic. Section 2 therefore discusses several complicating factors influencing the value of the Marina Property, including the loss of some "dry boat storage" spaces (impacting marina revenue when the condominium development occurs) and the reasonableness of the several additional adjustments in the Schubert Appraisal.

2. The Estimated Value of the Marina (With Condominium Development)

Both appraisers used the income approach, which involves capitalization of a net operating income estimate, to develop value estimates for the marina. Their net operating income estimates are quite close to each other ($415,770 for Mr. Schubert and $420,435 for Mr. Crafts) and so are their estimated capitalization rates (12.66% for Mr. Crafts and 12.661% for Mr. Schubert). Their final value estimates, however, differ to a material degree because of deductions made by Mr. Schubert (on page 60 of his appraisal) for potential loss of boat storage income and additional costs.[3] The board will next address the reasonableness of these deductions and why they do not satisfy the Taxpayer's burden of proving disproportionality.

[3] In his appraisal (p. 60), Mr. Schubert deducts almost $936,000 for these items, as follows:

($204,095)	"Lost Storage Income"
($1,125,000)	"Dredging Expenses"
($300,000)	"Moving Boat Storage Building and Office"
+ $693,165	"Value Gained" from Dredging
($935,930)	

This deduction is about 22% of the $4,282,775 value he estimates for the marina and 28 condominium unit approvals

A. Impact on Dry Boat Storage Income

The appraisers agree the development of 44 condominium units in accordance with the approved site plan should not impact the number of boat slips (144) but will, in all likelihood, reduce the number of boat racks from 60 (prior to development) to 24 (after development); it is also evident that there may be loss of some trailer dry boat storage on the Marina Property due to the additional density of development.[4]

Both of their appraisals show excess boat storage capacity presently exists insofar as the supply of 60 boat racks exceeds historic boat rack demand. Mr. Schubert employed a 60% summer vacancy rate and a 70% winter vacancy rate to his gross rental estimates and Mr. Crafts made somewhat similar vacancy assumptions. (Compare Schubert Appraisal, p. 53 with Crafts Appraisal, p. 51.) Applying Mr. Schubert's estimated vacancy rates means the marina has a summer (peak) effective demand for only 24 boat racks (40% occupancy x 60 boat racks) and a winter (off peak) effective demand of 18 boat racks (30% occupancy x 60 boat racks) and this demand can be satisfied even if only 24 boat racks are available after the development of 44 condominium units.

Consequently, the board finds the anticipated loss of boat storage income when the condominium units are built is likely to be far less drastic than estimated by Mr. Schubert, diminishing the credibility of his value conclusion. Relying solely on "owners' estimates of lost gross income," and without showing any analysis, Mr. Schubert deducts a very large amount ("$204,095") as the "Capitalized Value of Lost Storage Income" in his valuation analysis. (See Schubert Appraisal, pp. 59-60.) The board finds this calculation significantly overstates the

[4] In this regard, the site plan approved by the Town in 2007 has, as a condition for development, a requirement that no boat trailers will be allowed on the Marina Property. (See Taxpayer Finding Request No. 8.)

magnitude of the loss likely to occur because it is not adequately supported and is undercut by the financial data presented.[5]

Adding the annual boat storage gross revenue estimates on page 54 of the Schubert Appraisal ($48,900 + $72,000 = $120,900) and applying his 35% operating expense assumption means, in his estimation, the marina generates $78,585 of annual net operating income from boat storage. On page 60 of his appraisal, he concludes condominium development will result in a loss of "$25,840" or almost 33%, of this net operating income, but the board finds this is not a credible conclusion. Applying a lower 10% loss estimate (more reasonable particularly in light of the above analysis of excess boat storage capacity) results in lost income (using Mr. Schubert's approach) of $7,858; capitalizing this lost income at his 12.661% results in a deduction of $62,065, which is $142,030 or almost 70% less than the capitalized amount ($204,095) estimated by Mr. Schubert.[6] The board therefore finds the Taxpayer failed to prove any loss of boat storage income is likely to exceed $62,000, rounded, from the value a reasonable buyer would estimate for the Marina Property.

