Arnie Filipi

v.

Town of Swanzey

Docket No.: 27580-14LC

DECISION

The "Taxpayer" appeals, pursuant to RSA 79-A:10, the "Town's" 2014 land use change tax ("LUCT") of $10,790 on Map 31, Lots 26 and 27, two adjacent lots consisting of a total of 5.6 acres (the "Property"), based on a $107,900 full value assessment as of August 5, 2013. For the reasons stated below, the appeal for abatement of the LUCT is granted.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the Town's LUCT assessment was erroneous or excessive. See Tax 205.06. The board finds the Taxpayer carried his burden.

The Taxpayer argued the LUCT was excessive because:

(1) one of the two lots that comprise the Property, Lot 27, was not a buildable lot at the time the Taxpayer purchased both lots in August, 2013 because of a lack of sufficient setback (from existing wetlands) for a septic system and the Town's Zoning Board of Adjustment ("ZBA") denied an application for a variance from this setback requirement to permit development;

(2) the Town erred by assessing the Property on its "future potential value" (as two developable lots), not its market value as of August 5, 2013;

(3) the assessment-record cards ("ARCs") for other lots in the Town and in Chesterfield (in Taxpayer Exhibit No. 4) show the Town overvalued the Property when it issued the LUCT; and

(4) the LUCT should be abated to $6,000 because the market value of the Property was only $60,000, not the higher value ($107,900) reflected by the Town's LUCT assessment.

The Town argued the LUCT was proper because:

(1) the Taxpayer is an experienced builder who buys lots in the Town and other municipalities in Cheshire County (with knowledge of their development potential and value);

(2) in June, 2013, the Taxpayer agreed to purchase both lots that comprise the Property for $75,000, but an addendum to the sales agreement reduced the sale price to $70,000 and also indicated that, if a variance was not granted by the ZBA to allow development of both lots, the sale price would be further reduced to $40,000 (see Municipality Exhibit B);

(3) while the ZBA denied a variance, the ZBA minutes (Municipality Exhibit C) and other evidence confirms the lots, at the time of their purchase, could be 'reconfigured' (through a lot line adjustment) to allow each lot to be buildable without a variance;

(4) the Taxpayer purchased each lot with a separate deed (see Municipality Exhibits E and F) and then applied to the Town's Planning Board for a boundary line adjustment and his application was approved "very easily" within a very short timeframe after the purchase (see Municipality Exhibit A);

(5) as a result, the Taxpayer had the right to develop both lots and he subsequently obtained building permits, constructed a single-family residence on each lot and sold each of them (see

Municipality Exhibits F and G) with the transfer tax stamps indicating Lot 26 sold for $225,000 and Lot 27 sold for $226,000 (see Town's Finding Request Nos. 12 and 13);

(6) the Town based the LUCT on the assessed values established by its contract assessor ("Vision") during the 2009 revaluation and then arrived at the LUCT assessment by equalizing the value; and

(7) the Taxpayer has failed to meet his burden of proving the LUCT was excessive.

Board's Rulings

Based on the evidence presented, the board finds the Taxpayer met his burden of proving the LUCT was disproportionally assessed. The appeal is therefore granted for the reasons stated below.

The parties do not dispute the LUCT should be based on a reasonable estimate of the market value of the Property as of August 5, 2013. The LUCT is prescribed by law to be 10% of market value. (See RSA 79-A:7, I.)

The first issue in this appeal is whether it was proper for the Town to value the Property as two buildable lots as of the date of change (August 5, 2013). Based on the evidence presented and the authorities cited by the Town, the board finds it was not unreasonable for the Town to consider the high likelihood both lots could be developed when it assessed the LUCT. (See Town Finding Request Nos. 4, 14, 16 and 17 in Addendum A to this Decision.)

The second issue in this appeal is the market value of the Property as of the date of change. The Taxpayer challenges the $107,900 value assessed by the Town, contending the market value of the Property was no more than $60,000.

