

Beth Jordan Robinson and Barbara H. Wood

v.

Town of Tilton

Docket No. 4134-88

DECISION

A hearing in this appeal was held, as scheduled, on March 28, 1990. The Taxpayers were represented by Stanley H. Robinson, Esq. & husband, one of them. The Town was represented by John L. McCarthy, Chairman of the Board of Selectmen and George B. Ballester, Assessor.

The Taxpayers appeal, pursuant to RSA 79-A:10, the current use change tax of \$13,619 resulting from a full value assessment of \$136,190 as of November 20, 1987.

Mr. Robinson testified that the Taxpayers owned approximately 55 acres in November of 1987 and that after filing a Notice of Intent to Cut Wood or Timber with the Town, they proceeded to have selective logging done on the property. He argued that while he and the Taxpayers were aware that the land was in current use, they were unaware of the specific classification. As a result of the logging, he testified that the Town assessed the change of use tax in question.

Mr. Robinson argued . . . "(h)ad logging been inconsistent with the current use classification of the property, then the Town of Tilton should have notified Petitioners in November of 1987 when they filed their Notice of Intent to Cut."

and further that "RSA 79-A:7 states that there shall be a land use change tax imposed when the use of the land is changed to a use which does not qualify for open space assessment. The change involved in this matter involves a change from one use which qualifies for open space assessment to another use which qualifies for open space assessment, and thus, the Town of Tilton has no

statutory authority for imposing the land use change tax."

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Mr. Ballester for the Town argued, "Beth Jordan Robinson and Barbara H. Wood of Franklin, N.H. did have wood cut on their land in Tilton, without filing an intent to cut, as required under RSA 79:10; in or near the month of November 1987, and in doing so; did cause the use change penalty to be imposed as they had not notified or secured the approval of the assessing officials."

He argued that a letter dated August 16, 1988, from Arthur G. Danie, Assistant Commissioner of the Department of Revenue Administration and the attached rules Rev 1204.05 (Part of Exhibit TN-B) supported the Towns interpretation of the current use regulations. In part they read:

"It is the department's position that if someone who is under current use category of unmanaged forest land signs an intent to cut and in fact does cut, the Selectmen should impose the use change penalty tax.

Attached you will find rules which are on file with the Administrative Procedures Section regarding the proper steps to take in order to change from one qualifying category to another. If these procedures are not followed then the person seeking to change categories cannot assume that he is granted change in categories simply because the selectmen signs an intent to cut form."

Rev 1204.05 Change of Classification.

(b) Prior to a change in classification, and prior to initiating a physical change to the land, the land owner shall notify and secure the approval of the local assessing officials.

Mr. Ballester stated that the value of \$2530 per acre for the total area of 53.83 acres was determined from two abutting sales in 1987 and 1988.

The issues before the Board can be summarized as follows:

- 1) What was the proper current use classification at the date of change and were the local assessing officials notified and did they give approval to a change of classification prior to the act necessitating such a change?
- 2) Depending on the answers to the first issue, does an act which would necessitate a change in classification for it to properly occur, cause the change use tax to be imposed if the land owner does not first notify and secure the approval of the local assessing

officials?

First, the land in question was enrolled properly in current use in the unmanaged forest land category in 1979 by the previous owners Jeremiah and Rose Franklin.

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Unmanaged forest land in the 1987 current use rules was defined as:
Rev. 1205.04. Wild Land.

(2) Productive wild land.

- a. Unmanaged forest land shall be a tract of unimproved forest land of at least 10 contiguous acres upon which there are no detrimental structures which by its nature is capable of producing commercial forest crops, and which has been for at least the last 5 years left in its natural state without substantial interference to the natural ecological process. Harvesting of trees for the landowner's personal domestic use for fuel wood purposes shall be allowed, subject to compliance with generally accepted forest management and utilization practices.

Both parties concurred that the Franklins logged the property in 1983, but that through lax administration at that time, the issue of changing classification or assessing a change use tax was not noticed or addressed. With logging having occurred in 1983 and less than five years having passed to the Town's alleged date of change of November 1987, it is clear the land in question or at least a good portion of it no longer qualified for the unmanaged forest land category. There is no evidence that any owner specifically requested the Town to change the classification nor did the Town through an act of its own change the classification to the forest land category. Consequently the date of change of use, if indeed non notification of the desire to change classification triggers a change of use, would have occurred when the previous owners started logging in 1983.

As to the second issue of whether the act of not receiving approval from the assessing officials before changing classification of the land in itself triggers a change use tax, the Board finds the current use regulations addressing this situation are ambiguous and subject to interpretation.

Rev. 1203.02. **Change of Classification.**-(a) Land owners shall be permitted to change the classification of their land from a productive wild land category to the farm land or forest land categories only as follows:

(1) Unmanaged forest land shall be reclassified only in the active categories of farm land or forest land.

