

Ernest J. Thibeault, III

v.

Town of Hampton

Docket Nos.: 25966-10PT/26582-11PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2010 assessment of \$465,800 and 2011 assessment of \$419,300 on Map 295/Lot 59/5/B, 27 Duston Avenue, a residential condex (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 levels of assessment in the municipality. Id. The board finds the Taxpayer failed to prove disproportionality.

The Taxpayer argued the assessments were excessive because:

(1) the Property is in the “Duston Avenue” condex development, which has similar design features to the adjacent “Harbor Road” condominiums built by the same developers;

- (2) Duston Avenue consists of five two-unit (duplex) buildings and these condex units have “water access,” but are not “waterfront” residences like the Harbor Road condominiums;
- (3) there is a common pool, club house and boat slips offered to the Harbor Road condominium unit owners at discounted rates, but not to the Duston Avenue condex owners;
- (4) the Harbor Road units have good water views and the Duston Avenue units only have views from their third and fourth floors, except for several that have better view angles;
- (5) the Harbor Road units have higher market values than the Duston Avenue units (as shown in the analysis of sales in Taxpayer Exhibit No. 1) and this difference is about 15% in favor of the Harbor Road units as indicated by the sales in Taxpayer Exhibit No. 1;
- (6) according to a listing broker (Kathy Macgregor), the Harbor Road units have better kitchens and higher market values than the Duston Avenue units, which are also harder to finance;
- (7) the Town abated the 2010 assessments on four other Duston Avenue units but not on the Property; and
- (8) the market value of the Property was in the \$350,000 - \$375,000 range in 2010 and in the \$325,000 - \$350,000 range in 2011 and the assessments should be abated accordingly.

The Town argued the assessments were proper because:

- (1) the Town performed a revaluation in tax year 2011;
- (2) the Taxpayer is a developer of both the Duston Avenue condex development and the adjacent Harbor Road condominium unit development;
- (3) the Property is an end unit within the Duston Avenue development and has unobstructed views and a better location relative to other units (such as 9 – 19 Duston Avenue) which have lower assessments based on these factors;

(4) the Town's photographs (particularly Exhibits G, H and J) show these differences in views and amenities;

(5) the Property was the "model" unit for Duston Avenue and such units generally are improved with higher end upgrades compared to other units;

(6) the Property has a clear view of the state pier and the water (as shown in the photograph in Municipality Exhibit E);

(7) the most comparable sale is 23 Duston Avenue, which sold for \$450,000 in October, 2010, and it is supportive of the assessments under appeal;

(8) the Taxpayer representative's analysis in Taxpayer Exhibit No. 1 is not credible and neither is his reliance on hearsay statements from a "local real estate agent" (cf. Taxpayer Exhibit No. 1); and

(9) the Taxpayer failed to meet his burden of proving disproportionality.

The board held a consolidated hearing on these appeals on August 28, 2013. The parties agreed the levels of assessment in the Town were 108.8% in 2010 and 96.5% in 2011, the median ratios calculated by the department of revenue administration.

Board's Rulings

Based on the evidence presented, the board finds the Taxpayer failed to prove the assessments were disproportional and, thus, the appeals are denied.

As the parties recognize, assessments must be based on 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, 368 (2003). To establish disproportionality and obtain abatements, the Taxpayer had the burden of proving the market value of the Property was materially less than approximately \$430,000 in 2010 and 2011 (because \$465,000 assessed value in 2010 divided by

108.8% level of assessment in 2010 = \$428,125; and \$419,300 assessed value in 2011 divided by 96.5% level of assessment in 2011 = \$434,508). The board considered all of the evidence presented before finding the Taxpayer did not provide sufficient market evidence to meet his burden of proving disproportionality.

In determining whether an assessment is proportional, all relevant factors affecting market value must be considered. Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1975). Cf. LSP Assn. v. Town of Gilford, 142 N.H. 369, 379-80 (1997) (Horton, J., dissenting):

“Each unit's proximity to the lake, views, and other amenities contributes to its individual value. [Citations omitted.] Location can be considered in computing fair market value. [Citation omitted.]”

The Property is an end unit and, based on the photographs, layout and other evidence presented, has the best view of all the Duston Avenue units due to its location at the end of the line of five buildings, with a view of the water (and the state pier) from each of its four levels. The remaining units, in comparison, are more obstructed by the 21 Harbor Road condominium units situated along the waterfront. The Town also noted the Property was built as the “model unit” for the development and the Taxpayer is one of the developers.

A key issue in this appeal is whether the sale of another unit close to the Property in the same condex development, 23 Duston Avenue for \$450,000 in October, 2010, is probative of the value of the Property. The Town presented persuasive evidence 23 Duston Avenue is the best comparable sale for estimating the market value of the Property. This comparable has better views than most other Duston Avenue units but not as good as the Property. Of the ten units, the four most westerly units (21, 23, 25, and 27) have the benefit of better water views and this amenity enhances their market value. The views are also shown in Taxpayer Exhibit No. 2 at p.

4, where the Property is described as having a “Sunset View from our deck!” and “Amazing water views,” and this is also evident from its location shown in Municipality Exhibit J.

