Town of South Berwick

Planning Department

180 MAIN STREET
SOUTH BERWICK, MAINE 03908

TEL. 207-384-3012

To: South Berwick Town Council
From: South Berwick Planning Board
Date: 7/26/2023

RE: Chapter A142, Assessors Lot Merger Policy

On May 17, 2023, the Planning Board received an Amendment to the Chapter A142 Assessors Lot Merger Policy Ordinance. I have attached the letter from Verna Sharpe, Town Assessor here, as well as the court case that accompanied the letter.

In summary, the required changes affect the following chapters of the South Berwick Code:
1. Chapter A142, Assessors Lot Merger Policy

After deliberations about Verna's Letter, and the court case that Verna attached, the Planning Board discussed the process for adopting ordinances. Accordingly, the planning Board conducted a public hearing June 7, 2023 at 7:00pm.. At the conclusion of the public hearing the Planning Board voted to send the proposed changes to the Town Council.

Sincerely,

Greg Zinser, Chair

Memorandum

To: Planning Board

From: Verna E. Sharpe, Assessing Agent

Date: April 27, 2023

Re: Chapter A142. Assessors Lot Merger Policy

Att: Exhibit A, Maine Supreme Court decision 2019 ME 172
Exhibit B, Portland Press Herald article, August 2016

I would like to propose a change to **§ A142-2** of ordinance known as **Chapter A142. Assessors Lot Merger Policy**, approved by the Board of Assessors in 2005. In light of Maine Supreme Court decision **2019 ME 172 Kenyon C. Bolton III et al[1] v. Town of Scarborough**, I believe change is warranted to avoid or minimize any potential future legal liability on the part of the Town. A copy of the decision is attached as Exhibit A for your review. In summary, the Court found that the so-called "abutting lot program" of merging lots for property tax savings to be unlawfully discriminatory and violated the Taxpayers' right to equal protection. The Town of Scarborough had been found to be merging lots at owner request, resulting in substantial tax savings for those few owners. This is unconstitutional because the reduced assessments did not reflect just value[2] and the rest of the taxpayers in the Town were burdened by this inequity. The Court remanded back to the Superior Court with the remedy of abating the Taxpayers the difference in the amount they paid and what they would have paid if the merged lots were assessed at just value, plus interest, on multiple years.

There may be circumstances when a lot merger is warranted and should be allowed. These circumstances may include a proposed building that would straddle a property line, or when required setbacks are not met and a lot merger or lot line revision would remedy the deficiency. In these cases, it should be in the Planning Board's jurisdiction and clearly stated in the Findings of Fact or Notice of Decision. However, I would like to see language that addresses this and encourages a conservative approach. For example, if an owner submits a site plan for review and there is a need to incorporate area from the abutting lot, that a lot line revision may be the preferred option, instead of a lot merger.

---

[1] Also known as "the Taxpayers", 34 residents who appealed the Town's practice of merging lots.
[2] Just value is the same as market value.

Chapter A142. ~~Assessors~~ Lot Merger Policy

§ A142-1 **Purpose.**
The intent of this policy is to provide the Board of Assessors or the Planning Board with a general rule for the voluntary merger of contiguous parcels and to assure all parcels are being assessed at their just value.

§ A142-2 **Voluntary merger of preexisting approved or subdivided lots or parcels.**
Any owner of two or more contiguous preexisting approved or subdivided lots or parcels who wishes to merge them for planning ~~for municipal regulation and taxation~~ purposes may do so by applying in writing to ~~the Board of Assessors or~~ the Planning Board. Except where such merger would create a violation of then-current ordinances or regulations, all such applications shall be approved, and no public hearing or notice shall be required. The application must be signed by all owners of the property, including mortgagees. The application must be accompanied by a new deed which shall include the legal description for the merged lots and a Certificate of Merger signed by all the owners (including mortgagees) stating that, ~~in consideration of the tax benefits achieved by merging the lots or parcels~~, the owners agree that the merged lots or parcels shall thereafter be considered a single lot for all purposes under the Town's land use ordinances and that the owners waive any rights to divide the merged lot, separately convey any portion of the merged lot or separately develop any portion of the merged lot unless such division, conveyance or development meets all applicable requirements of the Town's land use ordinances at the time it occurs. Upon approval of the merger application by ~~the Board of Assessors or~~ the Planning Board, ~~the Board or~~ the Planning Board shall endorse such approval on the Certificate of Merger. The owners shall then record the Certificate of Merger in the registry of deeds and return a copy of the recorded certificate, endorsed with book and page number, ~~to the Board of Assessors or~~ the Planning Board within thirty days of approval. The merger shall not be effective until the Certificate of Merger has been recorded. If the merged lots are depicted on a previously recorded plan, no new plan needs to be recorded, provided the Certificate of Merger is recorded.

