

City of Lebanon
v.
Dartmouth College Trustees and Lebanon Board of Assessors

Docket No. 10914-91

Decision

Introduction

This case arises out of a complaint filed by the Lebanon City Manager on behalf of the Lebanon City Council (City) claiming the City Board of Assessors (Assessors) improperly assessed a land-use-change tax against the Dartmouth College Trustees (Dartmouth). An initial hearing was held on December 13, 1991, and an order was issued on March 3, 1992. On April 2, 1992, the Board of Tax and Land Appeals (board) granted the City's and Dartmouth's motions for rehearing due to lack of proper notice and rescinded the board's order of March 3, 1992. Proper notice was sent to the parties, and a rehearing was held on May 21, 1992, on the full merits of the case. The following decision replaces the board's earlier order.

Facts

The property in question includes four parcels owned by Dartmouth (lots 9-146, 9-131-1, 9-130, and 9-90), over which was constructed in 1988 the southern- access road to the newly constructed Dartmouth Hitchcock Medical

Center (Hospital) and a road accessing a new water tower on lot 9-90 constructed to service the Hospital. The paved road starts at the westerly side of Route 120, bisecting lot 9-146 (22 acres), crossing Mt. Support Road, continuing westerly across the northerly portion of lot 9-131-1 (151.1 acres), and further westerly into lot 9-130 (approximately 120 acres), ending in a hammerhead turnaround. From the southwesterly corner of the turnaround, a gravel road continues westerly across the balance of lot 9-130, terminating at the water tower on lot 9-90.

On March 27, 1991, the Assessors assessed a land-use-change tax in the amount of \$3,970 for 1.25 acres on lot 9-130. The actual date of land-use change was indicated as August 1988. The value was estimated at \$31,762 per-acre, calculated from a lease of a road in Lebanon by Twin State Cable TV from Joseph and Virginia Barden.

At the May 15, 1991 and June 5, 1991 City Council meetings concerns were raised as to: 1) which lots owned by Dartmouth are in current use and which lots the road crossed; 2) whether the entire right-of-way versus just the road surface and shoulders should be removed from current use; and 3) whether the value used to assess the land-use-change tax was too low. The Council at the June 5 meeting asked the Assessors to review their assessment.

On July 11, 1991, the Assessors met with Paul Olsen, real estate officer for Dartmouth, and Attorney Lawrence Kelly attorney for Dartmouth, reviewed the assessment, and voted to assess an additional tax of \$842 for 3.68 acres on lot 9-130 and release the current-use lien on the entire acreage of lots 9-131-1 and 9-146 for \$1.00 each.

Concerning the current-use status of the lots, lots 9-146, 9-131-1, and 9-130 had current-use liens filed as early as 1975 at the Grafton County Registry of Deeds. Lot 9-90 had no current-use lien on record. In 1986 the

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City had a complete reassessment done. During that process the current-use records dealing with these Dartmouth properties were lost or misfiled. Only current-use lien records at the registry of deeds exist as evidence of the parcels' current-use status prior to 1986.

Since 1986 only lot 9-130 was assessed at current-use values. Lots 9-146, 9-131-1, and 9-90 were assessed from 1986 to 1991 at ad valorem values.

Issues

This matter raises four issues to be answered:

1) **Jurisdiction:**

- a) Intercession: Does the board have authority to intercede in a disagreement between the City and Assessors as to the assessment of a land-use-change tax against Dartmouth; and
- b) Laches: Does the board have the authority to order the abatement of previously assessed taxes or does the doctrine of laches prohibit such a retrospective abatement?

2) **Current-use status of lots:**

Were the several lots in question properly in current use and thus were they subject to a land-use-change tax?

3) **Land area disqualified from current use:**

What is the proper land area disqualified from current use?

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4) **Value:**

What is the proper market value of the area disqualified from current use?

Jurisdiction - Intercession

The City requested, on September 30, 1991, the board, pursuant to its authority in RSA 71-B:16 II, review the actions of the Assessors in the assessing of the land-use-change tax against Dartmouth and removing certain parcels (lots 9-146 and 9-131-1) entirely from current use.