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[5] It is also quite reasonable to conclude the condominium development will result in a higher quality marina that yields higher boat slip rental revenues, a likelihood stated by the Town's appraiser. According to Mr. Crafts: the 144 boat slips rented in the summer for rates (per linear foot) of $130 in 2010 and $135 in 2011; these rates are "on the lower end of the spectrum of rates charged by competing marinas"; and at least one of these marinas (Wentworth) offers "high end condominiums" as part of the development and charges much higher rents. (See Crafts Appraisal, pp. 49 and 16.) Higher boat slip rentals could offset, at least in part, any loss of dry boat storage revenues (as discussed above) resulting from the increased density of development when the condominiums are constructed on the Marina Property.

[6] Another problem with Mr. Schubert's calculations is that he estimates lost boat storage income while at the same time assuming only 28 condominium units will be developed. The weight of the evidence presented, however, suggests most, if not all, of the boat storage loss will occur only if 44 units (rather than 28 units) are developed (because the additional 16 units would require construction of the second building and parking spaces for these units).

B. Impact of Mr. Schubert's Estimated Dredging Expenses and Income Gain Offset

The board also heard testimony regarding how progressive siltation may cause the depth of Hampton Harbor to become shallower over time. Reasoning that major dredging activity will ultimately have to occur, presumably at the Taxpayer's expense, in order to alleviate this natural development, Mr. Schubert made a very large net deduction (over 13%) to the estimated value of the marina in his appraisal.[7]

According to the Taxpayer's witnesses, about 25 of the 144 boat slips should be referred to as "mud slips" for this reason, but the Town noted the Taxpayer continues to derive undiminished slip rental revenues from them. (See Town Finding Request Nos. 9 and 10.) The Town's appraiser (Mr. Crafts) demonstrated detailed knowledge regarding other marinas, reviewed the Taxpayer's historical revenues from the marina and did not find the possible need for future dredging to be a significant issue warranting a separate deduction from the estimated value of the operating marina.

The board examined the reasonableness of Mr. Schubert's deduction of $1,125,000 in "Dredging Expenses" (to deepen water depth and improve the 'wet storage' features of the marina) offset in part by a "capitalized" income gain of "$693,165" he assumes will occur (because the dredging activity should increase rent for the boat slips). The board agrees with the Town's counter-arguments that these calculations, based in large part on expense estimates provided by an entity affiliated with the Taxpayer, are somewhat illogical and unreasonable: in brief, the Town argued, a prudent owner or buyer of the operating marina would not invest

[7] See p. 60 of the Schubert Appraisal, where Mr. Schubert deducts from his initial "Marina Valuation" of $3,280,000 the net amount of $431,835 ($1,125,000 "Dredging Expenses" offset by "Value Gained" of $693,165, discussed further below); see also fn. 3.

$1.125 million for dredging if he or she could only anticipate recouping less than $700,000 from this outlay and the board finds this argument has merit. (Cf. Town Finding Request No. 8.)

While the Taxpayer's two lay witnesses expressed their belief dredging will be necessary at some point, no dredging work was performed either in 2010 or thereafter, the Taxpayer does not presently have a valid permit to do so and the permitting process (from both state and federal agencies) may take several years to complete. (Cf. Town Finding Request No. 7.) Thus, the board is not persuaded a deduction for future dredging (at the high net cost estimated by Mr. Schubert) is likely to be a material factor a reasonably prudent buyer of the Marina Property would have employed in tax year 2010.

The weight of the evidence supports a conclusion that dredging activity, when it occurs at some point in the future, is more likely to constitute a desirable "improvement" that will augment revenues from the marina. Even if, to the contrary, dredging could arguably be viewed as "maintenance," the estimated costs could reasonably be accounted for as part of an ongoing maintenance reserve rather than as a very large, one-time deduction from value.[8]

C. Additional $300,000 Deduction

Another problem with the value estimate in the Schubert Appraisal (see pp. 59-60) is Mr. Schubert's deduction of an additional "$300,000" as an assumed cost 'to move or rebuild' several existing structures on the Marina Property. (See also fn. 3.) The board finds this large cost deduction is somewhat speculative and not supported by the weight of the evidence presented. Unlike Mr. Schubert, Mr. Crafts made no such deduction in his appraisal.

[8] The board notes Mr. Crafts used a higher operating expense percentage (42.5%; see Crafts Appraisal, p. 50) to calculate net operating income (7.5 percentage points (over 20%) higher than the 35% used by Mr. Schubert) and this could be viewed as all or part of a reserve for future dredging.

