

Harold C. and Alice J. Nowill

v.

Town of Marlow

Docket No.: 10921-91CU

DECISION

The "Taxpayers" appeal, pursuant to RSA 79-A:9, the "Town's" April 8, 1991 denial of the Taxpayers' current-use application on a 58-acre lot (the Property). For the reasons stated below, the appeal is denied. However, the board asserts its RSA 71-B:16 II and RSA 79-A:12 II, III jurisdiction and orders:

1) the Property be placed back into current use under the 1979 application;

2) the Town to refund the land-use-change-tax (LUCT) without interest;  
and

3) the Town to refund the 1991 taxes, with interest, that would not have been collected if the Property had been properly assessed in current use. The board is not ordering any refund of ad valorem taxes that were assessed between 1987 and 1991.

The Taxpayers argued they were entitled to relief because:

(1) they purchased the Property in 1987, and it was then in current use;

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- (2) the Town notified the Taxpayers in August 1987 that if they wished to keep the Property in current use, they would have to file a new map;
- (3) in September 1987 the Town billed the Taxpayers for a \$2,551 land-use-change-tax (LUCT) and in September 1988 sent notice of impending lien;
- (4) the Town illegally removed the Property from current use and has twice denied new current-use applications; and
- (5) the Property was sold in early 1993.

The Town argued relief should be denied because:

- (1) the procedure followed by the Town was standard at that time;
- (2) the Taxpayers were given the opportunity to be removed from current use and did not protest;
- (3) the Town was subsequently told by the department of revenue administration (DRA) that the procedure it followed was incorrect but because the Taxpayers had paid the LUCT nothing should be done;
- (4) there was a boundary dispute and the Taxpayers' map did not agree with the Town's tax map; and
- (5) most of the Property is currently reenrolled in current use.

#### **Chronology**

Before stating our decision, the board presents the following chronology.

#### **March 27, 1979**

Taxpayers' predecessor placed the Property in current use. (The Town did not have copy of current-use application, current-use map or correspondence with predecessor concerning current use.)

#### **May 7, 1987**

Taxpayers purchased Property in current use. Taxpayers stated they walked lot and identified posts on Sand Pond Road boundary.

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**August 10, 1987**

Town told Taxpayers that they must complete current-use application and must have new map to keep Property in current use. Town cited current-use rule Rev. 1202.02(a).

**After August 10, 1987**

Taxpayers called Town about the August 8, 1987 letter and were told they must obtain and submit a survey map. Taxpayers tried to get surveyor. Town received no response from Taxpayers.

**November 9, 1987**

Town sent Taxpayers (and recorded at registry) current-use lien release with \$2,500 due on LUCT. Release stated date of change was November 9, 1987.

**September 20, 1988**

Town sent Taxpayers notice of impending lien for unpaid LUCT.

**September 29, 1988**

Taxpayers paid \$2,551 (LUCT plus interest and costs).

**October 10, 1988**

Taxpayers went to selectmen's meeting concerning the LUCT and removal of the Property from current use. Town denied request.

**April 8, 1991**

Taxpayers wrote to Town requesting Property be put back in current use and requesting refund of LUCT.

**September 23, 1991**

Taxpayers appeal Town's refusal to grant the Taxpayers' new current-use application.

**Board's Findings**

Based on the evidence, the board denies the Taxpayers' appeal because the board is ordering the Town to place the Property back into current use under the 1979 application. The remainder of this decision addresses the

board's assertion of jurisdiction under RSA 71-B:16 II and RSA 79-A:12 II, III.

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This board is authorized by the following statutes to assert jurisdiction and order corrective actions.

1) "When it comes to the attention of the board from any source \*\*\* that a particular parcel of real estate \*\*\* has been \*\*\* improperly \*\*\* or illegally assessed \*\*\*". RSA 71-B:16 II.

2) "When it comes to the attention of the board \*\*\* from any source \*\*\* that a particular parcel of land has been \*\*\* improperly or illegally \*\*\* classified [under current-use]." RSA 79-A:12 II.

3) "When in the judgement of the board of tax and land appeals any \*\*\* land so classified \*\*\* shall be reclassified \*\*\*." RSA 79-A:12 III.