RSA 71-B:16 II reads:

The board may order a reassessment of taxes previously assessed or a new assessment to be used in the current year or in a subsequent tax year of any taxable property in the state

II. When it comes to the attention of the board from any source, except as provided in paragraph I, that a particular parcel of real estate or item of personal property has not been assessed, or that it has been fraudulently, improperly, unequally, or illegally assessed (emphasis added)

The board normally does not intercede in internal disagreements within municipalities. However, it does have the authority to do so, if warranted, under RSA 71-B:16 II and order a new assessment. It is evident from a review of the legislative intent and a review of caselaw that this statute was not intended to replace or be a "back door" appeal route to the specific requirements of RSA 76:16-a. See Appeal of Wood Flour, Inc., 121 N.H.

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991, (1981) (hereinafter "Wood Flour"); Appeal of Gillin, 132 N.H. 311, (1989).

Rather, it was intended to give the board the authority to broadly scrutinize the legality of assessments that come to its attention from any source. Such review is generally initiated by the board when there is evidence of clear violation of the law or gross assessment irregularities.

In this case, the City's complaint and the proffered supporting documentation indicated there were possible violations of RSA ch. 79-A and egregious assessing practices in the administration of current use. Therefore, the board is warranted in exercising its RSA 71-B:16 authority. To do otherwise would be shirking the board's statutory responsibility.

In addition to RSA 71-B:16 II, the board also has jurisdiction under RSA 79-A:12, which authorizes the board to review current-use classification when it comes to the board's attention from any source that "a particular parcel of land has been fraudulently, improperly or illegally so classified * * *." RSA 79-A:12 does not specifically state the board has jurisdiction over property illegally removed from current use. However, RSA 79-A:12 is a remedial statute, like RSA 71-B:16 II, and given the holding in Wood Flour, RSA 79-A:12 grants the board jurisdiction to review the illegal removal of a property from current use.

We turn now to the board's remedial powers. Once the board has

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jurisdiction over a particular matter, it may institute its own investigation, hold hearings and "take such other action as it shall deem necessary." RSA 71-B:5 I. RSA 71-B:16 specifically authorizes the board to abate taxes previously assessed. While RSA 71-B:16 does not recite a time limit on this abatement power, the board recognizes a time limitation exists. Lacking an explicit limitation, the board will use the principles of laches to determine whether it has the authority to abate taxes from 1986 forward. We note that laches is a limit on a party's right to assert a claim, not a limit on the tribunal's authority. Nonetheless, the general principles of laches shall be used to decide this issue concluding with an analysis of the facts under the annunciated principles.

The City did not challenge the board's authority to order the City to prospectively assess these properties in current use.

The City argued, however, that if the board found these parcels should have been in current use and assessed accordingly, laches prohibits the board from abating the ad valorem taxes back to 1986. The board disagrees, concluding the principles of laches would not be violated by such an abatement order.

Jurisdiction - Laches

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Laches, an equitable doctrine, limits a party's right to seek a remedy when that party has failed to assert the right within a reasonable time and the unreasonable delay prejudices the other party. E.g., State v. Weeks, 134 N.H. 237, 240 (1991); Wood v. General Electric Company, 119 N.H. 285, 289 (1979). Time is certainly an element of laches, but it is not the only consideration. Wood, 119 N.H. at 289.

The City, the party asserting laches, has the burden to show that abating the taxes from 1986 forward is unreasonable (a) because the delay is unreasonable and (b) because such an order would prejudice the City. See Weeks, 134 N.H. at 240; Wood, 119 N.H. at 289. We find the City did not carry its burden.

The City argued the delay was unreasonable because the time lines found in RSA 76:16-a (6 months in 1986) have long since passed. We reject this argument for several reasons. First, RSA 76:16-a governs appeals of individual taxpayers. Since taxes are assessed annually, the deadline must be short. Here, the board, not an individual taxpayer, is acting under RSA 71-B:16, scrutinizing the City's handling of current use. RSA 71-B:16 does not state a specific time limit, but it does authorize the board to abate "taxes previously assessed ***." Therefore, the board certainly may go back some time to abate taxes. Moreover, as held in Wood Flour, 121 N.H. at 994-995, RSA 71-B:16 is a

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remedial statute, and the board could not correct the errors found in the City without the authority to go back several years. We conclude, therefore, the RSA 76:16-a deadlines do not apply to the board's RSA 71-B:16 powers.

