Mt. Washington Sweater Co. Inc.
c/o Donna E. Beck and Edward W. Morrison

v.

Town of Conway

Docket Nos. 8431-90 and 10920-91CU

DECISION

The "Taxpayer" appeals, pursuant to RSA 79-A:9 the "Town's" denial of current use classification for 1990 and 1991 as follows.

1990

1.0 acre horticultural crops

1.66 acres inactive farm

1.4 acres wetland

1991

2.1 acres horticultural land

2.03 acres inactive farm

The "Property" consists of two adjoining parcels, map 48 lot 2 and map 48 lot 2B, totalling 4.58 acres improved a with dwelling, shed and greenhouse. The Taxpayer operates a seasonal bedding plant and garden center under the name of Ye Garden Center on the Property.

For the reasons stated below, the appeal is denied. The Taxpayer has the burden of showing that current use was improperly or illegally denied by the Town. We find the Taxpayer failed to carry this burden.

Arguments

The Taxpayer argued, that while the land was less than 10 acres, it qualified for current use under both the farmland category and the inactive farmland category for the following reasons:

1) its gross receipts and inventory of perennials and shrubs grown on the property for the two years in question indicate that an excess of $2500 value of crops were produced on the property;

2) 600 tomato plants planted in 1990 had a potential value far in excess of $2500; and

3) the conservation commission had determined the land warranted open space protection.

The Town argued the denial of current use was proper because:

1) the Taxpayer had not submitted conclusive evidence that the land was producing a value of products in excess of $2500;

2) the tomatoes the Taxpayer had planted in 1990 were not in the ground until after April 1, 1990;

3) the land applied for as inactive farmland did not qualify, because either

it was not cleared or that which was cleared had nursery stock on it; and

4) the conservation commission's comments on the desirability of maintaining this land as open space was only advisory to the selectmen and did not take into account the current use criteria of the inactive farmland category.

Board's Rulings

These appeals raise two general issues:

1) did the Taxpayer fulfill its burden of proving the land met the specific criteria of the current use regulations; and

2) did the Taxpayer's use of the land fulfill the intent of the current-use statutes.

Current-Use criteria

For the two years in question the Taxpayer applied for current use under three different categories: 1) wetland; 2) inactive farmland; and 3) horticultural land. Each of these catagories will now be addressed.

Wetland

The wetland request was only made in 1990. While there was not much evidence submitted on the wetland category request in 1990, it is presumed by reviewing all the evidence that the Taxpayer combined the wetland in the remaining two categories it sought in 1991. Regardless, the board finds that no evidence was submitted that any of the land would qualify as wetland as

defined in current-use rule Rev. 1205.06. The Town testified that some of the land may be floodplain but not wetland. Floodplain category under Rev 1205.07(b) states:

> lands located in a floodplain shall be required to meet criteria for other categories of open space and shall be assessed according to assessment ranges for those categories.

Therefore, if the land was indeed in a floodplain, it would have had to meet the qualifications for either inactive farm or horticultural crops. Therefore, we will proceed to those two categories in our discussion.

Inactive Farmland

The applicable current-use rule for inactive farmland is found in Rev. 1205.04 (2) c. 2 which states:

> The tract of land of any size which is being kept open by generally accepted methods, but not cropped, and which has been recommended to be maintained as open space by the municipal conservation commission or other appropriate authorized town body designated by the board of selectmen. The final acceptance or rejection of the recommendation shall be determined by the board of selectmen or local assessing officials.

The board finds that this land does not qualify as inactive farmland because it was not cleared.

The parties testified that this land primarily contained pine trees which the Taxpayer has subsequently cut in an attempt to qualify the land for inactive farmland. However, for both years in question, this land was forest land, not inactive farmland.

Horticultural Category

The applicable current-use rule for this category is Rev. 1205.02(a)(2) which states:

> A tract of land, of any size, actively devoted to agricultural or horticultural use having an annual gross value of products normally produced thereon totaling at least $2,500.

The Taxpayer attempted to prove it met this criteria in three general approaches.

