

**John X. Doherty Rev. Trust of 2001 & Susan E. Doherty Rev. Trust of 2001**

**v.**

**Town of Windham**

**Docket No.: 26470-11PT**

**DECISION**

The “Taxpayers” appeal, pursuant to RSA 76:16-a, the “Town’s” 2011 assessment of \$1,038,600 (land \$310,000; building \$728,600) on Map 17/J/70/D, 8 Granite Hill Road (the “Property”), a residential, waterfront condominium on 0.37 acres of land owned in fee simple with an additional 6.34 acres of common area land. For the reasons stated below, the appeal for abatement is denied.

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 failed to prove disproportionality.

The Taxpayers argued the assessment was excessive because:

- (1) the Property, located in the five unit “Granite Hill” condominium development on Cobbett’s Pond, was initially assessed in tax year 2010 for \$1,260,000 but, after abatement applications were filed by the unit owners, the Town reduced the assessments by varying amounts (as shown in Taxpayer Exhibit No. 1, Tab C), abating the assessment on the Property to \$1,038,600;
- (2) the Taxpayers agreed to the reduced assessment of \$1,038,600 in 2010 in order to effect a settlement and avoid further costs (see Settlement Agreement dated August 24, 2011, Municipality Exhibit B), not because they agreed this amount was reflective of the Property’s market value (either in 2010 or 2011);
- (3) two appraisals demonstrate the assessment on the Property is disproportional: the “Underwood Appraisal” (completed to support the 2010 abatement application) estimating a market value of \$731,600; and the “Shurtleff Appraisal” (completed in January, 2011 for refinancing purposes) estimating a market value of \$900,000;
- (4) 4 Granite Hill, located in the same condominium but superior to the Property in size and other amenities, sold twice, once in July, 2011 for \$1,030,000 (including payment of back taxes) and again in October, 2012 for \$1,070,000 and both sale transactions were arm’s-length in nature with sale prices reflecting market value;
- (5) the Property is overassessed in comparison to several other waterfront properties, as shown in Taxpayer Exhibit No.1, Tabs H, I and N and Taxpayer Exhibit No. 2;
- (6) the Town did not adequately account for the Property’s proximity to a commercial banquet facility or the interstate highway (I-93) and its access road, all of which negatively impact its market value; and

(7) the assessment should be abated based on a market value of \$800,000 (as stated in the appeal document).

The Town argued the assessment was proper because:

- (1) the Town performed a revaluation in tax year 2010 and, after receiving abatement applications for all five Granite Hill condominium units, performed a physical inspection and adjusted the assessments using a consistent methodology (see Municipality Exhibit A) to arrive at the \$1,038,600 assessed value for 2010 the Taxpayers agreed to in a Settlement Agreement (Municipality Exhibit B) and this assessment is also proportional for tax year 2011;
- (2) the Town completed a sales analysis using three comparable waterfront properties and concluded the market value of the Property in 2011, based on these sales, was within a range that is supportive of the proportionality of the assessment;
- (3) the Taxpayers did not submit to the board either the Underwood or Shurtleff Appraisals (but only provided the cover and first page of the Shurtleff Appraisal in Taxpayer Exhibit No. 1) and therefore no weight can be given to them as evidence of market value;
- (4) the Town did not use 4 Granite Hill as a comparable in its analysis because the July, 2011 sale indicated the seller was in “financial difficulty” (atypically motivated) and the October, 2012 sale occurred well after the April 1, 2011 assessment date;
- (5) on a per square foot basis, the Taxpayers’ assessment comparables (at 17 and 19 Farmer Road, for example) are supportive of the assessment on the Property and, even if it is assumed such properties were underassessed, that assumption does not carry the Taxpayers’ burden of proving the Property was disproportionately assessed in 2011 based on its market value; and
- (6) the appeal should be denied.

The parties agreed the level of assessment was 98.7% in tax year 2011, the median ratio calculated by the department of revenue administration. At the close of the hearing, the Town submitted a “Memorandum” to support its position that the appeal should be denied.

### **Board’s Rulings**

Based on the evidence presented, the board finds the Taxpayers failed to meet their burden of proving the Property was disproportionately assessed in tax year 2011. The appeal is therefore denied for the following reasons.

