

David A. Sclafini and Patricia A. Sclafini

v.

City of Claremont

Docket No. 4140-88

DECISION

The "Taxpayers" appeal, pursuant to RSA 79-A:10, the "City's" imposition of a \$3,300.00 land use change tax (the Tax) on two lots: 1) new map 55, lot 25--\$2,750.00 Tax; and 2) new tax map 55, lot 24--\$550.00 Tax (collectively the "Property"). The sole issue is whether the Tax should have been levied where the Taxpayers changed the Property's use from one current use classification to another. For the reasons stated below, we find the City erred in removing the Property from current use, and thus, the City improperly assessed the Tax. The City's actions also resulted in the Taxpayers paying taxes on the Property's full value in 1988. This too should not have occurred.

The facts are simple and uncontroverted. In 1987, the Property was in current use, classified as unmanaged forest, which is within the wild-land classification. See Rev. 1205.04 (1988). Sometime in 1987-1988 the Taxpayers, without contacting the City, had the Property selectively logged to establish a pasture. The Taxpayers intended to keep the Property in current use but to change its classification to permanent pasture, which is within the farmland classification. See Rev. 1205.02(2)(b). Nonetheless, the City unilaterally removed the Property from current use for the 1989 tax year. The Taxpayers refiled for current use as permanent pasture, and this application was accepted for the 1989 tax year.

The City testified its actions were based solely on the Taxpayers' failure to notify the City and obtain the City's approval before beginning the

work on the Property. The City based its decision to levy the Tax on DRA rule Rev.

1204.05(b) (1988), which states, "Prior to a change in classification, and prior to initiating any physical change to the land, the land owner shall notify and secure the approval of the local assessing officials."

In deciding this appeal, we must begin our analysis with the statute, not the DRA rule. RSA 79-A:7 ("Land Use Change Tax") states clearly: "Land which has been classified as open space land on or after April 1, 1974, pursuant to [RSA chapter 79-A] 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. The DRA rules cannot alter RSA 79-A:7. Rather the DRA rules serve only to effectuate the meaning and intent of RSA 79-A:7. See Foster v. Town of Henniker, 132 N.H. 75, 82 (1989). Based on RSA 79-A:7's clarity, we conclude the Taxpayers' failure to comply with Rev. 1204.5(b) did not empower the City's actions. RSA chapter 79-A does not make the Taxpayers' change of classification contingent on the notifying The City and obtaining the City's approval before changing the current use classification. Property in current use can be changed to another classification without imposition of the change in use tax. Municipalities must, if the property qualifies, change the classification upon the taxpayer's request. Rev. 1204.5(b) implies municipalities have discretion about whether a taxpayer may change classification. This rule is inconsistent with RSA 79-A:7, and we will not enforce it.

Based on the above, the City shall: 1) refund the \$3,300.00 Tax; and 2) abate the 1988 taxes to the extent the loss of current use status increased the Property's assessment, refunding the excess taxes paid. These refunds shall include 6% interest from the payment date to the refund date.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Peter J. Donahue, Member

Paul B. Franklin, Member

Ignatius MacLellan, Member

Date: October 15, 1990

I certify that copies of the within Decision have this date been mailed, postage prepaid, to David A. & Patricia A. Sclafini, taxpayers; and Chairman, Board of Assessors of Claremont.

Michele E. LeBrun, Clerk

Date: October 15, 1990

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