

Raymond Landry and Tina Landry

v.

Town of Northumberland

Docket No. 5735-89

DECISION

The Taxpayers appeal, pursuant to RSA 79-A:10, the land-use-change tax of \$1,320 assessed pursuant to RSA 79-A:7 by the Town of Northumberland on May 23, 1989. The property on which the tax was assessed was a 1.65-acre lot, being lot 5 of a plat entitled "Property Subdivision for Gerard H. and Wanda K. Cloutier."

The issue in this case is not whether the amount of the tax is correct, but rather, when did the change in use occur, and consequently, did the Town assess the tax to the correct owner.

The uncontested facts are:

- 1) the Cloutier property was surveyed in the fall of 1988;
- 2) in December 1988 the Northumberland Planning Board approved a subdivision of the Cloutier property into five lots, four of which are two or less acres in size and one is 18.54 acres;
- 3) all the lots were to be accessed by a new road shown on the approved plan;
- 4) some rough work was done to the road prior to March of 1989;
- 5) Lots 1 and 2 were transferred to new owners in January 1989;

6) Construction of a new house began on Lot 2;

7) Northumberland town meeting in March approved extending the town water line to serve the Cloutier subdivision;

8) on May 19, 1989, the Taxpayers, Raymond and Tina Landry, purchased Lot 5 for \$13,200;

9) on May 23, 1989, the Town assessed a land-use-change tax of \$1,320.

The Taxpayers argued the change in use did not occur when they purchased their lot in May 1989, but rather when the previous owners, the Cloutiers, started construction of the road in early 1989 to serve the lots as shown on the subdivision plan. They argued the Town should have assessed the tax against the Cloutiers, and as a consequence this board should order the Town to reimburse the land-use-change tax with interest and expenses for the hearing, all totaling \$2,061.30.

The Town argued the land-use-change tax was not assessed earlier than the actual transfer to the Landrys as Lot 5 was still unimproved and contiguous, in the same ownership with Lots 3 and 4, all with a combined acreage in excess of 20 acres.

The board rules that the change in use did occur with the roughing in of the road by the previous owner; however, the board does not order any reimbursement of the tax or assessment of costs for the following reasons:

RSA 79-A:7 IV(a) allows for the land use change tax to be payable when "(a)ctual construction begins on the site causing physical changes in the earth, such as building a road to serve existing or planned residential, commercial, industrial, institutional or commercial buildings . . ."

New Hampshire Administrative Rules Rev 1203.02(g) (2) and (3) state:

(2) If the development plan calls for more than the construction of a road, the amount of land to be disqualified from current use

and subject to the land use change tax shall be determined by applying Rev 1203.05 to that plan. The road shall be physically roughed in, to a point where the selectmen or assessing officials disqualify the land from current use.

- (3) In the case of planned or existing building sites, the road, together with all building sites serviced by the road, shall be considered changed in use.

Further, New Hampshire Administrative Rules Rev 1203.03(c) states:

- (c) No parcel of land shall be considered qualified for current use if the land has been committed so as to allow contiguous land to be intensified or developed to the maximum extent (sic) and there is no possibility of future development upon the land because of:
 - (1) Minimum acreage to satisfy local density requirements as established by municipal ordinances, planning board requirements as established by municipal ordinances, planning board requirements, or local zoning ordinances, or
 - (2) Applicable federal, state land use or development requirements.

It is clear from the statutes and the applicable rules that land subdivided into lots less than 10 acres and accessed by a new road as shown on a "development plan" is to be considered changed when the road is physically roughed in. Thus, in this case the change in use to Lot 5 occurred in early 1989 when still owned by the Cloutiers.

As to who shall pay the tax, RSA 79-A:7 II in part states:

"[T]he land use change tax shall be due and payable by the owner at the time of the change in use to the town or city in which the property is located . . ." and (e) "[a]ll land use change tax assessments levied under this section shall create a lien upon the lands on account of which they are made and against the owner of record of the said land on the date of the change in use."

Ideally, in this case the tax should have been assessed against the Cloutiers and, if unpaid at the time the Landrys acquired the property, the lien would have been paid by either the Cloutiers or the Landrys to release the lien and clear the title. Apparently, as testified to in this case, neither the Landrys nor their bank were aware of any current-use lien or land-use-change tax liability prior to the closing on the property. When the tax was assessed, the bank paid it to have the lien released that its title search had not turned up. Mr. Landry testified that if successful in his appeal he had a verbal agreement with the bank to repay them the tax, and if unsuccessful, no payment was to be made.

The board rules that if land-use-change taxes are not paid by the owner at the time of the change in use, a lien is created upon the land which is removable by a subsequent owner desirous of obtaining a clear title to the property. The legislature obviously recognized the transient nature of "owners," thereby allowing a lien to be placed on the land to ensure the collection of this tax. In this case the board rules the Town assessed the tax to the incorrect owner but that the lien on the land created by that tax was proper and was by necessity paid and released by the bank on behalf of the Taxpayers in obtaining their building loan.

This board could order, but does not, that the Town reimburse the Taxpayers for their payment of the tax and bill the Cloutiers. That alternative would not cause any greater equity and would result in additional administrative wheel spinning. What would occur was once the Town billed the Cloutiers for the tax, a lien would be created upon the Landrys' land. Thus, for the Landrys to clear their title they would either hope the Cloutiers

would pay the tax (an unlikely possibility as the Town cannot place a lien on any Cloutier land) or again pay the tax themselves and attempt, in a separate action, to recover the tax and expenses from the Cloutiers. This course of action does not put the Taxpayers any closer to an equitable solution than where they stand now with this board's ruling in hand.

The board would suggest that the Taxpayers, with this decision in hand and with the cooperation of the Town, could file a separate action in the courts to attempt to recover the land-use-change tax, interest and expenses.

SO ORDERED.

August 16, 1991

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin

Ignatius MacLellan

I certify that copies of the within decision have been mailed this date, postage prepaid, to Raymond and Tina Landry, the Taxpayers, and to the Chairman, Board of Selectmen, Town of Northumberland.

August 16, 1991

Brenda L. Tibbetts, Clerk