The board agrees with the Town's arguments that such a deduction is not reasonable since it is questionable whether the additional costs estimated by Mr. Schubert are independent of, rather than already accounted for, in the estimated contributory value of the vested right to develop each condominium unit. In other words, the board finds the respective Schubert and Crafts unit value estimates mentioned above ($35,813 and $40,000, respectively) are likely based on market data and analysis intended to reflect the net contributory value of each developable unit after factoring in all relevant financial assumptions (a value arrived at after subtracting all development, construction[9] and marketing costs from the sale price of each unit). Consequently, the board finds the $300,000 additional deduction in the Schubert Appraisal is not warranted.

3. Summary and Conclusions

In summary, the board finds the Taxpayer failed to prove the Marina Property was disproportionally assessed in tax year 2010. This finding rests on consideration of the equalized value of the assessment ($4.4 million) and the Taxpayer's burden of proving disproportionality, as well as the more detailed findings presented above regarding the key areas of disagreement reflected in the two appraisals. On balance, the board finds the market value estimate in the Taxpayer's Schubert Appraisal, compared to the Town's Crafts Appraisal, to be less credible and insufficiently supported by the weight of the evidence presented.[10]

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[9] In this regard, the board notes the two sale comparisons used by both appraisers (375 and 429 Ocean Boulevard) involved what appear to be similar densities of residential development of very small lots (9 units on 0.29 acres and 15 units on 0.2 acres, respectively) and required demolition of "existing improvements" which no doubt impacted their construction costs. (See Crafts Appraisal, pp. 33-35).

[10] The equalized value of the Town's assessment is also supported by the purchase price of the Marina Property in 2003 (over $4 million, as noted above). That purchase price (represented by the Taxpayer to be "fair market value") clearly did not include the augment value caused by the vested rights to develop condominiums because those rights, at the time of purchase, did not yet exist.

Further, even if, for the sake of argument and contrary to the board's specific findings, some of the sizable deductions Mr. Schubert made to arrive at a lower estimated value (discussed above in Sections 2.A., B. and C.) are assumed to have some plausibility, they would have to total more than $600,000 for the estimated value of the Marina Property to fall below the $4.4 million equalized value of the 2010 assessment, a conclusion borne out by the 'sensitivity analysis' shown below.[11] Consequently, no further abatement is warranted for tax year 2010.

For all of these reasons, the appeal is 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

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[11] As part of its analysis of whether the tax year 2010 assessment was disproportional, the board noted the following:

"As Is" Value of marina estimated in Schubert Appraisal	$	3,280,000
Add: Contributory value of vested rights to develop condominium units (44 Units x $40,000 per unit)	$	1,760,000
Deduct: Revised estimated value of Lost Storage, rounded	$	(62,000)
Deduct: (Imputed) Error Margin*	$	(600,000)
Net value:	$	4,378,000
Rounded net value:	$	4,400,000

* To reflect possibility of additional net cost of dredging and/or additional relocation cost for existing improvements (cf. Schubert Appraisal, p. 60; and fn. 3).

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, Chair

_____
Albert F. Shamash, Member

Addendum A

The proposed findings of fact and conclusions of law filed by each party are replicated below, in the form submitted and without any typographical corrections or other changes. The board's responses are in **bold face**. With respect to the board's responses, "neither granted nor denied" generally means one of the following.

a. the request contained multiple requests for which a consistent response could not be given;

b. the request contained words, especially adjectives or adverbs, that made the request overly broad or narrow so that the request could not be granted or denied;

c. the request contained matters not in evidence or not sufficiently supported to grant or deny;

d. the request was irrelevant; or

e. the request is specifically addressed in the decision.

TAXPAYER'S PROPOSED FINDINGS

1. The parcel known as 4 Harris Avenue, Hampton, NH, was properly assessed as of April 1, 2010

   Granted.

2. The Taxpayer sought to acquire 2 Harris Avenue, Hampton, NH, but the Taxpayer's efforts in this regard were unsuccessful.

   Granted.

3. The Taxpayer sought to acquire 2 Harris Avenue, Hampton, NH, so that the 16-unit building of the approved condominium plans could be situated across 2 Harris and 4 Harris Avenue.

   Neither granted nor denied.

4. Mr. Thibeault acquired his interest in Hampton River Marina, LLC, the Taxpayer, after site plans for both a 16-unit and 28-unit building were submitted.

   Neither granted nor denied.