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 reasonable market value on which to base the LUCT. Cf. 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).

The board gave some probative weight to the evidence presented by the Taxpayer. This evidence included ARCs indicating the sale prices and assessed values of other residential building lots and evidence lot prices were declining in the relevant time period.[1]

The Town, for its part, did not undertake a market analysis to estimate the Property's market value and assess the LUCT. Instead, the Town simply took the assessed value of the lots established in a 2009 revaluation (more than four years prior to the August, 2013 date of change), and 'equalized' that value to arrive at its value conclusion.[2] The board is unpersuaded this approach to estimating value resulted in a credible indication of value for the Property.

Using its judgment and experience, the board finds the evidence as whole indicates the Property had a market value of $90,000. This finding is based on a review of all of information submitted, specifically the sales of two lots on Whitcomb Road and one lot each on South Road and Goodell Avenue. (See Taxpayer Exhibit No. 4.) This market data indicates comparable residential building lots were selling, during the relevant time frame, in the range of $40,000 to $55,000.

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[1] The Town emphasized the Taxpayer did not present an appraisal or any other independent valuation of the Property, but relied instead on ARCs and other documents to challenge the values assigned by the Town. While, in general, an appraisal can be probative of market value, a party can meet his or her burden of proving disproportionality through other means.

[2] The Town equalized the assessed values utilizing the tax year 2013 median ratio of 110.8% calculated by the department of revenue administration. (See Municipality Exhibit H.)

The board's market value finding of $90,000 ($45,000 per lot) is near the low end of the range due to additional development costs and the slight risk associated with obtaining the lot line adjustment which resulted in the right to develop both lots. The board's finding is also supported by the asking prices ($45,900) of the two lots. (See Taxpayer Exhibit No. 6.)

If the taxes have been paid, the amount paid on the value in excess of $90,000 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

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

ADDENDUM A

The "Requests" received from the Town 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 Requests, "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 so broad or specific 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.

TOWN'S REQUESTS FOR FINDINGS AND RULINGS

1. The real estate at issue consists of two abutting lots, Lot 26 and Lot 27. Lot 26 and Lot 27 are located in the Town of Swanzey Residential zone, with a minimum lot size of one acre, minimum road frontage of 150 feet. Lots 26 and Lot 27 are "lots of record" under Section III, E of the Town Zoning Ordinance, and thus can be sold separately without subdivision approval.

Neither granted nor denied.

2. In June of 2013, taxpayer entered into a Purchase and Sales agreement with the prior owners of Lot 26 and Lot 27 which provided that if the taxpayer obtained a variance to qualify both lots as building lots, the purchase price would be $70,000.00, and if the taxpayer could not obtain a variance so that only one lot would qualify as a building lot, the purchase price for both lots would be $40,000.00.

Granted.

3. The taxpayer subsequently applied for a variance for Lot 27 to the Zoning Board of Adjustment for a variance from the setback required for a proposed septic system on the Lot from wetlands. Approval of this variance was the only procedural hurdle to both Lot 26 and Lot 27 qualifying for building permits.

Neither granted nor denied.

4. The minutes of the Swanzey Board of Adjustment meeting of July 15, 2013, attended by the taxpayer on the Variance application, indicate that the Chairman of the ZBA stated that there was "an opportunity to reconfigure the parcel to the south to allow both lots to be building lots. He noted that the owners have that flexibility, as both Lots 27 and 26 are owned by the same parties. There is a potential option that the owners could create."

Granted.

5. On July 22, 2013, the ZBA voted to deny taxpayers variance request.

Granted.

6. On August 2, 2013, taxpayer purchased Lot 26 and Lot 27 for a total price of $40,000.00. Because this sale separated Lot 26 and Lot 27 from other land of the seller in current use, and because the total acreage of Lot 26 and 27 combined is less than 10 acres, Lot 26 and Lot 27 no longer qualified for current use assessment as of that date.

Neither granted nor denied.