1) The Taxpayer used the total gross receipts for its garden center business as indicated on its IRS ll20 form and subtracted from those gross receipts an estimate of the retail value of products which it had purchased wholesale. The Taxpayer estimated the retail value of the wholesale items by multiplying the wholesale prices times 250%. The difference between the gross receipts and this estimated retail value in both years exceeded the $2500. For example, in 1990 the Taxpayer's gross receipts were $36,096.56. Its wholesale purchases for that year were $12,856.96 which when multiplied x 250% arrived at a figure of $32,142.40. The resulting difference between gross receipts and wholesale times 250% equals $3,954.16, which the Taxpayer attributed to crops (annuals, perennials, and shrubs) located on the Property and resold during the season. For 1991, the math was calculated in the same manner with a resulting difference of $4,423.89.

The board does not accept the premise that these figures are necessarily indicative of the value of products from the Property for the following reasons: a) the Taxpayer did not supply its entire IRS 1120 form so that the board could review the detailed receipts and expenses related to the business; rather it simply supplied a cropped copy of the top inch and a half of each tax form for the years under appeal; b) the Taxpayer's 250% markup was an estimate and therefore subject to question; and c) even if the Taxpayer's gross receipts

are attributable solely to all plant materials sold from the Property and even if their markup rate is reasonable, the resulting difference does not necessarily relate to the "annual gross value of products normally produced" on the Property as envisioned by the current-use board in this rule for the reason described in the next section.

2) The Taxpayer presented an inventory of annuals, vegetable crops, perennials and shrubs planted on the Property in the spring of 1991. The Taxpayer attributed a wholesale value to each of these crops to show that the

value of the crops exceeded the $2500 criteria. The board rules that this evidence does not conclusively prove that a value of $2500 is attributable to these items for the following reasons.

A) Both parties submitted photographs (the Town's taken with snow on the ground and the Taxpayer's during the growing season) that showed the beds containing the annuals and perennials were poorly maintained and overgrown with weeds. It is questionable based on these photographs that the value of the items would even approach much less exceed $2500 owing to their negligable maintenance and lack of attractiveness, desirability and quality.

Value is not defined in the current-use regulations nor is it specifically defined in any of the statutes related to taxation except for RSA 75:1. However, for an item to have value it must be desirable, have utility and have some scarcity. See Property Appraisal and Assessment Administration, The International Association of Assessing Officials (1990) 52-53. The board finds based on the photographic evidence, supplied by the Taxpayer, these plants had low desirability and diminished utility because they were not being properly managed. Therefore, their value was extremely limited since they had not been properly maintained and developed. Value is not something that one hypothesises and calculates on paper but rather what the market will recognize when the product is fully developed and available.

B) With the exception of the few trees and shrubs, most of the annuals and perennials were planted early in the spring and were intended for sale within a relatively short period of time. Thus the board finds their final value,

regardless of how diminished the desirability may be, is influenced more by taking those plants from a wholesale situation and locating them in a retail setting than by their growth on the land.

During deliberations, the board reviewed the minutes of current use advisory board (C.U.A.B.) meetings back to 1972 relative to the $2500 criteria. The board was unable to discern any intent on the C.U.A.B.'s part to allow a retail setting to enhance the value of wholesale products to qualify for the $2500 criteria. In fact, one of the earlier drafts of the criteria required all farmland, regardless of size, meet the $2500 criteria. This draft supports the concept of the $2500 criteria that the land must be actively devoted to and normally producing crops valued in excess of $2500. To conclude otherwise could result in ludicrous instances of land adjacent to commercial and residential improvements qualifying for current-use well beyond the intent and scope of the current-use statutes. For example, if it is assumed that "the gross value of products normally produced thereon" means that a person could purchase plant material at the wholesale price in April, place them in the ground for a month, sell them at a retail price and thus qualify for current use under the $2500 criteria, we could envision the K-Marts and Wal-Marts of the world leaving several thousand square feet of unpaved area in front of their stores in an attempt to qualify for current-use. This example is

obviously an absurd extension of this concept, but it shows the danger of going down that path without always bearing in mind the original intent of the current-use statute as will be discussed in the last section