5. The Taxpayer took steps to insure vesting of the site plan approval for the two condominium unit buildings (both the 16-unit building and the 28-unit building) so that building the 16-unit phase would be a viable option **if** 2 Harris Avenue were acquired.

   Denied.

6. Mr. Thibeault and Mr. Iacozzi testified that situating the 16-unit building where it is currently shown on the approved plans would destroy the functionality of the marina.

   Neither granted nor denied.

7. After Mr. Thibeault acquired his interest in the Taxpayer, certain utilities were hooked up so that vesting of the site plans would be possible, but the primary expenditures in this regard related to bringing water and sewer to the contemplated 28-unit building. Expenditures relating to the 16-unit building were minimal and limited to the cost of a stub for electricity.

   Neither granted nor denied.

8. It is a condition of the site plan approvals that no boat trailers will be permitted.

   Granted.

9. It is a condition of the site plan approvals that boat rack storage must be reduced from 60 boats to 24 boats.

   Granted.

10. Reducing permitted rack storage from 60 to 24 will mean that what had once been the average number of boats stored in racks will become the ceiling on the number of boats that could be stored in racks.

    Granted.

11. Building all 44 condominium units would eliminate essentially all of the dry storage area for boats.

    Denied.

12. The Town's appraiser made no adjustment for the lost trailer storage revenue that would result from building the condominium units per the site plan approvals.

    Granted.

13. The Town's appraiser made no adjustment for the lost rack storage revenue that would result from building the condominium units per the site plan approvals.

Granted.

14. The Town's appraiser made no adjustment for the lost dry boat storage revenue that would result from building the condominium units per the site plan approvals.

Granted.

15. The Town's appraiser made no adjustment for the cost that would be incurred to move the boat ramp if the condominium units were to be built per the site plan approvals.

Neither granted nor denied.

16. The Town's appraiser made no adjustment for the cost that would be incurred to move or demolish the existing office if the condominium units were to be built per the site plan approvals.

Granted.

17. The Taxpayer has not built any of the condominium units that appear on the site plan approvals.

Granted.

18. The 2010 equalization rate for the Town of Hampton is 108.8%.

Granted.

19. The Hampton River Marina was in need of dredging in as of April 1, 2010.

Neither granted nor denied.

20. As of April 1, 2010, the accumulated silt in approximately 25 of the Taxpayer's slips prompting Mr. Thibeault to label them as "mud slips."

Neither granted nor denied.

21. As of April 1, 2010, it was clear that silt problem was getting progressively worse.

Neither granted nor denied.

22. The Taxpayer must dredge in order to preserve the marina's income stream.

Neither granted nor denied.

23. The Town's appraiser made no adjustment to reflect the need for dredging that existed as of April 1, 2010.

Neither granted nor denied.

24. The Town's appraiser did not utilize any reserve for replacement expense to account for the cost of dredging the marina.

Neither granted nor denied.

25. The Schubert appraisal should be regarded as an "as is" appraisal.

Neither granted nor denied.

TOWN'S PROPOSED FINDINGS

1. This is an appeal under RSA 76:16-a from a decision by the Hampton Board of Selectmen on an application for a property tax abatement for the tax year 2010 on a working marina with development rights for 44 condominium units at 55 Harbor Road, as to which property, at the Selectmen's level, the assessment was reduced on July 25, 2011 by $291,800 from $5,079,000 to $4,787,200 (Municipality's Exhibit A);.

Granted.

2. The Department of Revenue has assigned an equalization ratio for the tax year 2010 to the Town of Hampton of 108.8% (Town's Exhibit G), which the parties do not contest; applying this equalization ratio to the assessment for 55 Harbor Road yields a figure of $4,400,000.

Granted.

3. Each of the parties has hired an expert appraiser to appraise the marina at 55 Harbor Road and the development rights for the 44 condominium units for which site plan approval was obtained from the Hampton Planning Board on January 5, 2005 (Town's Exhibit C) reflected in a set of plans (Town's Exhibit M) signed on January 5, 2007 and recorded as Plan D-34462 (Town's Exhibit D; Town's Exhibit O). The taxpayer's only expert for which it has provided a report is Charles F. Schubert of Applied Economic Research, and his report is dated January 24, 2012 and his last inspection occurred on January 14, 2012 (Taxpayer's Exhibit 1). The Town's expert is John M. Crafts of Craft's Appraisal Associates, Ltd. and his report (Town's Exhibit F) is dated May 2, 2013, and his inspection of the property occurred on October 31, 2012.