§ A142-3 **Discovery of previous combined lots.**
Any owner of two or more contiguous preexisting approved or subdivided lots or parcels which were previously merged for taxation purposes but not merged by deed or other instrument recorded in the registry of deeds shall receive written notification by the Board of Assessors or its designee requesting voluntary merger. Such notice shall state that if the owner wishes to keep these lots combined, the owner must comply with the voluntary merger policy of the Town of South Berwick as described above. If no application for a voluntary merger is received, the preexisting approved or subdivided lots or parcels shall be separately assessed at their individual values commencing on the next assessment date.

Deleted: Assessors
Formatted: Strikethrough
Deleted: its designee
Formatted: Font color: Auto, Not Strikethrough
Formatted: Font color: Auto
Formatted: Font color: Auto
Deleted:
Formatted: Font color: Dark Red, Strikethrough
Formatted: Font color: Auto
Formatted: Font color: Dark Red, Strikethrough
Deleted: its designee
Deleted: .
Formatted: Font color: Dark Red
Formatted: Font color: Dark Red, Strikethrough
Deleted: ,
Formatted: Font color: Dark Red
Deleted: its designee
Deleted: its designee
Formatted: Font color: Dark Red, Strikethrough
Formatted: Font color: Dark Red
Formatted: Font color: Dark Red, Strikethrough
Formatted: Font color: Dark Red
Formatted: Font color: Dark Red, Strikethrough
Deleted: its designee
Formatted: Font color: Dark Red
Deleted: '
Deleted: or its designee
Formatted: Font color: Auto

MAINE SUPREME JUDICIAL COURT
Decision: 2019 ME 172
Docket: Cum-19-73
Argued: September 24, 2019
Decided: December 23, 2019
Revised: April 9, 2020

Reporter of Decisions

Panel: SAUFLEY, C.J., and ALEXANDER, MEAD, GORMAN,* JABAR, and HJELM, JJ.

KENYON C. BOLTON III et al.

v.

TOWN OF SCARBOROUGH

ALEXANDER, J.

[¶1] Three years ago, we concluded that the Town of Scarborough had engaged in an unlawful and discriminatory assessment practice that violated the equal protection rights of Kenyon C. Bolton III and other plaintiffs (collectively, the Taxpayers); based on this conclusion, we remanded the matter to the Scarborough Board of Assessment Review "for a determination of the appropriate abatements" to address the inequality in tax treatment affecting the Taxpayers as a result of the discriminatory practice. *Angell Family 2012 Prouts Neck Tr. v. Town of Scarborough*, 2016 ME 152, ¶¶ 1-2, 15-21, 36,

* Although not available at oral argument, Justice Gorman participated in the development of this opinion. *See* M.R. App. P. 12(a)(2) ("A qualified Justice may participate in a decision even though not present at oral argument.").

violated the statutory requirement that each parcel of real estate be assessed separately, *see* 36 M.R.S. § 708 (2018), and the constitutional requirement that real estate be assessed at its just value, *see* Me. Const. art. IX, § 8. *See Angell*, 2016 ME 152, ¶ 19, 149 A.3d 271; *Petrin*, 2016 ME 136, ¶¶ 26-29, 147 A.3d 842. We further held that because the abutting lot program violated Maine law and imposed property taxes on the Taxpayers at rates that were not imposed on similarly situated owners of lots that happened to be abutting other lots of those owners, it contravened the Taxpayers' rights to equal protection. *See Angell*, 2016 ME 152, ¶¶ 20, 36, 149 A.3d 271; *Petrin*, 2016 ME 136, ¶¶ 29-31, 45, 147 A.3d 842.