Lacking any statutorily specified deadline, the board must decide whether going back six years is unreasonable. We conclude it is not because current use has long-term effects. The current-use law aims to promote the preservation of open space. RSA 79-A:1. Reading RSA ch. 79-A as a whole demonstrates the intent to provide a long-term mechanism for preserving open space. To this end, a lien is placed on the property, the land cannot be removed from current use--it comes out when the use changes--and a land-use-change tax must be paid when the use changes. Given these long-term factors with indeterminable time periods, it is prudent to correct the errors here because the errors will eventually have to be addressed, e.g., on transfer of property when recorded lien is discovered or when use changes and the land-use-change tax would be due. These errors, left uncorrected, are like time bombs that may explode several years or even decades later. It is our job to defuse them in an equitable way. Given the long-term effects of current use, we conclude six years is not an unreasonable delay. We now turn to whether the board's order results in any prejudice to the City. In analyzing this issue, we remember the City itself caused the problem here by not complying

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with the law. Therefore, any harm the City might suffer (refunding illegally assessed taxes) is due to its own actions. The board merely is requiring the City to comply with RSA ch. 79-A as the City should have been doing. Having illegally removed property from current-use assessment with the advantage of collecting ad valorem taxes, it would be inequitable to allow the City to avoid repayment of those illegally collected taxes. Finally, the City did not present any facts indicating it would be prejudiced by an order requiring it to pay the illegally collected taxes.

This conclusion--that the City will suffer no undue prejudice--is bolstered by one additional factor. The evidence indicated Dartmouth may have been unaware their property was being assessed at ad valorem values because the assessor stopped the current-use assessments during a revaluation year when Dartmouth could have assumed the higher assessments were due to the revaluation, not due to the cessation of current-use assessment.

Given the above analysis, the board rules that abating the previously assessed taxes from 1986 forward is authorized by RSA 71-B:16, RSA 71-B:5 and RSA 79-A:12, or is not barred by the principles of laches.

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Current use status of lots

Lot 9-90

The only evidence, as testified to by the Assessors, of this parcel ever having been in current use was a deed reference of a potential current-use-change tax liability. The Assessors testified, however, that no reference can be found at the registry as to any current-use lien on this lot. As the lien recording creates the constructive public notice of the current-use status, the Board rules lot 9-90 was not in current use and thus no land-use-change tax is due for improvements on that lot.

Lot 9-130

All the facts support that this lot is in current use and thus subject to a land-use-change tax for the improvements.

Lots 9-146 and 9-131-1

The Assessors argued these lots should be removed from current use for \$1 each because the City was in error to have assessed these lots at full value since 1986 when they were actually in current use. They argued Dartmouth had paid the difference between the current-use level of taxes and ad valorem taxes from 1986 to 1990, and that excess amount of taxes--\$24,346--far exceeds the land-use-change tax that might have been assessed for the road on these two

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lots. Further, they argued the addition of the words, "and assessed at current use values," to the land-use-change tax provision of RSA 79-A:7 I in 1991, indicates legislative intent "to protect the taxpayer from the arbitrary and capricious actions of their government when they did not fulfill their obligations under the terms of the current-use contract between landowner and city." (City Assessors Exhibit #2.)

The Board rules there are no provisions in the statutes, rules, or case law to remove land from current use unless it has been changed to a use that does not qualify. RSA 79-A:7 I states:

Land which has been classified as open space land and assessed at current use values 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 current use assessment. (emphasis added)

Concerning the amendments in 1991 to Chapter 79-A, the Board finds no legislative intent that the addition of the words "and assessed as current use values" was meant to be anything more than a clarification. No evidence was submitted to support the City's import of allowing the removal of current-use land for administrative errors.

The public purpose of current use is to encourage the preservation of open space by basing the assessment of land on its current use. Understandably, current use is not the easiest law to properly administer.

