

Clifton A. Wilson

v.

Town of Weare

Docket No. 4033-87

DECISION

A hearing in this appeal was held, as scheduled, on June 15, 1989. The Taxpayer was represented by himself and Mark McCann, Appraiser and Compton French, Appraiser. The Town was represented by William G. Herman, Selectman and Alice MacKinnon, Appraiser from Avitar.

The Taxpayer appeals, pursuant to RSA 79-A:10, the October 1, 1987 full value assessments for current use change tax purposes of: Lot 1, \$24,000; Lot 2, \$29,000; Lot 3, \$29,000; Lot 4, \$29,000; and Lot 5, \$29,000. Lots 1-5 are part of a subdivision, by Clifton Wilson, of a parcel originally enrolled in current use in 1982 by Joseph P. Pecukonis.

Mr. McCann stated that the Taxpayer was not contesting the Town's assessment on Lots 1, 4 and 5. However, they were contesting the value of .33 house site area of both Lots 2 and 3. Lots 2 and 3 are each 11 acres and thus the current use change tax was being calculated on the driveway and cleared site only on each lot.

Mr. McCann presented an appraisal of the .33 acre sites indicating a value of \$15,000 each. This appraisal was based on sales of three comparably sized lots in Weare and Goffstown.

Mr. Wilson stated that after receiving Planning Board approval and, in the case for the common drive for Lots 1 and 2, N.H. Wetland Board's approval, he constructed driveways and cleared sites on the five lots in the fall of 1987. Upon questioning Mr. Wilson testified that for the construction of the drive for

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Lots 1 and 2, culverts had to be installed to cross a stream and wetland to access the building sites on the rear of the lots.

Alice MacKinnon presented evidence that in 1982 the entire parcel was enrolled in the current use program with 50 acres in the wetland category and 27.24 acres in unmanaged forest land.

Ms. MacKinnon stated that in her opinion the Town erred in not assessing the change tax on the entire 11 acres of each Lot 2 and 3, since under the current use regulations the development of any portion of the wetland disqualifies the entire parcel. She testified and submitted evidence that 2 acre Lots in Weare were selling in 1987 for \$32,000 to \$42,000. She stated that while the house site area valued for the current use change tax was only .33 acre, it had nearly the same utility as a 2 acre lot and thus nearly the same value. She also referred to a letter in the Board's file in which Mr. Roberge, Avitar Appraiser for the Town, estimated the 11 acre lots of \$43,000 each. Ms. MacKinnon stated that while the Town probably could have assessed the change tax on both Lots 2 and 3 for \$43,000, the \$29,000 each lot was assessed was a conservative assessment and still valid.

She testified that two of the Taxpayer's appraisal comparables were deemed not buildable at the time of the appraisal. Since then comparable "C" which had been purchased in October, 1986 for \$10,000 had resold for \$18,000 after a variance to enable building had been obtained. Also comparable "A" which had been purchased in August, 1987 for \$12,500 had been resold for \$22,000. She further stated that comparable "B" had public water available to it but that the lot was still listed as a "non-building" lot. She stated that these lots were thus not really comparable to the building site areas of Lots 2 and 3 as Lots 2 and 3 were approved lots and readily buildable.

In regard to the Taxpayer's allegation the Board rules as follows.

The Taxpayer's appeal is based on the Constitution of New Hampshire, Part 2, Article 5, which states in part:

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And further, full power and authority are hereby given and granted to the said general court, from time to time, . . . to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and residents within, the state, and upon all estates within the same

79-A:7 Land Use Change Tax.

I. Land which has been classified as open space land on or after April 1, 1974 pursuant to this chapter shall be subject to a land use change tax when it is changed to a use which does not qualify for open space assessment. Notwithstanding provisions of RSA 75:1, said tax shall be at the rate of 10 percent of the full and true value determined without regard to the open space assessed value of the land changed to other than open space use or any equalized value factor used by the municipality; in which the land is located. Notwithstanding the provisions of RSA 76:2, such assessed value shall be determined as of the actual date of the change in land use if such date is not April first. This tax shall be in addition to the annual real estate tax imposed upon such property, and shall be due and payable upon the change in land use.

The Board rules that the Legislature's serious intent in enacting the current use chapter and the resulting financial impact of the program on taxpayers both individually as property owners and collectively as taxing districts require that the provisions of the law be as carefully and diligently administered as possible.

79-A:1 Declaration of Public Interest.

