

Joseph A. Austin

v.

Town of Chichester

Docket No.: 27483-13PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2013 assessment of \$459,100 (land \$173,600; building \$285,500) on Map 3/Lot 68B, a single-family home on 13.243 acres (the “Property”) located at 362 Dover Road. For the reasons stated below, the appeal for abatement is granted.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the assessment 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); Appeal of City of Nashua, 138 N.H. 261, 265 (1994). To establish disproportionality, the Taxpayer must show the Property’s assessment was higher than the general level of assessment in the municipality. Id. The Taxpayer carried this burden.

The Taxpayer argued the assessment was excessive because:

- (1) in November, 2005, the Town approved a site plan for development of the Property with a 17-unit residential condominium project, but the condominium documents required by RSA 356-B:7 were never completed or recorded in the Merrimack County Registry of Deeds (“MCRD”);
- (2) a mortgage broker (“FRM”) was supposed to assist in obtaining financing for the condominium project, however, they were operating a “Ponzi scheme” and the funds were never provided;
- (3) FRM facilitated numerous mortgages on the 17-condominium units (none of which were ever constructed) which could not be legally sold and these mortgages have resulted in the Property having significant title problems as of the April 1, 2013 date of assessment and the Property is not marketable;
- (4) FRM was also supposed to complete the requisite condominium documents but never did so and, beginning in 2009, the Property was “tied up” in federal bankruptcy court proceedings involving FRM and was not “released” from the bankruptcy court until sometime in 2013;
- (5) the Town’s contract assessor (David Hynes) sent out a notice setting a preliminary assessment of \$379,300 for tax year 2013, however, the final 2013 assessment increased to \$459,100 and the Town never explained the increase; and
- (6) the improvements on the Property are incomplete and require repairs and/or replacement including roof repairs, windows, a septic system, central heating system, one kitchen, flooring throughout the house, bathrooms, trim work, landscaping, etc.

The Town argued the assessment was proper because:

- (1) for tax year 2013, the Town properly assessed the Property as a single-family residence on a 13.243-acre lot in a commercial zoning district and the Town did not assign any contributory value associated with the approvals for development of the condominium;
- (2) the Taxpayer could have elected to have the Property assessed as a residence in a commercial zone, but did not file the requisite application pursuant to RSA 75:11;
- (3) the Town inspected the Property and has properly accounted for the items that would require finish work and has adjusted the assessment on the improvements by 15%; and
- (4) the Taxpayer presented no evidence of market value and therefore the appeal should be denied.

The parties agreed the level of assessment in tax year 2013 was 99.6%, the median ratio calculated by the department of revenue administration. During its deliberations, the board decided to view the Property. The board conducted the view on July 14, 2015 with the Taxpayer and Chad Roberge of Avitar Associates of New England, Inc. (“Avitar”), the contract assessor for the Town.

Board’s Rulings

Based on the evidence, the board finds the proper assessment to be \$164,100. Therefore, the appeal is granted.

In arriving at a judgment regarding proportionality, the board applies its learning and experience in taxation, real estate appraisal and valuation. See RSA 71-B:1; see also RSA 541-A:33, VI. Arriving at a proper assessment is not an exact science, but a process requiring use of informed judgment and experienced opinion. See, e.g., Brickman v. City of Manchester, 119 N.H. 919, 921 (1979) (use of judgment in selecting valuation methodology and assumptions).

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

Although the right to an abatement and the board's powers in these proceedings are dictated by statute, the statutory authority contained in RSA 76:16-a to "make such order thereon as justice requires" confers broad discretion and equitable powers to abate taxes. Cf. Porter v. Town of Sanbornton, 150 N.H. 363, 368 (2003).

The legislature created the board as a tribunal specializing in valuation issues (property tax and eminent domain) and requiring the board members be "learned and experienced in questions of taxation or of real estate valuation and appraisal...." (See RSA 71-B:1.) As a specialized tribunal, the board has de novo appellate authority to review all the evidence submitted. To determine whether an abatement is warranted, the board considers and weighs the evidence presented, utilizing its "experience, technical competence and specialized knowledge." See former RSA 541-A:18, V(b), now RSA 541-A:33, VI, quoted in Appeal of City of Nashua, 138 N.H. 261, 265 (1994) (the board must employ its statutorily countenanced ability to utilize its "experience, technical competence and specialized knowledge in evaluating the evidence before it.") Further, in making its findings where there is conflicting evidence, the board must determine for itself the credibility of the witnesses and the weight to be given the testimony of each because "judgment is the touchstone." See, e.g., Appeal of Public Serv. Co. of New Hampshire, 124 N.H. 479, 484 (1984), quoting from New England Power Co. v. Littleton, 114 N.H. 594, 599 (1974) and Paras v. City of Portsmouth, 115 N.H. 63, 68 (1975); see also Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 256 (1994).