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However, the purpose of current use can be better fulfilled, in this case, by correcting past assessment mistakes and properly assessing this and any other future land-use-change taxes rather than removing large tracts of land prematurely from current use when such taxation could serve as a disincentive to intensify the use of the land. See Dana Patterson, Inc. v. Town of Merrimack, 130 N.H. 353 (1988).

Area disqualified from current use

The Assessors testified that only the travel surface and the shoulders of the roads were considered in calculating the area to be removed from current use. They argued the balance of the cleared right-of-way constituted only a change from one category to another.

The Board rules the entire width of the cleared right-of-way is disqualified from current use.

Rev 1203.02 (b) (4)(a) states: "if only a road is to be constructed, and that road is not exempted by RSA 79-A:7, IV(a), only the land consumed by the road shall be disqualified from current use." Further, Rev 1203.03 (a) states, "under the classification of farm land, forest land, flood plains and recreation land, only the number of acres on which the actual change has taken place shall become subject to the use-change tax. Unless otherwise

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disqualified, that land not physically changed shall remain in current use."

The entire right-of-way most definitely was physically changed. Trees were cut, the right-of-way stumped and graded, unstable material removed, gravel brought in, diversion ditches constructed, stable slopes constructed, and all un-paved and graveled surfaces seeded to allow continued maintenance of those areas in support of the roadway. Even if there are areas in the right-of-way that still have trees, those areas are also disqualified because they have been dedicated and incorporated in the area required by City subdivision regulations for the construction of a road. See Foster v. Town of Henniker, 132 N.H. 75 (1989); Dana Paterson, Inc. v. Town of Merrimack, 130 N.H. 353 (1988).

Value

The City derived its value for assessing the land-use-change tax by an income approach analysis of a lease of a road by Twin State Cable TV from Joseph and Virginia Barden. The value of the Barden road was estimated at \$31,762 per-acre. The City initially assessed the ten percent land-use-change tax on 1.25 acres on March 27, 1991, in the amount of \$3,970 by applying the \$31,762 per-acre figure to the 1.25 acres. Later, on August 22, 1991, an additional 3.68 acres was assessed a land-use-change tax of \$842. The board was unable to discern from the evidence the basis of the second valuation.

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Dartmouth presented three methods of valuation:

- 1) the 1988 assessments for the 11.6 acres disqualified from current use were equalized on a per acre basis indicating a value of \$21,691;
- 2) the Barden lease was analyzed indicating a value of \$8.75 per linear foot of road which was then applied to the 6000 linear feet of access road, resulting in a value of \$52,500; and
- 3) an analysis of six sales of large residentially zoned acreage in the City indicated a value of \$68,150.

The board rejects all of Dartmouth's methods of valuation because they all failed to address one of the basic tenants of appraising--determination of the highest and best use.

Method 1 failed because it was based on assessments and assumptions of highest and best use in 1986 before there were any firm plans to locate the Hospital on the adjacent property.

Method 2 failed because it attempts to equate on a linear-foot basis the value of a narrow gravel road used infrequently for maintenance of a telecommunication tower site to a wide, paved highway that provides primary access to the largest medical facility north of Boston.

Method 3 failed because it treated the subject property as if it was just another large residentially zoned parcel rather than a large residentially zoned parcel adjacent to the largest medical facility north of Boston.

The highest and best use of any property is the use that returns the

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greatest profit, considering all physical and legal limitations. Here, the highest and best use of the land in question was as a primary access road to the adjacent planned Hospital. At the date of change, the subject land had received approval from the City Planning Board to be an access road to the Hospital. Thus, the argument raised by both Dartmouth and the City that the residential zoning of the land controlled the land's highest and best use and value is specious. Obviously, the primary highway accessing a major medical facility is not a normal residential use, especially when approvals for a nonresidential use were already in place.

This land is most akin to supporting or secondary land of commercial and industrial property (parking lots, access roads and fire lanes, stormwater retention areas, landscaped or buffer areas, etc.). Other than the Barden lease, there was no market data submitted on property such as this. Therefore, the board finds the Barden lease, analyzed on an area basis, is the best value indicator. The Barden road, albeit narrow and infrequently used, is both as critical to the function of the telecommunication tower site as the access road is to the function of the Hospital and performs an identical function provided by the 3.35 acres covered by the road servicing the water-tower site. Therefore, the value of \$31,762 per acre is applicable to the 11.65 acres disqualified from current use.