It is hereby declared to be in the public interest to encourage the preservation of open space in the state by providing a healthful and attractive outdoor environment for work and recreation of the state's citizens, by maintaining the character of the state's landscape, and by conserving the land, water, forest, and wildlife resources. It is further declared to be in public interest to prevent the conversion of open space to more intensive use by the pressure of property taxation at values incompatible with open space usage, with a minimum disturbance of the concept of ad valorem taxation.

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Also, the court has said in *Dana Patterson, Inc. v. Merrimack*, 30 N.H. 353, 355 (1988).

The statute operates as a disincentive to intensify the productive use of land. See RSA 79-A:1. Where current use land is put to productive use, however, and no longer qualifies for the reduced tax rate, the owner is subjected to a land use change tax of "10 percent of the full and true value" of the land. RSA 79-A:7, I. This tax permits a town or city to recapture some of the taxes it could have collected had the land not been in current use.

The Board finds that the entire parcel in question was properly enrolled in current use in 1982.

The Board finds that on August 24, 1987, Mr. Wilson received approval by the Weare Planning Board for five lots plus a "remaining area" all of which total 60.09 acres. The Board rules that while 77.24 acres may have been a reasonable estimate of the entire parcel's acreage in 1982, Mr. Wilson's approved subdivision plan totalling 60.09 acres is the best evidence before the Board. As to how to allocated the wetland and unmanaged land among the reduced acreage, the Board finds that the revised current use map in the Town's files with the notation "updated per Clif 4/13/88" is the best evidence. That map indicates a total of 36 acres of wetland, 17.65 acres of unmanaged forest and farmland, and the balance of the acreage of land as lots and house lots no longer eligible for current use.

The Board finds that shortly after planning board approval, Mr. Wilson had house sites and drives cleared and constructed on Lots 1 through 5. The Board rules that the Town's date of change of October 1, 1987, is reasonable based on the testimony.

RSA 79-A:7

- IV. For purposes of this section land use shall be considered changed and the land use change tax shall become payable when:
- (a) Actual construction begins on the site causing physical changes in the earth, such as building a road to serve existing or planned residential, commercial, industrial, or institutional buildings; or installation

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of sewer, water, electrical or other utilities or services to serve existing or planned residential, commercial, industrial, institutional or commercial buildings; or excavating or grading the site for present or future construction of buildings; or any other act consistent with the construction of buildings on the site.

The Board finds the Town's full value assessments of Lots 1, 4 and 5 (\$24,000, \$29,000 and \$29,000 respectively) and as agreed to by the Taxpayer to be correct.

As to the value of the 1/3 acre cleared house site on Lots 2 and 3, the Board finds that while they are of more value than the comparable sales as submitted by the Taxpayer's appraiser, they also do not have the full utility flexibility, privacy or value of 2 acre lots as alleged by the Town. Thus the Board rules that the correct value of the 1/3 acre sites is \$21,000 each.

The Board finds that in constructing the common drive for Lots 1 and 2, a permit from the New Hampshire Wetlands Board had to be obtained to fill wetlands to access the building sites of the two lots. The Board finds that the Supreme Court in *Claridge v. N.H. Wetlands Board* (1984), 125 N.H. 745, 485 A.2d 287 and *N.H. Wetlands Board v. Marshall* (1985), 127 N.H. 240, 500 A.2d 685 and the Current Use Advisory Board in its regulations have found wetlands to be particularly sensitive and important lands. As a consequence the Current Use Advisory Board in its rules dealing with wetland criteria states that . . . "once accepted as wetland and assessed as such, the development of any portion of the qualifying parcel disqualifies the entire parcel for classification as wet land." Thus the Board rules that all 36 acres of wetland at the time of the change of use no longer qualified for current use and were subject to the current use change tax.

Based on the revised current use map, the Board finds that Lot 1, already separately valued, appeared to contain approximately 1/2 acre of wetland, leaving 35 1/2 acres to be assessed for the change tax separately.

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size, the Board finds the disqualifying wetland should be valued at \$500 per acre.

Summarizing the full value assessment by each lot, the Board finds as follows:

Lot 1: (entire lot)		<u>Total</u>
		\$24,000
Lot 2:		
.33 acre house site	\$21,000	
9.5 acres wetlands @ \$500/A	\$ 4,750	\$25,750
Balance still in current use.		
Lot 3:		
.33 acre house site	\$21,000	
6 acres wetland @ \$500/A	\$ 3,000	\$24,000
Balance still in current use.		
Lot 4 (entire lot)		\$29,000
Lot 5 (entire lot)		\$25,000
"Remaining Area":		
20 acres wetland @ \$500		\$10,000
Balance still in current use.		
Total		\$141,750

The Board therefore orders that the Taxpayer is subject to an additional current use change tax of \$175.00 based on the additional value of \$1,750 (\$141,750 - \$140,000).