[¶5] Respecting our direction on remand that it provide the Taxpayers with appropriate abatements to address this inequality, the Board conducted hearings on the issue in early 2017. Because the Town had continued to implement the program, and most of the Taxpayers had continued to file yearly abatement requests during the intervening years between their initial requests and our decisions in 2016, the parties agreed to expand the scope of the proceedings to allow the Board to determine the appropriate abatements for

[¶7] In May 2017, after deliberating, the Board voted unanimously to adopt a written decision granting the Taxpayers eight percent abatements to their land values—exclusive of any improvements—for each year during the abatement period in which they filed abatement requests. The Board explained that because the combined value of these abatements was equal to the total amount of taxes avoided by the abutting lot program participants during the abatement period, the eight percent figure provided each Taxpayer with a proportionate share of the total benefit of the program.

[¶8] The Taxpayers appealed to the Superior Court, *see* 36 M.R.S. § 843 (2018); M.R. Civ. P. 80B, which entered a judgment vacating the Board's decision based on its conclusion that the Board's abatement formula was unreasonable because it made the percentage discount a function of the number of appealing Taxpayers. The court remanded the matter to the Board with instructions to provide the Taxpayers with abatements that would place them "in a position roughly equal to the favored abutting lot owners."

[¶9] On remand from the Superior Court, the Board held an additional hearing where the parties mostly relied on the evidence introduced in the prior proceedings. The Taxpayers continued to assert that their proposal of 31.48 percent abatements was the most appropriate way to remedy the inequality.

The Board then averaged the yearly percentage reductions, which resulted in the 14.74 percent figure.

[¶11] Once again, the Taxpayers appealed to the Superior Court. The Town also appealed to preserve its argument that the original eight percent abatements were sufficient. In January 2019, the Superior Court entered a judgment affirming the Board's decision granting the Taxpayers 14.74 percent abatements after finding that the Board's formula was rational and reasonable.[3] The Superior Court's judgment being final, *see* M.R. Civ. P. 80B(n), the Taxpayers appealed to us, and the Town cross-appealed seeking reinstatement of the eight percent abatements, *see* M.R. App. 2B(c)(1), 2C(a)(2).[4]

II. LEGAL ANALYSIS

[¶12] The Taxpayers contend that the Equal Protection Clause mandates that they be extended the same discounts that were provided to participants in the abutting lot program. They assert that neither of the Board's abatement

---

[3] The court modified the interest rate calculation in the Board's second decision, but that issue is moot in light of our conclusion that the Board's original decision provided adequate relief. *See infra* n.9.

[4] M.R. Civ. P. 80B(m) provides that when, as here, "the Superior Court remands the case for further action or proceedings by the governmental agency, the Superior Court's decision is not a final judgment, and all issues raised on the Superior Court's review of the governmental action shall be preserved in a subsequent appeal taken from a final judgment entered on review of such governmental action."

Biddeford v. Adams, 1999 ME 49, ¶¶ 24-25, 727 A.2d 346. Thus, our standard of review encompasses the reasonableness requirement.

[¶15] The more significant effect of section 843 on our review is that it limits our ability to substitute our own judgment for that of the Board. *See So. Portland Assocs. v. City of South Portland*, 550 A.2d 363, 369 (Me. 1988) (stating that we will not intrude on the authority that 36 M.R.S. § 843(1) grants to Boards of Assessment Review by substituting our own value estimates or acting "as final-offer arbitrators" to resolve opposing figures); *see also Weekley v. Town of Scarborough*, 676 A.2d 932, 934 (Me. 1996) (holding that courts lack the authority to determine the just value of properties or "grant relief in the nature of an abatement").

[¶16] We find no merit in the Taxpayers' argument that we should depart from this deferential standard because the Board is "hopelessly biased" against them. The aspects of the record that the Taxpayers allege demonstrate "bias" merely show the Board members—who are not lawyers—grappling with a complicated area of the law and an equally complex set of facts.