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The board's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence, especially, as in this case, where there is a dearth of relevant market data. See RSA 541-A:18, V(b). The board's finding of \$31,762 per acre is supported by the board's general knowledge that the prime-site land for shopping plazas in the City had a value of approximately \$100,000 per acre during this time period. Further, it has been the board's experience that secondary land for such development has generally had approximately 25 to 35 percent of the value of the prime, developed site. While this general knowledge was not specifically or solely relied upon by the board in reaching its finding of value, it, nonetheless, supports board's findings of the \$31,762 per acre finding.

Finally, the \$31,762 per-acre value is reflective of the value of the land inherent in the road only, not the land it abuts or accesses. While it is true that the land the road abuts or accesses is also enhanced in value, that land can only be taxed when and if it is ever developed so as not to qualify for current use. As of the date of change, no evidence was submitted that any development plans, as defined in the current-use rules, were in place for the land abutting the road.

Conclusion

Therefore, in summary, the Board orders the following.

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1) The City refund Dartmouth the excess ad valorem taxes paid from 1986 to 1990 on lots 9-146 and 9-131-1 with six percent interest from the payment date to the refund date.

2) The City assess Dartmouth an additional land-use-change tax of \$32,186 for the entire road right-of-way area calculated as follows.

Lot 9-130:	a) portion of south access road and hammerhead turnaround -	.98 acre
	b) access easement area to Hospital -	.77 acre
	c) water-tower road -	3.35 acres
Lot 9-131-1:	portion of south access road -	4.34 acres
Lot 9-146:	portion of south access road -	<u>2.21 acres</u>
Total		11.65 acres
Value per acre	x	<u>\$31,762</u>
	(rounded)	\$370,000
Land-use-change tax	x	<u>10%</u>
		\$ 37,000
Less earlier land-use-change taxes		<u>4,814</u>
		\$ 32,186

3) the City shall refile current-use liens on the balance of the acreage of lots 9-131-1 and 9-146 and shall file a corrected land-use-change tax lien release for the correct acreage removed on lot 9-130.

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Member

Ignatius MacLellan, Esq., Member

Michele E. LeBrun, Member

I certify that copies of the within order have been mailed this date, postage prepaid, to Steven L. Smith, City Manager, to the Dartmouth College Trustees, and to the Lebanon Board of Assessors.

Date: January 5, 1993

Valerie B. Lanigan, Clerk

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ORDER AND HEARING NOTICE

This order relates to the "City's" and the "College's" rehearing motion on the board's March 3, 1992 order. The motions are granted due to the lack of proper notice, see Duclos v. Duclos, 134 N.H. 42, 44-45 (1991), and the order is rescinded. The board notes this procedural error occurred during a period of flux with the board's clerk's position.

This matter shall be reheard on the merits and on any preliminary motions at the board's hearing room on Thursday, May 21, 1992 at 9:00 a.m. The hearing will involve the board's exercise of its RSA 71-B:16 II and RSA 71-B:5 I authority, including a review of four parcels owned by Dartmouth College Trustees shown on the city tax maps as lots 9-146, 9-131-1, 9-130 and 9-90 (the Properties). The review will include:

(1) the current-use status, including compliance with releasing land from

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current use (RSA ch. 79-A);

(2) the land-use change procedure, including the assessment of any change-in-use tax (RSA ch. 79-A); and

(3) the ad valorem property taxation, including whether land was taxed ad valorem when it should have been taxed in current use (RSA ch. 75, 76).

This review will cover tax years 1985-1991 and will include a determination of whether the Properties were "fraudulently, improperly,

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unequally or illegally assessed." RSA 71-B:16 II; see also RSA ch. 79-A, RSA ch. 75 and 76.

