Thoughts on the recent court case from Scarborough, Donald Petrin v. Town of Scarborough

This is simply an opinion. Although I hope to think it may be regarded as the informed opinion of a long time assessor, you may also regard it as the misguided opinion of someone who should have retired five years ago. Either way I wanted to express some of my thoughts on this important decision. I do so with full knowledge that I have been chastised by attorneys and members of the State Board of Property Tax Review for expressing my opinions on Maine Statutes as a non-lawyer.

First, I think that the decision in two very important ways is supportive of the tax assessment efforts made by Paul Lesperance and the Town of Scarborough. This tax appeal was hard fought with a long process before the local Board of Assessment Review, the Business and Consumer Court, and to the State Supreme Judicial Court. The Town successfully defended itself on two primary points.

This appeal is based upon the concept of discrimination. In my simple minded opinion, this concept means that like property must be treated alike in tax assessment values.

On the issue of land valuation of a single parcel in excess of the base lot size, the Town received support from the Court. The decision on page 21 upholds the BAR finding "that in assessing the fair market value of a single parcel that consists of a base lot and additional unimproved land, that additional land contributes in diminishing degrees to the overall market value of the parcel."

On the issue of discrimination from a partial revaluation, the Town was upheld and the decision states on page 23 that "The evidence, viewed as a whole, supports the Board's conclusion that the partial revaluation improved the equity of the Town's assessments."

Many comments on this court decision have emphasized that the Town lost the appeal on the issue of valuing some small contiguous lots as excess land to the adjacent lot when requested by the taxpayer to have the lot assessed that way. That is a big part of the decision, but one must not lose sight of the important rulings in favor of the Town. In my opinion, Paul and the Town deserve credit for enduring the appeal process and achieving success on some points that are important to all towns.

The big ruling of the Court that has caused expressions of concern of many assessors is the finding that there was a finding of discrimination on the third issue of this appeal: the issue of the valuation, upon taxpayer request, of an adjacent parcel in the same ownership very modestly as excess land to the base lot in the other contiguous parcel. The Court points out on footnote 7 on page 17 that the combined lot policy was applied in situations not permitted by Section 701-A.

The decision prominently points out the statutory requirement to assess each parcel of land separately in Title 36 Section 708.

§708. Assessors to value real estate and personal property

> The assessors and the chief assessor of a primary assessing area shall ascertain as nearly as may be the nature, amount and value as of the first day of each April of the real estate and personal property subject to be taxed, and shall estimate and record separately the land value, exclusive of buildings, of each parcel of real estate.

The ruling is that on this issue there was discrimination. The case is remanded to the Business and Consumer Docket to remand to the Scarborough BAR. There will be a revisiting of the abatements in

view of the Court Decision, with no clear direction on how it should be addressed, and it is likely to go up the appeal ladder again.

The key finding is on page 28 in the conclusion:

> the evidence compels the conclusion that that Town's method of assessing separate but abutting parcels held in common ownership resulted in unequal apportionment because the methodology necessarily deprives Taxpayers "of a rough equality in tax treatment of similarly situated property owners."

The Court decision on page 16 states in regard to Section 708 that:

> We have explained that in implementing this requirement, "tax assessors have a reasonable degree of discretion in determining where individual parcels exist," considering all of the circumstances. City of Augusta v. Allen, 438 A.2d 472, 476-77 (Me. 1981). The measure of discretion, however, does not mitigate a municipality's obligation under the law to treat "separate and distinct real estates belong[ing] to the same owner . . . as distinct subjects of taxation . . . [that] must be separately valued and assessed." McCarty v. Greenlawn Cemetery Ass'n, 158 Me. 388, 393-94, 185 A.2d 127 (1962) (quotation marks omitted). This requirement satisfies section 708 and preserves a taxpayer's right to redeem each lot separately. See id. at 393-94.

On page 18, paragraph 29 it states:

> [¶29] Because each parcel of real estate must be assessed separately and according to just value, regardless of whether the parcel abuts another parcel in common ownership, the Town's rationale for the abutting property program is not reasonable, see Allegheny, 488 U.S. at 344, and cannot serve as the basis for the Town's assessments.

Given these statements I assume that an assessor does have the discretion to value certain adjacent parcels that have as their source different registry references when there is a reasonable basis for doing so. Although I can think of many instances I will mention just a few.

Example 1. A property owner has built a garage that encroaches on the neighboring land. To correct the situation the neighbor conveys to the property owner a six foot strip of additional land, which contains about 2 feet of the property owner's garage. I certainly think it is reasonable to combine the separately described land areas into one parcel. It is used as one parcel and it would be a bit excessive to value the newly created six foot parcel with 2 feet of garage on its own as a separate parcel. If one was required to value each area as a separate parcel would one also have to value the 2 feet of garage at almost no value because it has no utility on its own and adjust the value of the remaining area of the garage because it has no side wall.