B. Constitutional Considerations

[¶17] As discussed above, we previously determined that the abutting lot program was unlawfully discriminatory and violated the Taxpayers' equal

imposed an impermissibly discriminatory tax retains flexibility in responding to this determination," *McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco*, 496 U.S. 18, 39-40 (1990), because how a state "eliminates unconstitutional discrimination 'plainly is an issue of state law,'" *Levin*, 560 U.S. at 427 (quoting *Stanton v. Stanton*, 421 U.S. 7, 17-18 (1975)). Indeed, the Supreme Court has explicitly indicated that its practice is "to abstain from deciding the remedial effects" of finding "a tax measure constitutionally infirm" to maintain "federal-state comity." *Id.*

[¶19] The Supreme Court has said, however, that the Due Process Clause requires states "to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *McKesson*, 496 U.S. at 31. It has also provided guideposts for determining the appropriate remedy for a discriminatory tax. In seeking to effectuate equal tax treatment, a state may (1) invalidate and withdraw the benefits from the favored class, (2) extend the benefits to the excluded class, or (3) use some other measure. *See Levin*, 560 U.S. at 426-27; *Heckler v. Mathews*, 465 U.S. 728, 740 (1984). In considering these options, it is important to remember that the Equal Protection Clause imposes no "iron rule of equal taxation" and encompasses an area of the law where it is often "impracticable and unwise to attempt to lay down any general rule or

provided by the abutting lot program. Additionally, the number of Taxpayers who sought abatements exceeded the number of property owners who received the benefit of the abutting lot program for each of the four years at issue. Thus, to extend the benefit in the manner that the Taxpayers suggest would increase by several magnitudes the negative effect of the abutting lot program on the nonappealing taxpayers, who bore the same burden of the original program as the Taxpayers.[6] *See Williams v. Griffes*, 686 A.2d 964, 967 (Vt. 1996) (Morse, J. concurring) (a state "need not blindly sacrifice the interest of the taxpaying public to the desires of a relative few aggrieved taxpayers" when determining the appropriate remedy for a discriminatory tax scheme). To magnify rather than rectify the discriminatory effect of the program would be an inappropriate mandate under the guise of equality. *Cf. Haman v. Cty. of Humboldt*, 506 P.2d 993, 997 (Cal. 1973) (the proper remedy for discriminatory tax treatment should not increase "discrimination among other taxpayers").

---

[6] The Board supportably found that the Town lost $395,397.90 in tax revenue over the abatement period as a result of the discounts provided by the abutting lot program. By comparison, the parties agree that providing the Taxpayers with 31.48 percent abatements to their land values would cost the Town around $1,600,000.

could substantially compromise the municipality's capacity to provide essential services.

[¶25] What then is the proper remedy? The Supreme Court has suggested a third option: not withdrawing or extending benefits to achieve equal tax treatment, but rather using "some other measure." *Levin*, 560 U.S. at 426. The best measure of the actual disproportionality borne by the Taxpayers here is not the discounts provided by the abutting lot program but rather the effect that those discounts had on the Taxpayers. We alluded to this in our previous decisions when we said that we were remanding "for the Board to address the unlawfully discriminatory effect of the Town's abutting property program" and described that effect as the "unequal apportionment" of the municipal tax burden. *Petrin*, 2016 ME 136, ¶¶ 32-33, 45, 147 A.3d 842. We suggested then and hold now that the injury to the Taxpayers was not that their properties were over-assessed in comparison to the properties in the abutting lot program, but that they paid more than their fair share of taxes as a result of the discounts that were unlawfully provided by that program.

[¶26] The Taxpayers may be made whole by abatements that refund the difference between what they paid in taxes and what they would have paid had the properties in the abutting lot program been assessed at just value. Such a

section 8 of the Maine Constitution, which "is to equalize public burdens so that a taxpayer contributes to the entire tax burden in proportion to his [or her] share of the total value of all property subject to the tax." *Eastler v. State Tax Assessor*, 499 A.2d 921, 924 (Me. 1985).

[¶28] Practically speaking, we recognize that there may be times when the amount of such abatements may be too insignificant to justify any individual taxpayer taking action against discriminatory tax schemes, but any remedy must also avoid unduly burdening other nonappealing taxpayers.

[¶29] The record here reflects that as a result of the Board's original decision granting eight percent abatements, a decision recommended by the Town, the Taxpayers were collectively refunded approximately $380,000 before any interest.[9] This amount is more than enough to make the Taxpayers

---

[9] In its first decision, the Board granted the Taxpayers interest on the abatements at a rate of seven percent from the date of overpayment pursuant to 36 M.R.S. § 506-A (2018), based upon the Town's contention that that was the proper interest rate for overpayments. Seven percent is the interest rate that the Town used when it paid the eight percent abatements, which brought the collective amount paid to the Taxpayers to approximately $461,000. After the Superior Court's remand, however, the Town introduced budget orders for the years at issue showing that the correct interest rate for overpayments was actually three percent. Thus, the Taxpayers received an extra four percent in interest, which the Town acknowledges must stand if the Board's original decision is reinstated.

