

Sugarbush, Inc.

v.

Town of Landaff

Docket No. 5746-89

DECISION

The Taxpayer appeals, pursuant to RSA 79-A:10, a land use change tax of \$13,258.00 based on an assessment of \$132,580.00, as of November 18, 1988. The property in question consists of a 31.36 acre unimproved tract of land that had been subdivided into six lots all of slightly more than five acres each. The tract fronts on both Landaff Center Road, a paved state road, and on Hodge Hill Road, a gravel town road. The Taxpayer had purchased, already subdivided, the tract on November 18, 1988, from Jockey Hill Farms, Inc. for \$72,500.

The Taxpayer argued the Town's reliance on the subsequent retail sale prices of the six lots in January through June of 1989 for determining the "full and true value" was erroneous. They argued that the retail prices should be discounted by factors for engineering/survey costs, marketing costs, financing costs, overhead costs and profit as allowed in Cheney East Corporation and Real Estate Advisors, Inc. v. Town of Newmarket, Board of Tax and Land Appeals Docket No. 3595-87 (Cheney hereafter) and Appeal of Sawmill Brook Development Co. 129, N.H. 410 (1987) (Sawmill Brook hereafter). If such costs were allowed, the full and true value would approximate the purchase price of \$72,500 and a proper tax of \$7,250 would result.

The Town argued that the full and true value was reflected by the Taxpayer's sale of the lots shortly after acquiring the subdivided tract. They argued the discounts enumerated by the Taxpayer are not correct for this subdivision as no road, utility, drainage or other value enhancing improvements were needed to market the six lots.

The issues before the Board are basically:

- 1) What action caused the property to no longer qualify for open space assessment and when did that change occur.
- 2) Was a full and true value of \$132,580.00 as determined by the Town reasonable as of the date of change.

First, both parties ostensibly agreed at hearing that the date of change was occasioned by the purchase of the property by the Taxpayer on November 18, 1988. The Board disagrees. If an agreement or stipulation is made contrary to the law, the Board cannot be bound by it. See Appeal of Gillin, 132 N.H. 311, 313 (1989) (Board must exercise its power in accordance with the statutes).

The statutes and rules are quite clear as to what action triggers a land use change tax.

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 . . .

Rev 1203.02 When is Land Changed. Land under current use classification shall be considered changed and the use change tax imposed when a physical change takes place to the land, which is contrary to the requirements of the category under which the land is classified, such as but not limited to the following:

- (a) Change in acreage.
 - (1) If a parcel of land is sold or transferred to another owner and no longer meets the minimum or other acreage requirements as described in the category in which the land is classified, that land shall be considered changed and the use change tax assessed. . .
 - (2) If a parcel of land is sold or transferred to another owner and still meets the minimum or other acreage requirements as described in the category in which the land is classified, the encumbrance shall remain with the land.

Rev 1201.07 Tract means land which is contiguous and qualifies for current use assessment in any category or combination of categories as described under PART Rev 1205, totaling ten acres or more unless otherwise specified within this chapter.

The mere acquisition by the Taxpayer of a subdivided tract in November of 1988 did not cause the parcel to be disqualified for current use. The obtaining of subdivision approval does not by itself change the use to which the land is put. See Blue Mountain Forest Ass'n v. Croydon, 117 N.H. 365, 379, 373 A.2d 1313, 1321 (1977). An owner may obtain subdivision approval but delay for years the actual change in use. By continuing the tax advantage of open-space taxation until there has been an actual change in use, the preservation of open space is encouraged and the purpose of the statute is advanced. Frost v. Town of Candia, 118 N.H. 923, 924 (1978).

As of November, 1988, the entire parcel was still in excess of ten acres and no physical changes had occurred. The Board rules that the digging of several test pits for determining percolation and the minimal cutting of some trees along one portion of the frontage were actions not so inconsistent with the current use criteria as to disqualify the tract.

The Board rules the change of use occurred when the individual lots, all less than 10 acres, were transferred at different times from January through June of 1989. While technically several dates of change exist, it is reasonable for administrative purposes, since the transfer dates are so close, to rule an effective date of change to be January 31, 1989. This is the date at which no two lots of this tract remained contiguous and in the same ownership.

As to the second issue, the burden lies with the Taxpayer to prove the assessment of \$132,580.00 for the 6 lots as of January 31, 1986 is excessive.
TAX 201.04 (c)

(c) The taxpayer (appellant) or his representative has the burden of proof and shall be prepared to convince the board by a preponderance of the evidence that the assessment is improper or inequitable or constitutes an excessive share of the tax burden.

The highest and best use of these lots on January 31, 1989, was for residential building lots. All state and local permits and approvals had been obtained, no utility or road improvements were needed or required and the marketing effort had been largely completed. The value of these lots had reached full retail level. The discounting of the retail value to arrive at

full and true value as argued by the Taxpayer, is erroneous in this case. The Cheney and Sawmill Brook cases, as cited by the taxpayer, involved subdivisions that no

longer qualified for current use status at a point in time well before the lots in question had achieved their full retail value. Physical improvements such as roads and utilities and final subdivision approval had yet to be reached in those cases. Thus, some discounting from the lots eventual retail value was necessary to estimate their value in their incomplete and unmarketable stage. That is not the case with this appeal. These lots were complete and being transferred as of the date of change.

While the valuation of \$132,580.00 is curiously coincidental to the total sales prices of the five lots that had transferred as of the Town's billing date, the Board rules the assessment is a reasonable estimate of the full and true value of all six lots and was corroborated by the one comparable sale (Exhibit TN-C) submitted by the Town. The Taxpayer's argument that the sale to the taxpayer of the subdivided tract for \$72,500 in 1988 as the best evidence of value is given little weight as it was for a larger parcel and the individual lots were yet to be marketed.

Therefore the Board denies the appeal.

The Board answers the Taxpayers and Towns requests as follows:
Taxpayer's Request for Findings of Fact and Rulings of Law:

Facts

1. Granted.
 2. Granted.
 3. Granted.
 4. Granted.
 5. Neither Granted nor Denied.
 6. Granted.
 7. Granted.
 8. Neither Granted nor Denied.
 9. Granted.
 10. Neither Granted nor Denied.
 11. Denied.

Rulings of Law

- A. Granted.
- B. Denied.
- C. Denied.
- D. Denied.
- E. Neither Granted nor Denied.
- F. Denied.

Town's Request for Findings of Fact and Rulings of Law:

1. Granted.
2. Granted.
3. Granted.
4. Granted.
5. Granted.
6. Granted.
7. Granted.
8. Granted.
9. Granted.
10. Granted.
11. Granted.
12. Granted.
13. Neither Granted nor Denied.
14. Neither Granted nor Denied.
15. Neither Granted nor Denied.
16. Neither Granted nor Denied.
17. Granted.
18. Granted.
19. Granted.
20. Neither Granted nor Denied.
21. Neither Granted nor Denied.
22. Neither Granted nor Denied.
23. Neither Granted nor Denied.
24. Neither Granted nor Denied.
25. Neither Granted nor Denied.
26. Granted.
28. Granted.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Paul B. Franklin, Member

Ignatius MacLellan, Member

Date: August 15, 1991

I certify that copies of the within Decision have this date been mailed, postage prepaid, to Edwinna C. Vanderzanden, Esq., counsel for Sugarbush, Inc., taxpayer; and Michael M. Ransmeier, Esq., counsel for the Chairman, Selectmen of Landaff.

Brenda L. Tibbetts, Clerk

Date: August 15, 1991

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