Example 2. A property owner owns two adjacent old lakefront subdivision lots that are each 60 feet wide. One of the lots has a camp thereon. One is vacant. The zoning now requires 200 feet of frontage and 40,000 square feet of land and it requires that in the case of situations like this the adjacent subdivision lots, either vacant or partially developed, cannot be made more non-conforming. I think it is reasonable to merge the lots as one and value them as one parcel. Is that not essentially what the zoning ordinance requires?

Example 3. A development firm purchases land from three landowners to develop a new retail complex. The development proposal goes though site review as one development proposal. When the development is completed retail area number 1 is located on land acquired form one landowner, the rest of retail area 1 and some associated parking lot are on land acquired from a second landowner, and retail areas 2 and 3 plus the entry road are on land purchased from a third landowner. I think there is a reasonable and rational basis to value the land as one parcel.

I think that the problem in Scarborough was that there was no rational and reasonable basis provided for the valuation of vacant adjacent parcels as one. I also think assessors retain some discretion to merge lots and value as one when there is a reasonable basis to do so.

So, now, what is the remedy? The decision found that the appellants do have standing to pursue the issue of discrimination. The Business and Consumer Court had ruled that they did not. So, now the case is remanded to the local BAR with no other direction than a finding that the selective abutting lot valuation is discriminatory, the partial revaluation is okay, and the conservative valuation of excess land in a single parcel is okay.

My thoughts on this develop from every day tax assessment practice.

For example, a lakefront property owner presents an abatement on the basis that his one acre developed lot on the lake is overvalued compared to the one acre developed lots on the public road that runs parallel to the lake. His lot is valued at $150,000. Those similar one acre lots on the road are valued at only $30,000. He requests an abatement of $120,000 down to the value of the lots on the road on the basis of discrimination, like property was not treated alike.

I certainly would deny the abatement. He has only shown that unlike property was not treated alike. There is no discrimination.

In another example, the owner of a vacant lot valued at $25,000 on that road seeks an abatement. He has a one acre lot and he references three other vacant one acre lots on the same road that are valued at $2000. He asserts that on the basis of like property being treated alike he should receive an abatement of $23,000. In reviewing the abatement request I conclude that recent sales certainly support that the vacant lot is worth $25,000. I also conclude that the three lots valued at $2000 are indeed very similar to the subject lot. In researching some old assessment notes I realize that the town had had a policy of valuing adjacent vacant lots in the same ownership as a developed lot as excess land at $2000 per acre. That is the reason the comparable lots are valued so low.

In this case, I have to grant the abatement consistent with the decision of Ram's Head Partners, LLC v. Town of Cape Elizabeth from 2003. In the future, I would be inclined to value all these similar lots at the higher value supported by the sales. But, in the short run, abatement is the remedy.

So in the Scarborough situation what are the like properties that have been the subject of discrimination. Are they the larger lots that were valued with a conservative excess land value that the Court found was supported by reasonable evidence? I do not think so.

Are they the smaller improved lots? This is subject to argument. I would make the argument that the developed lots are different enough from the undervalued adjacent lots that they are not similar and

not subject to abatement. The decision itself cites a precedent that it is the value of the whole that is relevant and not its components. The decision on page 21 paragraph 36 states:

> So long as an assessment "represents a fair and just determination [**24] of value" for the parcel "as a whole," no constitutional harm has occurred. *Roberts v. Town of Southwest Harbor, 2004 ME 132, ¶ 4, 861 A.2d 617* (quotation marks omitted) (holding that a taxpayer failed to satisfy his burden of proving unjust discrimination when his argument "focused only on a component of his assessed value . . . and not on the total assessed value").

In my opinion, vacant parcels of land that did not receive the favorable valuation as excess land that some vacant abutting parcels received are the lots that fit squarely into the issue of discrimination In my opinion, those vacant lots owned by taxpayers who filed an appeal should be abated. In the longer run, all the vacant lots should be realistically valued.

Adding to the confusion over the assessments of parcels may be a lack of definition. I have to confess that if there is a definition in the Maine statutes of what is a parcel for tax assessment purposes, I am unaware of it. There certainly is a definition in the state subdivision statute. Title 30-A Section 4401 provides the following definition:

> **6. Tract or parcel of land.** "Tract or parcel of land" means all contiguous land in the same ownership, except that lands located on opposite sides of a public or private road are considered each a separate tract or parcel of land unless the road was established by the owner of land on both sides of the road after September 22, 1971.

So there may be some level of disconnect in how a parcel is defined in one statute and how it is to be defined in tax assessment practice. This disconnect may be very important to tax assessors because we have to consider land use restrictions in our calculation of just value. In my opinion, at the very least, the above definition means that, outside of approved subdivision lots, vacant land parcels assembled together lose some of their value as distinct parcels and may become the same value as land of the same size conveyed in one deed because these assembled lots, just like the land conveyed in one deed, cannot be sold as more than two lots in a period of less than 5 years without subdivision approval.