As prescribed in RSA 75:1, ad valorem assessments must be based on market value. Proportionality is determined by arriving at a reasonable estimate of market value adjusted by the level of assessment in the Town. 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 order to prevail in this appeal, the Taxpayers had the burden of proving the market value of the Property in 2011 was less than approximately \$1.05 million, rounded (\$1,038,600 divided by the 98.7% level of assessment).

The Property is in the 5-unit Granite Hill condominium and consists of a 0.37 acre lot (owned in fee) and an undivided one-fifth interest in 6.34 acres of common area with 335 feet of waterfront on Cobbett’s Pond. (See Municipality Exhibits A and D.) Granite Hill is a gated community with a privately maintained road used exclusively by the owners of the five units and their guests. The Property is at the end of this private road, is well situated on a “knoll” with good views of Cobbett’s Pond and has the right to one private boat dock.

In 2010, in response to abatement applications filed by the owners, the Town reduced the assessments on all five units, including the Property. (See Tab C of Taxpayer Exhibit No. 1.) In

a Settlement Agreement (Municipality Exhibit B) signed on August 24, 2011, the Taxpayers agreed to an abated assessed value of \$1,038,600 on the Property for tax year 2010.

The Taxpayers contend the \$1,038,600 assessment is disproportional for tax year 2011. They provided no evidence regarding any changes in market values between 2010 and 2011. Instead, they rely on the market value estimates in two appraisals (the Underwood and Shurtleff Appraisals), but did not produce either appraisal as evidence or call either appraiser as a witness in this appeal. These appraisals resulted in very different value conclusions (\$731,600 in the Underwood Appraisal and \$900,000 in the Shurtleff Appraisal). The latter appraisal, completed in January, 2011, undercuts the Taxpayers' argument that the Property only had a market value of \$800,000 in 2011. (See Town Memorandum, pp. 3-4.)

The board is unable to place material weight on these appraisals for several reasons. First, the Taxpayers chose not to submit either of them as evidence and did not rely on the value conclusions reached in the appraisals and instead offered their own opinion of market value. Further, the Town's own review of the Shurtleff Appraisal indicates it contained material errors that lessen its credibility.<sup>1</sup> For these reasons, the board finds mere recitation of the disparate value conclusions in these two appraisals, without producing them as evidence or calling the appraisers as witnesses, does not satisfy the Taxpayers' burden of proving disproportionality.

Evaluating the evidence presented, the board finds the best evidence of the Property's market value can be derived from two comparable sales used by the Town and one submitted by the Taxpayer. The Town comparable sales, 28 Horseshoe Road and 54 Turtle Rock Road, are

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<sup>1</sup> According to the Town, these errors included: incorrect information regarding the number of units in the development (six units rather than five); identifying the Property as "Proposed construction" rather than a finished house; using a lower room count and square footage based on only the "Finished area above grade"; using one comparable located in another town (Salem); and not making reasonable adjustments for the superior features of the Property relative to the comparables selected. (See Municipality Exhibit C.)

within ½ mile of the Property and are also on Cobbett's Pond<sup>2</sup>. 28 Horseshoe Road sold for \$1,250,000 in October, 2009 and 54 Turtle Rock Road sold for \$875,000 in May, 2011. The Taxpayers rely on only one comparable, 4 Granite Hill, which is in the same condominium development and sold twice: once in July, 2011 for \$1,030,000 (including \$30,000 in back taxes paid by the buyer); and again in October, 2012 for \$1,070,000.

Although the Town treated both of the 4 Granite Hill sales as "qualified" (for equalization purposes), it did not use either as a comparable sale in this appeal because the seller in the first transaction was in financial difficulty and the second sale occurred 19 months after the April 1, 2011 assessment date. The board finds some weight can be placed on 4 Granite Hill because of its proximity and similarities to the Property and the fact the two sales (within a reasonably narrow time frame) lead to a consistent conclusion regarding market value. The board finds the likely market value of 4 Granite Hill was approximately \$1,070,000, as of the April 1, 2011 assessment date.<sup>3</sup>

After considering physical differences between the Property and these three comparable sales, making appropriate adjustments for these differences and placing slightly less weight on the 54 Turtle Rock Road sale (because of the larger magnitude of adjustments needed due to style and quality differences), the board finds the indicated value of the Property, as of the April 1, 2011 assessment date, was approximately \$1,060,000 (based on an adjusted value range of \$1,030,000 to \$1,090,000). When adjusted by the 98.7% level of assessment noted above, this market value finding is supportive of the assessment under appeal.