It is also clear from this exhibit that 23 Duston Avenue is part of a building in the interior of the development and therefore has condex buildings on both sides which diminishes privacy and partially obstructs its views, whereas the Property is in the last condex building and therefore has an open view with no adjoining building on one side. The board finds the enhanced views of the water from the side of the Property and the additional separation from other units in the development are likely to be value enhancing features when comparing the Property to other units, including 23 Duston Avenue.

The Taxpayer asked the board to exclude the sale of 23 Duston Avenue because its representative considered the price to be an “outlier” when compared to three other Duston Avenue sales (#9 for \$360,000 in June, 2013, well after the 2010 and 2011 assessment dates, # 17 for \$367,500 in October, 2009 and #19 for \$350,000 in March, 2011, as shown in Taxpayer Exhibit No. 1). The board is not persuaded, however, that the 23 Duston Avenue sale was an outlier or an aberration from the market. Rather, the higher sale price likely reflects its superior water views and other amenities, when compared to these three other unit sales which the Taxpayer relied upon.

The board considered all of the evidence presented, including an “email” from the prior owner of 23 Duston Avenue to Vincent Iacozzi documenting the upgrades to the unit (Taxpayer Exhibit #1 at p. 4). The board is not persuaded the upgrades were significantly different than the Property which was built as the model unit for the development. Model units typically have upgrades which other units do not offer. See Taxpayer Exhibit 2, pp. 4 and 5, a photo gallery which appears to be from a listing of the Property. These photos depict the Property has a

“Gourmet kitchen w [sic] granite... Gas stove stainless steel... Jacuzzi in master bath.” The Taxpayer made no attempt to rebut the fact that the Property is an upgraded unit. In fact, the Taxpayer disagreed with the Town that a view of the Property and the other units would be helpful to the board in deciding these appeals. (See the board’s October 2, 2013 Order.)

The Taxpayer’s representative also stated a local real estate agent (Kathy Macgregor) told him the buyer of 23 Duston Avenue paid above market in a cash transaction and, had an appraisal been required, she believed it would have ‘stopped the transaction.’ This statement, however, is highly speculative and is of no probative value. Ordinarily, the cash price offered for a property is lower, not higher, than the price offered subject to obtaining a mortgage or other contingency. Further, without having Ms. Macgregor present at the hearing to testify as to the nature of this or other sales or the quality and grade of the interior fit-ups, neither the Town nor the board had the opportunity to examine the basis of her alleged statements to the Taxpayer’s representative.

The Taxpayer also asserted abatements on the Property were warranted because the Town had granted 2010 tax abatements on four other Duston Avenue units. The board does not agree. On the evidence presented, the board finds the Town took into account the Property’s superior location and views when it denied an abatement on the Property but granted abatements on four other units owned by the Taxpayer’s company (Waters Edge Yacht Club). The Town concluded the four other units (9, 11, 13 and 19 Duston Avenue) had a “fair market value of \$375,000 for 2010” and equalized this value to abated assessments of \$408,000 each for 9, 11 and 19 Duston Avenue and \$408,100 for 13 Duston Avenue in tax year 2010. (Taxpayer Exhibit No. 4.)¹

¹ The board finds no support in the evidence for the Taxpayer’s arguments that the Property had the same or a lower market value (in the “\$350,000 - \$375,000 range” in 2010, for example, as noted above) than these units.

One possible way of using the Town's abatements on these units to prove disproportionality would have been for the Taxpayer to establish that the readily apparent location and view differences between the Property and these four units (leaving aside other features) was less than about \$58,000 (\$465,800 versus \$408,000). The Taxpayer, however, failed to do so. The historic selling prices listed in Taxpayer Exhibit No. 1 (p. 6) in fact demonstrate that value differences between Duston Avenue units have been as much as \$235,000 (\$585,000 compared to \$350,000), attributable in part to the times of sale but also to value differences perceived by the market based on location, water view and perhaps other factors.

As stated above, the Property differs from 9, 11, 13 and 19 Duston Avenue because of its superior location and wider, more expansive views. See 2010 assessment-record card ("AMMENITY [sic] = BETTER LOCATION/VIEW) and 2011 assessment-record card (Condo data – Code "A" View, Factor 130 percent). See also Municipality Exhibit J, three aerial photographs of the Duston Avenue and Harbor Road developments. These photographs clearly demonstrate units 23, 25 and 27 (the Property) do not have the same obstructed views as the other Duston Avenue units.

The board is not persuaded the Town acted in an improper or unreasonable manner when it granted abatements on the four other units in good faith without also granting an abatement on the Property due to these clear differences. The evidence presented also shows the Town assessed other Duston Avenue units with better locations and water views than these four units in a manner consistent with how it assessed the Property. A consistent methodology is some evidence of proportionality. See Bedford Development Co. v. Town of Bedford, 122 N.H. 187, 189-90 (1982).

For all of these reasons, the board finds the Taxpayer failed to prove the Property was disproportionately assessed in tax years 2010 and 2011. 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 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

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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:

Anne M. Stelmach, Clerk