Parties may make such preliminary motions as they deem fit by filing such motions and supporting memorandum at least 10 days before the hearing. The board will consider such motions before the hearing on the merits.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Member

Ignatius MacLellan, Esq., Member

Michele E. LeBrun, Member

I certify that copies of the within Order have this date been mailed, postage prepaid, to Steven L. Smith, City Manager, Representative for the Taxpayer; Lawrence A. Kelly, Esq., Representative for Trustees of Dartmouth College; and Lebanon Board of Assessors; and a copy to Paul Olsen, Dartmouth College Trustees.

Valerie B. Lanigan, Clerk

Date: April 2, 1992

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ORDER OF NOTICE

Pursuant to RSA 71-B:16 and RSA 71-B:5 I, the board is asserting its authority to review:

- (1) the current-use status, including compliance with releasing land from current use (RSA ch. 79-A);
- (2) the land-use change procedure, including the assessment of any change-in-use tax (RSA ch. 79-A); and
- (3) the ad valorem property taxation, including whether land was taxed ad valorem when it should have been taxed in current use (RSA ch. 75, 76).

This review will cover tax years 1985-1991 and will include a determination of whether four parcels owned by Dartmouth College Trustees shown on the city tax maps as lots 9-146, 9-131-1, 9-130 and 9-90 were "fraudulently, improperly, unequally or illegally assessed." RSA 71-B:16 II; see also RSA ch. 79-A, RSA ch. 75 and 76.

The college is a party to this matter and should appear to protect its rights. Attached is the information that was filed with the board and that brought this matter to the board's attention. The complete file may be reviewed at the board's office. A separate hearing notice has been sent.

Note: This order of notice is being sent to correct any defect in prior notice.

The college, however, appeared at the board's December 13, 1991 hearing

on this matter.

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Member

Ignatius MacLellan, Esq., Member

Michele E. LeBrun, Member

I certify that copies of the within Order have this date been mailed, postage prepaid, to Steven L. Smith, City Manager, Representative for the Taxpayer; Lebanon Board of Assessors; and by certified mail to Lawrence A. Kelly, Esq., Representative for Trustees of Dartmouth College; and a copy to Paul Olsen, Dartmouth College Trustees.

Valerie B. Lanigan, Clerk

Date: April 2, 1992

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ORDER RE COMPLAINT AGAINST THE LEBANON BOARD OF ASSESSORS

AND A LAND-USE-CHANGE TAX ASSESSED TO DARTMOUTH COLLEGE TRUSTEES

Introduction

This case arises out of a complaint filed by the Lebanon City Manager on behalf of the Lebanon City Council (City) claiming the Board of Assessors (Assessors) improperly assessed a land-use-change tax against the Dartmouth College Trustees (Dartmouth). The property in question includes four parcels owned by Dartmouth (lots 9-146, 9-131-1, 9-130, and 9-90), over which was built the southern access road to the newly constructed Dartmouth Hitchcock Medical Center (Hospital) and a road accessing a new water tower on lot 9-90.

Jurisdiction

The City requested, on September 30, 1991, the Board of Tax and Land Appeals (Board), pursuant to its authority in RSA 71-B:16 II, to review the

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actions of the Assessors in the assessing of the land-use-change tax against
Dartmouth.

RSA 71-B:16 II reads:

The board may order a reassessment of taxes previously assessed or a new
assessment to be used in the current year or in a subsequent tax
year of any taxable property in the state . . .

II. When it comes to the attention of the board from any source, except
as provided in paragraph I, that a particular parcel of

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real estate or item of personal property has not been assessed, or that it has been fraudulently, improperly, unequally, or illegally assessed . . .

The Board normally does not intervene in internal disagreements within municipalities. However, after a hearing on this matter on December 13, 1991, the Board finds the assessment and the Assessors' assessing practices egregious to such an extent so as to exercise our authority under RSA 71-B:16 II. The Board's latitude under this chapter is quite broad, allowing us to review previous as well as current assessments.

Facts

To provide a secondary access to the Hospital and access to a water tower, the "South Access Road" was constructed in 1988 across several parcels owned by Dartmouth with the intention the roads eventually be deeded to the City. The paved road starts at the westerly side of Route 120, bisecting lot 9-146 (22 acres), crossing Mt. Support Road, continuing westerly across the northerly portion of lot 9-131-1 (151.1 acres), and further westerly into lot 9-130 (approximately 120 acres), ending in a hammerhead turnaround. From the southwesterly corner of the turn around, a gravel road continues westerly across the balance of lot 9-130, terminating at a water tower on lot 9-90.