There was also some dispute after the Superior Court's remand about when the interest should begin to run. If the Town made any error in calculating when the interest began to run when it made the eight percent abatement payments, the error was rendered harmless by the extra four percent interest and the fact that the Taxpayers received more money than was necessary to make them whole.

Jonathan A. Block, Esq., Pierce Atwood LLP, Portland; John B. Shumadine, Esq., and Sage M. Friedman, Esq., Murray Plumb & Murray, Portland; and William H. Dale, Esq. (orally), Jensen Baird Gardner & Henry, Portland, for appellants Kenyon C. Bolton III et al.

Michael A. Hodgins, Esq. (orally), Eaton Peabody, Bangor, and Zachary B. Brandwein, Esq., Bernstein Shur, Portland, for cross-appellant Town of Scarborough

Cumberland County Superior Court docket numbers AP-2018-24, AP-2018-26, AP-2018-30, and AP-2018-31
FOR CLERK REFERENCE ONLY

Court finds Scarborough tax breaks for adjacent lots illegal

pressherald.com/2016/08/17/maines-high-court-finds-scarborough-tax-breaks-for-adjacent-lots-illegal/

By Kelley Bouchard August 17, 2016

A little-known but widespread practice of giving property tax breaks to homeowners for adjacent lots they also own is illegal, the Maine Supreme Judicial Court decided Tuesday.

The justices reviewed the outcome of a 2014 superior court appeal filed by 34 residents of Scarborough's seaside neighborhoods, who had been denied abatements after being assessed property tax increases they said were discriminatory and unconstitutional.

The landowners lost their initial claim that the former town assessor discriminated against them when he increased most waterfront land values in 2012. Some of their neighbors, however, were immune to the full impact of the increase because they owned adjacent lots that were considered "excess land" for assessment purposes.

The practice, which has been permitted by state officials, led to assessment reductions ranging from a few thousand dollars on inland parcels to a few million on waterfront properties.

On Tuesday, the state supreme court found that the practice of randomly undervaluing adjacent lots upon request violates the constitutional requirement for equal taxation and state laws that call for each lot to be assessed separately and at just value.

scarborough maine

Certificate of Lot Merger (Page 1)

(Please type or print legibly in black ink)

The undersigned applicant requests that the Town of South Berwick, Maine, hereby merge the following parcels of land for the purposes of being assessed and treated for regulatory purposes as a single tract or parcel of land:

Name of record owner(s) (must be identical for all lots consolidated):_____

_____

Mailing address of owners(s):_____

The following existing parcels are to be consolidated into a single parcel:

Map #	Lot #	Property Location	Plan #	Deed References Book	Page
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

(Attach additional sheet if necessary)

It is a condition of this lot merger that~~, in consideration of the tax benefits achieved by merging the lots or parcels,~~ the owners agree that the merged lots or parcels shall thereafter be considered a single lot for all purposes under the Town's land use ordinances and that the owners waive any rights to divide the merged lot, separately convey any portion of the merged lot or separately develop any portion of the merged lot unless such division, conveyance or development meets all applicable requirements of the Town's land use ordinances at the time it occurs. The owners understand that the merged lot will continue to be assessed at just value.

By signing below, the applicant agrees (i) that upon approval, a copy of this agreement shall be recorded in the York County Registry of Deeds, and (ii) subsequent to the approval of this agreement, the owner(s) shall not separately convey or encumber any of the previously existing parcels. Any attempt to separately convey or development any parcel or part of a parcel submitted hereunder shall require compliance with all applicable Town land use ordinances at the time it occurs.

Witness our hands this ____ day of _____, 20____.

_____ _____
Witness Owner's Signature

_____
Print Name

_____
Owner's Signature

_____
Print Name

STATE OF MAINE
COUNTY OF YORK, ss

_____
Date

Personally appeared the above named _____
and acknowledged the foregoing instrument to be his/her free act and deed.

Before me. _____
Notary Public/Attorney at Law