7. By application to the Swanzey Planning Board dated October 24, 2013, taxpayer applied for a boundary line adjustment between the existing boundary lines of Lot 26 and Lot 27.

Granted.

8. At a public hearing of the Planning Board on November 14, 2013, taxpayer stated that he wished to change the lot boundary between the lots to "accommodate another septic site." By unanimous vote, the Planning Board approved the boundary line adjustment. This approval is evidenced by a plan bearing the Town Planning Board approval dated November 14, 2013, and recorded as Plan No. 14003 in the Cheshire County Registry of Deeds.

Neither granted nor denied.

9. As a result of this approval, both Lot 26 and Lot 27 qualified for building permits, notwithstanding the denial of the variance by the ZBA in July, 2013, because the lot line adjustment allowed the relocation of the septic systems on the lots so that neither violated setback requirements.

Granted.

10. By Land Use Change tax bill dated April 22, 2014, the Town assessed a land use change tax of $10,790 for the lots, based upon the Town's 2013 assessment of each lot's value without regard to current use and application of the 2013 Equalization Ratio of 110.8%.

Granted.

11. Taxpayer applied to the Town for an abatement, which the Town denied by letter dated August 7, 2014. The basis of the denial was the knowledge that the septic setback issue that was left unsolved by the variance denial would be easily cured by a boundary line adjustment.

Neither granted nor denied.

12. Taxpayer subsequently constructed a single family home on Lot 26 and sold Lot 26 on June 23, 2014 for $225,000.00 (based on tax stamps affixed to the deed transferring ownership).

Granted.

13. Taxpayer subsequently constructed a single family home on Lot 27 and sold Lot 27 on August 14, 2014 for $222,500.00 (based on tax stamps affixed to the deed transferring ownership).

Granted.

14. Taxpayer's claim that the full and fair value of the property on which the LUCT is based should be reduced by the taxpayers' development expenditures to create the two buildable lots is not in accord with New Hampshire law. Land that "was once in current use does not entitle the landowner or developer to a reduced assessment of the full and true value of the land once it is no longer in current use" based upon the developer's "substantial development expenditures." *Woodview Development Corporation v. Town of Pelham.*

Neither granted nor denied.

15. There is no dispute that the date the real estate no longer qualified for current use is August, 2013. Prior to this date, at the ZBA meetings regarding taxpayer's variance request, it was made clear that the Lots would qualify for a simple boundary line adjustment that would make a variance unnecessary.

Neither granted nor denied.

16. New Hampshire law is clear that when a Town assesses the full and fair market value of property for purposes of assessing the LUCT, the Town "need not, and should not, ignore the potential for development" of the land. *Woodview Development v. Town of Pelham*, 152 N.H. 114 (2005).

Granted.

17. A town must not be "blind to the economic reality of the land's best and highest use when it determines full and true value under RSA 79-A:7, I (Supp.1983) as of the date of the change in use. Rather, the town should consider the potential for development as it would with any piece of comparable land that is not subject to current use valuation. " Appeal of Town of Hollis, 126 N.H. 230 at 234 (1985) (citations and quotations omitted).

Granted.

18. The Town reasonably acknowledged the potential to create two buildable lots as of the change date, by a simple boundary adjustment that would remedy the septic setback issue based on the prior lot boundaries. This potential for development was obvious and known to taxpayer, as taxpayers future actions in obtaining a boundary line adjustment approval demonstrate.

Neither granted nor denied.

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Arnie Filipi, 8 Warmac Road, Swanzey, NH 03446, Taxpayer; Chairman, Board of Selectmen, Town of Swanzey, PO Box 10009, Swanzey, NH 03446; Gary J. Kinyon, Esq., Bradley & Faulkner, P.C., PO Box 666, Keene, NH 03431, counsel for the Town; and Current Use Board, c/o Department of Revenue Administration, 109 Pleasant Street, Concord, New Hampshire 03301, Interested Party.

Date: 4/7/15

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Anne M. Stelmach, Clerk