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<sup>2</sup> The third sale used by the Town in the analysis in Municipality Exhibit A (31 W. Shore Road) is on Canobie Lake and is a farther distance (two miles) from the Property, making it less comparable for both of these reasons.

<sup>3</sup> More reliance is placed on the second sale because the first sale was arranged very quickly (within one day of its listing) at a price well below its listing price of \$1,199,000, which suggests the first seller probably had atypical motivations for agreeing to this price.

The board considered all of the other evidence presented by the Taxpayers, including the assessments on two waterfront residences at 17 and 19 Farmer Road (Taxpayer Exhibit No. 1, Tab H) and 166 Range Road (Id., Tab N, and Taxpayer Exhibit No. 2). The board does not agree these assessments meet the Taxpayers' burden of proving the Property was disproportionately assessed.

17 and 19 Farmer Road have almost identical design features (as evident from the Taxpayers' photograph in Taxpayer Exhibit No. 1, Tab H) and were constructed by the same developer at the same time. While each house has the same "A+" grade as the Property, they are considerably smaller in size (2,688 square feet versus 3,658 square feet). Although the two Farmer Road lots are larger (0.85 acres and 1.28 acres), each is bisected by a right-of-way, which makes the buildable area of each lot (0.35 acres and 0.28 acres) comparable to the fee simple lot size of the Property (0.37 acres). (See Taxpayer Exhibit No. 2.) These two lots, unlike the Property, are not on a private gated road, do not have the additional 6.34 acres of common area land enjoyed by the Property and the waterfront of each lot is considerably smaller (less than 1/3 of the frontage owned in common by the Property and the other four units in Granite Hill).

Based on the evidence presented, the board finds the Property enjoys superior privacy and other amenities, lessening the comparability of its assessment to the assessed values of 17 and 19 Farmer Road. According to the Town, the assessments of these properties on a per square foot basis, when compared to the assessment on the Property using the same metric, supports the proportionality of the assessment: 17 and 19 Farmer Road are assessed at approximately \$295 per square foot of gross living area, whereas the Property is assessed at approximately \$284 per square foot. Even if, for the sake of argument, the board were to assume a discrepancy exists in the assessments of these properties (for approximately \$240,000 less than

the Property), their possible underassessment does not prove the overassessment of the Property. See Appeal of Cannata, 129 N.H. 399, 401 (1987).

For analogous reasons, the assessment of 166 Range Road (for approximately \$250,000 more than the Property) is not probative on the issue of whether the Property was proportionally assessed. (In fact, due to size differences, the assessed value per square foot of gross living area for 166 Range Road is approximately \$288 per square foot, about \$4 higher than the Property.)

The board also considered the locational attributes of the Property, specifically its proximity to I-93 and an exit from that highway (to Route 111), and a commercial banquet facility. The Town's assessor testified he considered these locational features and adjusted one of the land valuation factors downward in arriving at the 2010 abated assessment value and the board finds no further adjustment is warranted for tax year 2011.

The board considered the cost information presented in this appeal as a further test of the proportionality of the assessment. The Taxpayers purchased the lot for \$325,000 in December, 2005 and then paid a builder an "estimated" \$550,000 to construct the residence in October, 2007 for a total out-of-pocket cost of \$875,000. (See Taxpayer Exhibit No. 1, answer to Town's Interrogatory No. 3). This sum does not include additional finish work and painting that the Taxpayers performed to complete the house. The board also noted the Town's own detailed cost estimate in Municipality Exhibit A for the land, building and extra features on the Property calculates a value that is supportive of the assessment under appeal.

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 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: John X. Doherty Rev. Tr. of 2001 & Susan E. Doherty Rev. Tr. of 2001, John & Susan Doherty, 8 Granite Hill Road, Windham, NH 03087, Trustees for the Taxpayer; Chairman, Board of Selectmen, Town of Windham, PO Box 120, Windham, NH 03087; and Bernard H. Campbell, Esq., Beaumont & Campbell Prof. Assn., 1 Stiles Road - Suite 107, Salem, NH 03079, counsel for the Town.

Date: May 22, 2014

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Anne M. Stelmach, Clerk