Background

In this instance, the board finds a summary of the recent history regarding the Property is relevant to its findings. This history is largely undisputed and is based on the record as a whole, including various documents recorded at the MCRD and the testimony of the Taxpayer, John Boender (a mortgage holder), Attorney Maureen Higham, representing J. Bruce and Elaine M. Gatchell (the “Gatchells”, the Taxpayer’s former partners and a mortgage holder) and the board’s own view of the Property.

The Property is a 13.243-acre lot improved with a large, partially constructed log style residence. The Property has road frontage on Dover Road, also known as Route 4, a heavily traveled state highway that connects Concord to the seacoast area. The Property is irregularly shaped and access to the improvements is via a gravel driveway approximately 800 feet long.

(See Municipality Exhibit A.)

In 2004 or 2005, the Gatchells invested in the Property in order to finish construction of the residence and develop the land as a residential condominium development. Ownership of the Property transferred from the Taxpayer (singularly) to the Taxpayer and the Gatchells; it was subsequently transferred to Chichester Condominium Corporation (the “Corporation”). As of April 1, 2013, the Property was in the name of the Corporation.

In October, 2005, the Taxpayer received a certificate of registration for the condominium development from the State of New Hampshire Attorney General’s Office “subject to the conditions imposed by RSA 356-B.” The Town granted site plan approval for development of a 17-unit residential condominium development on November 15, 2005 and the site plan was recorded in the MCRD as Plan No. 17634. The plan called for the existing single-family home to be expanded and then converted into two-units, and for the development of 15 additional units

on an interior road in the approximate location of the existing driveway. (See Municipality Exhibit A.) It appears some improvements to the driveway were made, including installation of some underground utilities, and the expansion of the existing residence and conversion into two units commenced but never completed. No condominium units were ever constructed.

Sometime after approvals were granted, the Gatchells wanted to “get out” of the project; the Taxpayer agreed to try and find investors to buy them out. To protect their financial interest in the Property, the Taxpayer granted the Gatchells a mortgage on the Property and the Gatchells transferred their shares of stock in the Corporation to the Taxpayer. As a result of the stock transfer, the Taxpayer then became the sole owner of all shares in the Corporation. The Corporation was subsequently administratively dissolved by the New Hampshire Secretary of State’s Office on August 29, 2008. (See Taxpayer Exhibit No. 2, p. 28.)

Although the exact timing and circumstances are not clear from the record, it is undisputed the Taxpayer entered into a relationship with FRM, a mortgage brokerage firm, to assist him in finding investors to replace the Gatchells and to complete the condominium documents required pursuant to RSA 356-B. FRM found numerous investors who were granted “mortgages” on the individual condominium units, but the majority of the funds were never provided to the Taxpayer for development of the Property. Instead, FRM was operating a Ponzi scheme and the funds were misappropriated. As a result, the Taxpayer did not have the funds to complete the improvements on the Property, including the incomplete portion of the house in which he resides as well as the infrastructure to serve the proposed condominium.

In July, 2008, the Corporation applied for and received approval (on August 19, 2008) to subdivide the Property into two lots¹; a 2.624-acre lot with frontage on Route 4 and a 10.619-acre lot with the existing improvements. (See Plan 18989 recorded in the MCRD.) According to the Taxpayer, his intent was to sell the smaller, commercial lot but no such sale ever transpired. The Taxpayer voluntarily merged the two lots into a single 13.243-acre lot on April 1, 2010. (See Voluntary Lot Merger, the “Merger,” submitted as Taxpayer Exhibit No. 2, p. 62.)

Board Rulings

The board finds the Taxpayer carried his burden of proving the Property was disproportionately assessed and therefore the appeal is granted. The board finds the assessment is improper for several reasons: 1) the Town did not adequately account for the costs required to complete and make necessary repairs to the Property; 2) the Town overstated the condition of the Property (rated in “Good” condition for its age as reflected on the Property’s assessment-record card); and 3) the Town did not consider the title problems associated with the Property and their negative impact on its market value.

