

Stephen Hudson and Kathleen Merrill

v.

Town of Dalton

Docket No. 5913-89

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Raymond and Lynn Labbe

v.

Town of Dalton

Docket No. 5949-89

**DECISION**

This is a consolidated order for both appeals since the appeals raise the same issue and rely upon similar facts.

The "Taxpayers," (individually referred to as "Hudson" and "Labbe") appeal, pursuant to RSA 79-A:10, the "Town's" assessment and collection of an RSA 79-A:7 land-use-change tax (the Tax). A Tax of \$1,200 was assessed to Labbe, and the bill indicated June 30, 1989, was the change-of-use date. A Tax of \$1,347.37 was assessed to Hudson, and the bill indicated August 17, 1989, was the change-of-use date. These change dates and values, upon which the Tax was assessed, coincided with the Taxpayer's purchase of these lots.

The Taxpayers have the burden of showing the Tax was improperly assessed. See RSA 79-A:10; RSA 76:16-a; TAX 201.04(e); Appeal of Town of Sunapee, 126 N.H. 214, 216 (1985). We find the Taxpayers carried this burden and proved the Tax was imposed contrary to the law. The facts are as follows.

In 1985, the Taxpayers' grantors, Bradley and Shirely Whitcomb (Whitcomb), purchased the property from Eileen Johnson. (The term "Property" refers to the entire tract, which was subdivided in May, 1988.) Whitcomb then

began to develop the Property by seeking subdivision approval and putting a road into the

subdivision. The road work began in 1987 and was completed no later than sometime in 1988.

The subdivision was approved in May 1988. On July 24, 1989, the Town recorded a current-use application that had been filled out in 1977 by Hazel Tillotson.

The application was approved by the Town selectmen in 1989, but the Property had been receiving current-use classification since at least 1984.

The Taxpayers now enter the story. On June 30, 1989, Labbe bought their lot, and on August 17, 1989, Hudson bought their lot. Both Taxpayers had a title search done before the purchase, and no record of the current-use application was found during the title search. Nonetheless, the Town assessed the Tax against each Taxpayer on the date the lot was transferred and using the sales price of the lot as the basis for the Tax. The Taxpayers now appeal the assessment of the Tax. For the reasons stated next, the Taxpayers should not have been assessed the Tax.

This appeal raises two initial issues: 1) were the Taxpayers personally liable for the Tax under RSA 79-A:7 II?; and 2) were the Taxpayers' lots subject to a lien for the Tax under RSA 79-A: 7 II(e)? We have answered both negatively, and those issues will be discussed here. Simultaneously, we have issued an order against Whitcomb, which is attached, because we have concluded Whitcomb may be liable for the Tax and because the Town erred in how and when it assessed the Tax.

#### Taxpayers' Personal Liability

The Tax did not impose any personal liability on the Taxpayers because they did not own the property when the change in use occurred. The Town erred in treating the conveyance to the Taxpayers of the lots as the change date. Under RSA 79-A:7 II, the owner of the land when the change occurs is personally liable for the Tax. Having considered the evidence here, the change occurred in 1987 when Whitcomb begin construction on the road to serve the subdivision. See RSA 79-A:7 IV(a); Criteria for Current Use Assessment, Section IV A (1987); Appeal of Town of Hollis, 126 N.H. 230, 232 (1985). When the change occurred, Whitcomb was the owner, not the Taxpayers. Therefore, the Taxpayers had no personal liability for the Tax.

Lien on the Lots

The Tax did not create a lien on the lots as to these Taxpayers because the Town failed to properly record the notice of current use with the registry.

See

RSA 79-A:5 VI. In 1977 when Tillotson applied for current use, the Town did not record at the registry any current-use notice as required by RSA 79-A:5 VI.

The notice was finally recorded in 1989, but it was not indexed under Whitcomb but was indexed under Tillotson. Thus, the notice was not in Whitcomb's chain of title, and the Taxpayers testified they had no actual notice of the property's current-use status. Therefore, the Taxpayers were bona fide purchasers of their lots, purchasing the lots free of any lien for the Tax. See RSA 477:3-a; Amoskeag v. Chagnon, 133 N.H. 11, 14 (1990). Under RSA 79-A:5 VI, the Town was required to record the notice of current-use status. This recording requirement brings RSA 477:3-a into play. As stated in Amoskeag, 133 N.H. at 14, "[RSA 477-a serves] to protect both those who already have interests in land and those who would like to acquire such interest." Based on RSA 477:3-a, the Taxpayers were bona fide purchasers.

The Taxpayers would not have been bona fide purchasers if the Town had properly recorded the notice of current use. See RSA 79-A:7 II(e) (lien created for 18 months without recording notice of lien); RSA 477:3-a (not bona fide purchaser to extent recording lien is exempted).

Conclusion

The Taxpayers had no personal liability for the Tax, and their lots were not subject to a lien for the Tax. The Town is therefore ordered to refund the Tax paid by the Taxpayers plus 6% interest from the date paid to the refund date. Pursuant to RSA 76:17-b, the Town is also ordered to refund each Taxpayer's \$40.00 because the Town's error was plain and clear error of fact and law.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Member

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Ignatius MacLellan, Esq., Member

I certify that copies of the within Decision have been mailed this date, postage prepaid, to Raymond & Lynn Labbe, taxpayers; Brien L. Ward, Esq., counsel for Stephen Hudson and Kathlene Merrill, taxpayers; and the Chairman, Selectmen of Dalton.

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Brenda L. Tibbetts, Clerk

Date: November 7, 1991

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