After hearing the Taxpayers' appeal and reviewing the chronology presented above, the board has decided to assert jurisdiction under these statutes because the Town improperly "removed" the Property from current use. The board places the word "removed" in quotations because property is not removed from the current-use classification but rather no longer qualifies for current-use. RSA 79-A:7 I specifically states that a parcel of land no longer qualifies for current use and a LUCT is due when the land "is changed to a use which does not qualify for open space assessment." There is no provision whatsoever for a town or a taxpayer to remove property from current use.

In this particular case, the Town acted without any justification in the statutes or the current-use rules. While the current-use rules have since 1973 required that the property being placed in current use be delineated on the ground, ("The tract shall be marked with easily identifiable boundaries, on the

ground." CUB II A), there is nothing in either the statutes or the rules that authorize the removal of a property from current use when subsequent

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purchasers, like the Taxpayers, are unable to produce a new map and a new delineation of boundaries. In 1979 the Town accepted the Taxpayers' predecessor's current-use application and map and accepted the predecessor's compliance with marked boundaries. The Property was then placed in current use.

(The board attempted to obtain a copy of the 1979 application and map, but the Town was unable to locate them.) Nothing occurred in the Property's use that resulted in the Property no longer qualifying for current use, and thus, the Town should not have taken the land out of current use.

Therefore, the board orders as follows.

1) The Town shall place the Property back in current use pursuant to the 1979 application, and the Town shall take whatever corrective action is required at both the Town offices and the registry of deeds. The Town shall, within thirty (30) days of the clerk's date below, file with the board documentation showing that these remedial steps have been taken. Because the Property was originally completely in current use, the Town shall place the entire Property in current use as the Property is shown on the tax maps.

2) Because the Town improperly and illegally took the Property out of current use and because we are ordering corrective action, the Town shall also refund the Taxpayers' \$2,551 LUCT without any additional interest. The board is not ordering any interest because the Taxpayers failed to challenge the Town's actions in a timely manner. Specifically, the Taxpayers did not appeal the Town's actions under RSA 79-A:9, 10 or 11. The board finds the Taxpayers were slothful and slept on their rights to seek a full remedy.

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3) The Town shall also refund, with interest from date paid to refund date, the difference between the assessed 1991 taxes and the taxes due if the Property had been assessed in current use. The board orders this 1991 refund because the Taxpayers perfected their appeal for the 1991 tax year. However, the board is not ordering the Town to abate the ad valorem taxes for any other year after the Town improperly removed the Property from current use. Again, we find the Taxpayers acted slothfully by not filing appeals under RSA 76:16 and RSA 76:16-a or RSA 76:17. Thus, while the board concludes corrective action is required and warranted we do not find that we need to order the abatement of all ad valorem taxes that the Taxpayers could have easily challenged in a timely manner. Additionally, because the relief provided here is pursuant to the board's 71-B:16 and 79-A:12 jurisdiction, and not the Taxpayers' appeal, the board is not required to order an abatement of the paid ad valorem taxes for years other than 1991.

A motion for rehearing, reconsideration or clarification (collectively "rehearing motion") of this decision must be filed within thirty (30) days of the clerk's date below, not the date this decision is received. RSA 541:3; TAX 201.37. The rehearing motion must state with specificity all of the reasons supporting the request. RSA 541:4; TAX 201.37(b). A rehearing motion is granted only if the moving party establishes: 1) the decision needs clarification; or 2) based on the evidence and arguments submitted to the board, the board's decision was erroneous in fact or law. Thus, new evidence and new arguments are only allowed in very limited circumstances as stated in board rule

TAX 201.37(e). Filing a rehearing motion is a prerequisite for

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appealing to the supreme court, and the grounds on appeal are limited to those stated in the rehearing motion. RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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George Twigg, III, Chairman

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Ignatius MacLellan, Esq., Member

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Michele E. LeBrun, Member

**Certification**

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Harold C. and Alice J. Nowill, Taxpayers; and Chairman, Selectmen of Marlow.

Dated: July 6, 1995

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Valerie B. Lanigan, Clerk

0006

Harold C. and Alice J. Nowill

v.