On the other hand, the board finds the Town properly assessed the Property as a 13.243-acre lot improved with a single-family residence and did not consider the Property had approval for development of a 17-unit residential condominium development. When the Taxpayer subdivided the Property into two lots (July, 2008), the subdivision superseded the November, 2005 site plan approval for the condominium development. On August 29, 2008, the New Hampshire Secretary of State’s Office administratively dissolved the Corporation. (Taxpayer Exhibit No. 2, p. 28.) Further, the subsequent Merger (April 1, 2010) substantiates the fact that, as of April 1, 2013, the site plan approval granted by the Town for the proposed condominium

¹ Map 3, Lot 68-B and Map 3, Lot 68-B2.

development (in November, 2005) was no longer valid and stipulated that “subsequent to lot merger, the owner(s) and their assigns shall not attempt to convey a portion of the merged tract without first obtaining approval from the Chichester Planning Board.” (See Merger, Taxpayer Exhibit No. 2, p. 62.)

The Town adjusted the \$373,613 “Market Cost New” by 10% for condition, which appears to be for physical depreciation. Regarding the cost to complete construction, the Town made an additional 15% adjustment which equates to an “under construction” adjustment of approximately \$56,000.

The Property has a three bedroom septic system, which is insufficient to support either a completed six-bedroom residence or two, three-bedroom units. Therefore, a new septic system is necessary. Additionally, the entire residence needs central heating (portions of the residence are currently heated with a wood stove), flooring, finished electric service, roof repairs, numerous window replacements, repair of water damage, mold removal and some finish trim work. The proposed second unit also requires a complete kitchen, a second form of egress, finished stairway to second floor, railings on loft area, poured concrete floors in the basement and/or garage, stairway(s) to basement, etc. Based on the entire record, the board finds significant adjustments are proper considering the extensive amount of work to be completed.

Based on its judgment and experience, and its view, the board finds the Property is in fair condition and not in good condition as it is currently assessed. The board finds an adjustment of 30% for condition is fair and reasonable. Additionally, based on the number of repairs required and the amount of construction work necessary to complete the residence, the board finds the 15% adjustment, or \$56,000, is woefully insufficient and should be increased to 30%. After adjusting the “Market Cost New” of \$373,613 by the total of 60% (30% for condition and 30%

for costs to complete construction), the residence contributes \$149,400 to the Property's assessed value. To the \$149,400, the features (\$5,300) and land (\$173,600) assessments are added to reach a preliminary assessment of \$328,300.

In addition, the Property has significant title problems that impacted its marketability as of the April 1, 2013 date of assessment and were ongoing as of the date of the hearing. The board finds an additional adjustment is warranted for these issues. After FRM failed, the individual mortgage holders realized the mortgages they held were issued on condominium units that "did not exist" and the Property was "tied up" for several years in bankruptcy proceedings resulting from FRM's collapse. These events led to prolonged legal action (that is ongoing) as the many mortgage holders work to "untangle" the title issues now impacting the Property. As Attorney Higham stated, the title work she completed totals more than 1,000 pages and this is perhaps one of the most "convoluted" titles she has ever encountered.

While the Taxpayer did not present evidence as to what the proper adjustment should be for the title issues, he testified he thought the Property was unmarketable and therefore had little value. While the board agrees the lack of clear title negatively impacts the Property's marketability and ultimately its market value, the board does not agree with the Taxpayer that the Property has little value. While the title problems are substantial, the testimony was the various parties involved are working together to resolve the issues and they are not insurmountable. Considering the number of mortgagees involved, the time that will be required to resolve the complex title issues and the costs involved in doing so, the board finds an adjustment of 50% is appropriate. This adjustment results in an assessment of \$164,100.²

² The board's ruling that title problems may diminish the market value of a property is consistent with prior board rulings. See, e.g., John Keith Markley and Pamela L. Markley v. Town of Campton, BTLA Docket No. 16867-96PT (December 15, 1998).

If the taxes have been paid, the amount paid on the value in excess of \$164,100 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Until the Town undergoes a general reassessment or in good faith reappraises the property pursuant to RSA 75:8, the Town shall use the ordered assessment for subsequent years. RSA 76:17-c, I and II.

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

Theresa M. Walker, Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Joseph A. Austin, #16B Trap Road, Chichester, NH 03258, Taxpayer; Chairman, Board of Selectmen, Town of Chichester, 54 Main Street, Chichester, NH 03258; Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258, Contracted Assessing Firm; and courtesy copies to: Maureen Hingham, Esq., Normand & Associates, 15 High Street, Manchester, NH 03101 and John Boender, PO Box 267, W. Friendship, MD 21794.

Date: July 30, 2015

Anne M. Stelmach, Clerk