(2) Unmanaged farm land shall be reclassified only into the active categories of farm or forest land.

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(b) Prior to a change in classification, and prior to initiating a physical change to the land, the land owner shall notify and secure the approval of the local assessing officials.

(c) A change in classification may occur at any time during the tax year; however, the land shall be assessed in accordance with the category under which it was classified as of April 1 of the tax year.

(d) A change in the classification of the land shall not cause the 10% use-change penalty to be imposed, so long as the land owner complies with the established criteria of the category to which the land is changed.

However, the statutes are clearer and take precedence.

RSA 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. . . emphasis added

RSA 79-A:2 **Definitions**. . . .

VI. "Land use change tax" means a tax that shall be levied when the land use changes from open space use to a non-qualifying use.

It is clear from the record that the logging that took place both in 1983 and in 1987 was selective enough to have qualified the tract as open space under the managed forest land category. The process of notifying and receiving approval was not done but that in itself does not disqualify the resulting condition of the tract from being eligible for current use nor is the severity of assessing the change use tax proportional to the transgression of not following the process. The N.H. Supreme Court decision Michael H. Foster v. Town of Henniker of August 9, 1989, clearly states that the change to the land must be viewed in the context of the spirit of the current use statutes.

"In determining whether a change in status has occurred, the assessing officials are not limited by a literal application of the regulatory criteria promulgated by the current use advisory board, RSA 79-A:3, :4 (Supp. 1988), which functions within the department of revenue administration. See N.H. Admin. Rules, Rev 1201.01-1205.07. The regulatory criteria did not modify the statute, but served to effectuate its purpose. Reno v. Town of Hopkinton, 115 N.H. 706, 707-08, 349 A.2d 585, 586 (1975); McGraw, 18 N.H.B.J. at 112. The criteria in this instance are instructive in determining when a change has taken place and when the use change tax may be

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assessed, but they do not have a limiting effect upon the scope of the statute."

Therefore, the Board rules that no change in use took place as a result of either logging operations and the tract continues to be eligible for open space assessment under the forest land category. If any change use taxes have been paid, the entire amount is to be refunded with interest at six percent per annum from date of payment to date of refund.

The Board further orders that the Taxpayers supply the Town, with a copy to this Board, within 60 days information required in Rev. 1205.03 Forest Land.

(2) The assessing officials shall require a written statement upon application and periodically thereafter at intervals of 5 (or more) years summarizing past forestry accomplishments, present forestry conditions, and plans for forest improvement and harvest for the following 5 (or more) year period on the tract of land, as evidence of meeting the conditions in Rev. 1205.03 (a),(1). The map or drawing showing changes in forest type acreages as required under Rev. 1202.02(b) shall be updated as necessary at each update of the written statement.

In commentary, the Board finds that the issues in this case may need further attention and clarification by the legislature and/or current use Advisory Board.

In this case, an elderly couple enrolled a tract of 110 acres in current use in 1979. Subsequent to their death, a partnership of two professional people (the husbands of the present owners) acquired the estate. From that time the Board notes that the owners have taken a number of actions that follow the pattern of maximum return or liquidation of the property allowable without losing the benefit of current use assessment. The owners have subdivided the land into lots that have mostly been just in excess of the minimum 10 acre requirement for current use so that the sale of the lots would not trigger a change use tax. The owners logged from 35 to 40 acres nearly 150,000 board feet four years following the over 250,000 board feet cut by the previous owner on the total 110 acres at that time. While the loggers testimony indicates that the cut was done to reasonable silvacultural standards and the resulting stand is more densely stocked than was the parcel in the Foster v. Henniker case, the photographs do show evidence of a heavily logged parcel and that it was done with something other in mind than long term timber return from the tract. The

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testimony was also clear that the owners deliberately had the logger not clear the sites and drives on the subdivided lots so as not to trigger the change use tax for those areas. While the Board has found that none of these actions have warranted the assessment of a change use tax, it must ask the rhetorical question of whether the public purpose of current use, i.e. that of maintaining the character of the state's landscape, of conserving the land, water, forest and wildlife and of preventing the conversion of open space land to more intensive use, has been upheld on this parcel as much after the above mentioned actions as it was when the parcel was originally enrolled in current use.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Anne S. Richmond, Esq., Chairman

(Mr. Twigg did not sit.)

George Twigg, III, Member

Peter J. Donahue, Member

Paul B. Franklin, Member

Date: April 17, 1990

I certify that copies of the within Decision have this date been mailed, postage prepaid, to Stanley H. Robinson, Esquire, representative for Beth Jordan Robinson and Barbara H. Wood, taxpayers; and the Chairman, Selectmen of Tilton.

Michele E. LeBrun, Clerk

Date: April 17, 1990

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