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On March 27, 1991, the Assessors assessed a land-use-change tax in the amount of \$3,970 for 1.25 acres on lot 9-130. The actual date of land-use change was indicated as August 1988. The value was estimated at \$31,762 per acre, calculated from a lease of a road in Lebanon by Twin State Cable TV from Joseph and Virginia Barden.

At the May 15, 1991, and June 5, 1991 City Council meetings concerns were raised as to: 1) which lots owned by Dartmouth are in current use and

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which lots the road crossed; 2) whether the entire right-of-way versus just the road surface and shoulders should be removed from current use; and 3) whether the value used to assess the land-use-change tax was too low. The Council at the June 5 meeting asked the Assessors to review their assessment.

On July 11, 1991, the Assessors met with Paul Olsen, real estate officer for Dartmouth, and Attorney Lawrence Kelly, reviewed the assessment, and voted to assess an additional tax of \$842 for 3.68 acres on lot 9-130 and release the current-use lien on lots 9-131-1 and 9-146 for \$1.00 each.

In 1986 the City had a complete reassessment done. During that process the current-use records dealing with these Dartmouth properties were lost or misfiled. Only current-use lien records at the registry of deeds exist as evidence of their current-use status prior to 1986.

Since 1986 only lot 9-130 was assessed at current-use values. Lots 9-146, 9-131-1, and 9-90 were assessed from 1986 to 1991 at ad valorem values.

Lots 9-146, 9-131-1, and 9-130 had current-use liens filed as early as 1975 at the Grafton County Registry of Deeds. Lot 9-90 had no current-use lien on record.

Board's Rulings

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1) Current-use status of lots

Lot 9-90

The only evidence, as testified to by the Assessors, of this parcel ever having been in current use was a deed reference of a potential current-use-change tax liability. The Assessors testified, however, that no reference can be found at the registry as to any current-use lien on this lot. As the lien recording creates the constructive public notice of the current-use

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status, the Board rules lot 9-90 was not in current use and thus no land-use-change tax is due for improvements on that lot.

Lot 9-130

All the facts support that this lot is in current use and thus subject to a land-use-change tax for the improvements.

Lots 9-146 and 9-131-1

The Assessors argued that these lots should be removed from current use for \$1 each because the City was in error to have assessed these lots at full value since 1986 when they were actually in current use. They argued Dartmouth paid the difference between the current-use level of taxes and ad valorem taxes from 1986 to 1990, and that excess amount of taxes, \$24,346, is far in excess of the land-use-change tax that might have been assessed for the road on these two lots. Further, they argued the addition of the words, "and assessed at current use values," to the land-use-change tax provision of RSA 79-A:7 I in 1991, indicates legislative intent "to protect the taxpayer from the arbitrary and capricious actions of their government when they did not fulfill their obligations under the terms of the current-use contract between landowner and city."

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The Board rules there are no provisions in the statutes, rules, or case law to remove land from current use unless it has been changed to a use that does not qualify. RSA 79-A:7 I states:

Land which has been classified as open space land and assessed at current use values 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 current use assessment. (emphasis added)

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Concerning the amendments in 1991 to Chapter 79-A, the Board finds no legislative intent that the addition of the words "and assessed as current use values" was meant to be anything more than a clarification. No evidence of the City's import of allowing the removal of current-use land for administrative errors.

The public purpose of current use is to encourage the preservation of open space by basing the assessment of land on its current use. Understandably, current use is not the easiest law to properly administer. However, the purpose of current use can be better fulfilled, in this case, by correcting past assessment mistakes and properly assessing this and any other future land-use-change taxes rather than removing large tracts of land prematurely from current use when such taxation could serve as a disincentive to intensify the use of the land. See Dana Patterson, Inc., v. Town of Merrimack 130 N.H. 353 (1988).

2) Area disqualified from current use

The Assessors testified that only the travel surface and the shoulders of the roads were considered in calculating the area to be removed from current use. They argued the balance of the cleared right-of-way constitutes only a

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change from one category to another.