Neither granted nor denied.

4. The marina property was purchased on August 28, 2003, for $4,016,256; the taxpayer now claims on page 7 of the Schubert Report that the purchase price did not reflect fair market value, but its principal signed a PA-34 Department of Revenue Administration form under oath on August 28, 2003 (Town's Exhibit B) indicating that the sales price of $4,016,256 did indeed represent the fair market value of the property, and at the time of the sale, a mortgage to Ocean National Bank was recorded in the amount of $3,750,000. (Town's Exhibit J)

Neither granted nor denied.

5. Both appraisers used the same approaches to valuation: a) the comparable sales approach for the development rights for the approved condominiums, and b) the income approach for the value for the marina itself, but Mr. Schubert's opinion of value as of April 1, 2010 is $3,350,000 (which is less than the equalized assessed value of $4,400,000 by about a million dollars), whereas Mr. Craft's opinion of value as of April 1, 2010 is $4,850,000 (which is more than the equalized assessed value of $4,400,000 by about $450,000).

Neither granted nor denied.

6. Mr. Schubert's cover letter to his Report states that his value conclusion is based on the property's "as is" condition; however, his appraisal opinion of value for the marina is premised upon hypothetical conditions—a) that dredging work has been performed at a cost of $1,125,000, and b) that the development of 16 out of the 44 condominium units would result in an unacceptable loss of income to the marina. A "Hypothetical Condition" is defined by the Uniform Standards of Appraisal Practice as "that which is contrary to what exists but is supposed for the purpose of analysis."

Neither granted nor denied.

7. The dredging expenses claimed by Mr. Schubert come in part from the owner itself, but the taxpayer admits that the dredging work has not been performed in 2010 or at any time since; the 2008 dredging permit application materials contained in the Schubert Report beginning on page A-41 did not in fact result in a permit being granted as separate Federal requirements were not met and as a result, per the rebuttal testimony of Mr. Iacozzi, a new application to dredge had to be made beginning in 2012 that has taken a couple of more years to process.

Neither granted nor denied.

8. Mr. Schubert's inclusion on page 60 of his Report of the $1,125,000 expense for dredging makes no business sense to incur (i.e. is not financially feasible) where the additional real estate value of $693,165 that he indicates would be generated from performing the dredging on page 60 of his Report is substantially less than the dredging expense; the component of the dredging costs that represents the owner's work has in fact doubled to $305,000 from the $150,000 that appears on page 60, as shown on a letter dated April 22, 2013 from one entity owned by Mr. Thibeault (Thibeault Corporation) to the taxpayer, which is an LLC of which Mr. Thibeault is a member. (See page 8 of Taxpayer's Exhibit 2).

Neither granted nor denied.

9. The area of boat slips that the Taxpayer claims should be dredged is confined to the northwesterly corner of the outside rectangle of slips; Mr. Iacozzi on rebuttal admitted that even those slips are still rentable for smaller boats and at the same per foot rental cost as for the other slips.

Granted.

10. Even without dredging, the income from the marina has remained fairly constant from 2007 to 2011, except for 2009, when there was a significant drop in income due to damage from a major storm, requiring subsequent reconstruction of much of the docking facilities, which was performed. See Crafts Report at pages 41-44; Town's Exhibits F and N.

Granted.

11. If the dredging expenses are excluded, the two appraisers here arrive at similar values for the marina operation itself using the income approach (and before factoring in the development rights value of the condominium units): the Schubert Report on page 60 puts this figure at $3,280,000 (Taxpayer's Exhibit 1) whereas the Crafts Report for the Town on page 59 puts this figure at $3,090,000 (Town's Exhibit F).

Granted.

12. As to additional value from the 44 approved condominium units, Mr. Schubert assigns a value of $35,813 per unit using 3 comparable sales of properties in Hampton, whereas Mr. Crafts for the Town assigns a value of $40,000 per unit using 4 comparable sales, 3 of which are the same as those used by Mr. Schubert. If all 44 condominium units are valued, as they should be, Mr. Schubert would show $1,575,772 in value for the development rights whereas Mr. Crafts attributes $1,760,000 in value to those development rights. Town's Exhibits F and R.

Neither granted nor denied.