The Board also orders the Town to file new current use assessment lien release forms with Hillsborough Co. Registry of Deeds correcting the acreages and values for Lots 2 and 3 and the "remaining area".

Further, the Board orders the Taxpayer to submit a revised current use map to the Town showing the dimensions and exact location of the 1/3 acre house sites on Lots 2 and 3 and the correct locations and boundaries of the wetlands and unmanaged land on the "remaining area" parcel. (See Department of Revenue Administration Administrative Rules: Rev 1202.01(d)(2).)

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

(Ms. Richmond did not sit.)
Anne S. Richmond, Esquire, Chairman

George Twigg, III, Member
Acting Chairman

Peter J. Donahue, Member

Paul B. Franklin, Member

Date: 7/14/89

I certify that copies of the within Decision have this date been mailed, postage prepaid, to Clifton A. Wilson, taxpayer; and the Chairman, Selectmen of Weare.

Michele E. LeBrun, Clerk

Date: 7/14/89

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AMENDED DECISION

A decision in this appeal was issued on June 28, 1989. The Board amends the decision by making the following change.

On Page 6, second paragraph, remove:

Lot 5 (entire lot) \$25,000

and replace with:

Lot 5 (entire lot) \$29,000

The Board therefore finds that the correct value for Lot 5 is \$29,000, and the total value remains the same at \$141,750.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

— Anne S. Richmond, Esquire, Chairman

— George Twigg, III, Member

— Peter J. Donahue, Member

— Paul B. Franklin, Member

Date: 7/14/89

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I certify that copies of the within Decision have this date been mailed, postage prepaid, to Clifton A. Wilson, taxpayer; and the Chairman, Selectmen of Weare.

— Michele E. LeBrun, Clerk

Date: 7/14/89

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Docket No. 4033-87

ORDER RE MOTION FOR CLARIFICATION

The Board received a letter from the Weare Selectmen dated July 12, 1989, requesting clarification of the Board's decision of this appeal.

The Town's concern is that of the total 11 acres of lot 3 only 4.67 acres of land still qualifies for current use assessment as a result of the Board's decision. The Town states that on September 18, 1988, lot 3 was sold to a Timothy Loomis. Further, quoting from the Town's letter: "If Mr. Wilson still owned lot 3, the balance of 4.67 acres not effected by the change could remain in current use as he owns the abutting remaining land. However, the new owner does not own any abutting current use land and so this 4.67 acres must come out of current use also. We can not see how we can assess this penalty to Mr.

Loomis as Mr. Wilson was the owner at the time of the change. He put in the driveway, etc. Do we get a fair market value and tax Mr. Wilson?"

The Board rules that any potential change use tax resulting from sale of lot 3 would constitute a separate and distinct tax and possible appeal from the one presently at bar.

The Statutes (RSA 79-A:10 and RSA 76:16-a) are clear in giving this Board jurisdiction of current use change tax appeals only after a tax has been assessed and appeal processes are followed.

The Board rules that it only has jurisdiction in this case to hear an appeal of a current use change tax assessed on October 1, 1987, by the Town of Weare of 60.09 acres owned by Clifton A. Wilson. The Board reaffirms that this tax was caused by the homesite development and associated wetland alterations

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that occurred around October 1, 1987. The Board finds that as of the date of change, the 4.67 acres of lot 3 was still eligible for current use as it was owned by Mr. Wilson with other abutting and qualifying current use land.

Thus, the Board rules it does not have jurisdiction to fully clarify the status of the 4.67 acres nearly a full year later on September 18, 1988.

The Board fully recognizes the vexing administrative dilemma its decision causes. We would recommend you consult with the Department of Revenue Administration and Town Counsel to resolve the matter in as practical manner as possible.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

(Ms. Richmond did not sit.)
Anne S. Richmond, Esquire, Chairman

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George Twigg, III, Member

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Peter J. Donahue, Member

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Paul B. Franklin, Member

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Date: July 14, 1989

I certify that copies of the within Order have this date been mailed, postage prepaid, to Clifton A. Wilson, taxpayers; and the Chairman, Selectmen of Weare.

Michele E. LeBrun, Clerk

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Date: July 14, 1989

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