3) In 1991 the Taxpayer planted 600 tomato plants on the Property. The Taxpayer stated, based on a hypothetical yield of 10-15 pounds of tomatoes per plant and an organic price per pound of $2.00, the potential yield would have been $12,000 to $18,000 from the 600 tomato plants. Again the Taxpayer falls short in their burden of proof because the testimony was that only several bushels of the tomatoes were either sold or given away as a donation. There was no evidence as to the quantity, quality, condition and desirability, all of which go to establish value, of the tomatoes at the time of fruition. The board finds that the investment of time and money necessary to plant 600 tomato plants and then minimumly harvesting them results in two conclusions: 1) either Taxpayer did not maintain the tomato plants in any better condition than the photographs of their other crops suggested; or 2) the planting of the tomato plants was nothing more than a ploy to gain current-use assessment.

In summary, the board reaches the conclusion that the horticultural use of the Property is, at best, cosmetic and little more than "window dressing" for the retail operation or, at worst, a scam to obtain current-use assessment.

Current Use Legislative Intent

In reaching these conclusions, the board is always mindful of the requirement that rules must always carry out, but not modify, statutory intent. "The regulatory criteria (do) not modify the

> statute, but serve(d) to effectuate its purpose." Foster v. Town of Henniker, 132 N.H. 75, 82 (1989).

Consequently, in interpreting the intent of rules, one must always be conversant with the statute from which the rules emanate.

Current-use assessment as it is known today was probably one of the more significant modifications to New Hampshire's property tax laws in this century. After several years of debate and public input, the New Hampshire constitution was amended to allow for current-use taxation (Pt. 2 art. 5-B). The legislature then amended RSA 75:1 and enacted chapter 79-A relative to current-use assessment. Inherent in the debate and ultimately in the statutes dealing with current-use was the basic intent of the legislature to recognize the importance of the recreational, economic, scenic and environmental importance of open space. RSA 79-A:1. RSA 79-A:4 gave the C.U.A.B. authority to promulgate rules, establishing criteria and values for current-use land to carry out the intent of the statutes. Most criteria require current-use land to have a minimum of 10-acres. However, in several sections there are exceptions to the 10-acre minimum criteria. These exceptions deal with small-acreage agricultural land, recreational land, wetlands and natural preserved lands. In all these exceptions, however, there appears to be a common thread of the land being significant or unique to the open space concept that the statute embodies.

Therefore, the board when analylizing the facts in any case must always bear in mind the intent of the law contained in RSA 79-A:1. Obviously, in most cases where the land exceeds 10-acres, the open space purpose has been met.

However, when the parcel is less than the minimum acreage, the uniqueness of the parcel in fulfilling the open space goals of the statute must be closely reviewed and established.

The board finds that in most situations where there is a bonafide use of agricultural land of less than 10 acres with products having value in excess of $2500, there is generally a significant visual impact as envisioned with the open space. However, as we have outlined in this case, the board does not find that there is a bona fide use of the land to meet the $2500 criteria nor is there a significant visual impact relative to open space. In addition to its negligible use, this four plus acre parcel with a dwelling and retail operation has had top soil removed and contains a mounded sewer line easement in the front of the lot and a New Hampshire Department of Transportation drainage easement through the parcel. These factors do nothing to enhance the open space features of the Property.

The Taxpayer's various attempts to qualify high-valued commercial land for current use assessment pushes the envelope of exceptions to the general current use program too far in the board's opinion. The board would point out that the discretionary easement program (RSA 79-A:15-21) grants municipalities the discretion of allowing parcels that do not qualify for current use to be assessed as such if the property is locally unique and if there would be a public benefit conferred by granting such an easement. The board would suggest that this would be a more appropriate program for the property to be reviewed under, rather than to attempt to expand the more general current use assessment

program beyond its original intent.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

_____

George Twigg, III, Chairman

_____

Paul B. Franklin, Member

_____

Ignatius MacLellan, Esq., Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid to John W. Barto, Esq., counsel for Mt. Washington Sweater Co, Inc., c/o Donna E. Beck and Edward W. Morrison; and the Chairman, Selectmen of Conway.

Dated: August 24, 1993

0008

Valerie B. Lanigan, Clerk