The Board rules that the entire width of the cleared right-of-way is disqualified from current use.

Rev 1203.02 (b) (4)(a) states: "[i]f only a road is to be constructed, and that road is not exempted by RSA 79-A:7, IV(a), only the land consumed by the road shall be disqualified from current use." Further,

Rev 1203.03 (a) states, "[u]nder the classification of farm land, forest land,

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flood plains and recreation land, only the number of acres on which the actual change has taken place shall become subject to the use-change tax. Unless otherwise disqualified, that land not physically changed shall remain in current use."

The entire right-of-way most definitely was physically changed. Trees were cut, the right-of-way stumped and graded, unstable material removed, gravel brought in, diversion ditches constructed, stable slopes constructed, and all non paved and graveled surfaces seeded so as to allow continued maintenance of those areas in support of the roadway. Even if there are areas in the right-of-way that are still treed, those areas also disqualify as they are dedicated and incorporated in the area required by City subdivision regulations for the construction of a road. See Foster v. Town of Henniker, 132 N.H. 75 (1989) and Dana Paterson, Inc. v. Town of Merrimack, 130 N.H. 353 (1988).

3) Value

The only supported evidence of value was derived by the income approach from a lease of a road by Twin State Cable TV from Joseph and Virginia Barden.

The value of the road was estimated at \$31,762 per acre. Based on the

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evidence, the Board rules this value is applicable to the road in question.

The land that the road abuts or accesses is most definitely enhanced in value.

However, that land can only be taxed when and if it is ever developed so as not to qualify for current use; right now, however, no development plans, as defined in the current-use rules, are in place for the adjoining land.

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Conclusion

In summary, the Board orders:

1) the City refund Dartmouth the excess ad valorem taxes paid from 1986 to 1990 on lots 9-146 and 9-131-1 with six percent interest from the date of payment to the date of refund;

2) the City assess Dartmouth a land-use-change tax in the amount of \$32,186 for the entire road right-of-way area calculated as follows:

Lot 9-130:	a) portion of south access road and hammerhead turnaround -	.98 acre
	b) access easement area to Hospital -	.77 acre
	c) water-tower road -	3.35 acres
Lot 9-131-1:	portion of south access road -	4.34 acres
Lot 9-146:	portion of south access road -	<u>2.21 acres</u>
	Total	11.65 acres
	Value per acre	x <u>\$31,762</u>
		(rounded) \$370,000
	Land-use-change tax	x <u>10%</u>
		\$ 37,000
	Less earlier land-use-change taxes	<u>4,814</u>
		\$ 32,186

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3) the City refile current-use liens on the balance of the acreage of lots 9-131-1 and 9-146 and file a corrected land-use-change-tax-lien release for the correct acreage removed on lot 9-130.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul Franklin

Ignatius MacLellan, Esq.

Michele E. LeBrun

I certify that copies of the within order have been mailed this date, postage prepaid, to Steven L. Smith, City Manager, to the Dartmouth College Trustees, and to the Lebanon Board of Assessors.

March 3, 1992

Melanie J. Ekstrom, Deputy Clerk

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**City of Lebanon - Complaint against property of
Dartmouth College and Board of Assessors**

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ORDER

The Board, during its deliberations in this case, was unable to accurately determine the area of the several road layouts for Parcel 9-130, including the northerly area of the parcel subject to the zoning line adjustment.

The City is ordered to supply the Board by January 21, 1992, copies of any plans (such as site plans, road layout plans, etc.) from which the area of the several roads on Parcel 9-130 can be calculated. The City should provide certification that copies of the maps have been provided to the Lebanon Board of Assessors and Dartmouth College.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Member

Ignatius MacLellan, Esq., Member

Michele E. LeBrun, Member

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#10914-91, City of Lebanon - Complaint against property of
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I certify that copies of the within Order have this date been mailed, postage prepaid, to Mr. Steven L. Smith, City Manager, Lebanon; Mr. Paul Olsen, Dartmouth College Trustees; and the Chairman, Board of Assessors of Lebanon.

Brenda L. Tibbetts, Clerk

Date:

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