13. The Mr. Schubert's presentation of an additional comparable at 83-91 Ocean Boulevard (Taxpayer's Exhibit 4) is flawed as to the total sales price, inasmuch as $615,000 of consideration from the deeding of two condominium units back to the seller (Town's Exhibit Q) was omitted from the sales price; using the same methodology to arrive at a price per unit as Mr. Schubert used without adjustments on Taxpayer's Exhibit 4, the accurate Price per Unit on Taxpayer Exhibit 4 should instead have been $47,619, which supports Mr. Craft's opinion of value and not Mr. Schubert's.

Neither granted nor denied.

14. The Hampton Planning Board's records (Town Exhibit K) indicate as follows with regard to the 44 unit condominium development:

a. As proposed by the taxpayer, this development was conditionally approved by the Hampton Planning Board on January 5, 2005, utilizing a set of plans marked as Town's Exhibit M, which shows the development being built in two buildings, one containing 28 units and the other containing 16 units.

Granted.

b. At its January 4, 2006 meeting, the Planning Board voted to grant a one year extension of the conditional approval to January 5, 2007.

Granted.

c. On January 5, 2007, the Chairman of the Planning Board signed the proposed Site Plan for the Hampton Marina Condominiums, which was recorded in the Rockingham County Registry of Deeds as Plan D-34462. Town's Exhibit D and O.

Granted.

d. At its May 16, 2007 meeting, the Planning Board granted the Plaintiff's requests for modification of the Board's definition of "active and substantial development" to include basic infrastructure only, and to extend the vesting period from January 5, 2008 to January 5, 2009.

Granted.

e. At its November 19, 2008 meeting, the Board voted to grant an extension of vesting to its June 5, 2009 meeting.

Granted.

f. By e-mail to the then Town Planner dated November 30, 2011, Vincent Iacozzi for Hampton River Marina asked for a statement to verify, as a result of the infrastructure work that was done in June of 2009 with the construction of sewer and water lines and the reconstruction of seawalls, that active and substantial development had been achieved.

Granted.

g. The then Hampton Town Planner replied to this request by letter to Mr. Iacozzi dated December 1, 2011, confirming that the infrastructure work was done and that the condominium project had therefore achieved active and substantial development.

Granted.

h. Plaintiff has filed no application with the Hampton Planning Board seeking to reduce the number of condominium units in the approved development.

Granted.

15. That the taxpayer's representatives may at one time have been contemplating the idea of trying to place the second, 16 unit condominium building on two properties to the east on Harris Avenue is of no relevance, as they did not buy one of the properties to do so and have never sought from the Hampton Planning Board to amend the approved site plans to eliminate the 16 unit building and have instead done everything necessary to vest the taxpayer's rights to build all 44 units' worth of condominiums as originally platted with both buildings on the 55 Harbor Road site.

Granted.

16. Mr. Schubert claims in his report on page 60 that 16 of the 44 condominium units should be assigned no value, but from page 16 and 32 of his report, it is clear that this conclusion is based solely upon Mr. Schubert's discussions with the property owners; Mr. Schubert has offered no independent analysis to support his assumption that the 16 units are not feasible to develop.

Neither granted nor denied.

17. According to page 16 of Mr. Schubert's Report, "the owners contend that about one-half the marina revenue will be lost if the 16 units are built." The income analysis in the Schubert Report itself shows this contention to be false:

a. The Schubert Report on page 53 outlines in detail the various sources of revenue of the marina in 2010, and about $500,000 of the marina's $643,776 in effective gross income derives from the rental of 144 boat slips that are in the water; it is clear from comparing the approved site plan (Town's Exhibit O) with the existing conditions plan (Town's Exhibit E) that the location of the 16 unit building would replace none of those slips, and therefore that the vast majority of marina income would not be lost from building the 16 unit building.

Neither granted nor denied.

b. Another source of revenue in 2010 for the marina shown in Mr. Schubert's Report on page 53 is $13,421 for Buildings, but it is clear from the site plan approved by the Planning Board (Town's Exhibit M) that the location of the 16 unit building would displace none of these existing Buildings as the 16 unit building would be located on previously vacant land. (Compare Town's Exhibit O with Town's Exhibit E).

Granted.

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; and Chairman, Board of Selectmen, Town of Hampton, 100 Winnacunnet Road, Hampton, NH 03842.

Date: 01/30/15

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Anne M. Stelmach, Clerk