Town of Marlow

Docket No.: 10921-91CU

ORDER

This order responds to the first argument in the "Town's" July 24, 1995 rehearing motion. The board previously responded to the other Town arguments in the August 14, 1995 order. For the reasons stated below, the board denies the Town's rehearing motion based on the paragraph #1 issue.

Following the board's August 14, 1995 order, the board notified the current owners of the property -- David and Linda Kinson (Kinsons) to provide the Kinsons an opportunity to respond to the Town's concerns about the effect the board's decision might have on the Kinsons' interests. The board also scheduled an informal prehearing telephonic conference and a formal hearing. Based on the information received at the informal conference, there is no reason

to hold the October 16, 1995 hearing, which is cancelled.

During the telephonic conference, the Kinsons stated they had no objection to the board's decision to, in essence, revive the 1979 current-use application.

The Kinsons also stated they were aware of the release of the 1979 current-use application and "Nowill's " appeal therefrom. The board received a letter from Betty Blanchard of RE/MAX Town and Country that stated the Kinsons were aware

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of the current-use issue and had discussions with Nowill at the closing about this. Thus, the Kinsons would not qualify as bona fide purchasers.

In addition to its concern about the Kinsons' rights, the Town also stated the Kinsons had filed a new current-use application that changed the property's current-use classifications. As indicated in the board's August order, this does not pose a problem because the Town can revive the 1979 current-use application but then change the classifications based on the Kinsons' recent application.

Based on the above factors and the reasons stated in the August 14, 1995 order and the July 6, 1995 decision, the board denies the Town's rehearing motion to the extent it was based on paragraph #1 of the rehearing motion.

The Town shall, within 30 days of the clerk's date below, file documentation with the board indicating that it has taken the corrective action necessary to:

- 1) revive the 1979 current-use application;
- 2) rescind the 1987 release of the 1979 current-use application;
- 3) release, without any land-use-change tax, the Kinsons' current-use application;

4) use the Kinsons' current-use application ordered below to determine the appropriate classifications; and

5) issue the refunds that were ordered in the decision.

The Town shall file the necessary documents to effectuate this order with the registry of deeds, indexing those documents as recommended by the registrar, and with the Town records.

The Kinsons shall, within 20 days of the clerk's date below, submit to the Town an amended current-use application that is consistent with their original application but that shows the classification of the land that was not in

current

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use under their original application. Although not ordered by the board, the Kinsons should attempt to mark the boundary in dispute with consultation with the abutters, or they may seek a survey for boundary delineation.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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George Twigg, III, Chairman

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Ignatius MacLellan, Esq., Member

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Michele E. LeBrun, Member

**Certification**

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Harold C. and Alice J. Nowill, Taxpayers; and Chairman, Selectmen of Marlow.

Date: September 25, 1995

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Valerie B. Lanigan, Clerk

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Harold C. and Alice J. Nowill

v.

Town of Marlow

Docket No.: 10921-91CU

ORDER

This order responds to the "Town's" rehearing motion. We grant a rehearing on the issue raised in paragraph 1), but we deny rehearing on the issues raised in the other paragraphs. The numbered paragraphs below correspond to the motion's paragraphs.

1) The Town raises interesting issues about the effect of the board's order on the current owners -- David and Linda Kinson. One such issue is whether the Kinsons were bona fide purchasers in terms of the 1979 current-use lien that had been released before the Kinsons' purchase. To answer this issue, the board must determine if the Kinsons had any actual or constructive notice of: a) the 1979 lien; and b) the possibility that the lien had been incorrectly released by the Town and was the subject of an appeal by the "Taxpayers." The board has sent an order to the Kinsons to inform them of this matter and to seek their attendance at a hearing. All parties shall now copy the Kinsons on all communications with the board.

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The Town should note, however, that even if we find the Kinsons were bona fide purchasers, this does not necessarily mean the board will change its order concerning the refund of the erroneously collected land-use-change tax (LUCT). The protection afforded the Kinsons does not extend to the Town.

Another issue concerns the effect of applying the 1979 approval and classifications to the Kinsons. The board understood from the hearing that the major difference between the Kinsons' application and the 1979 approved application concerned one of the boundaries. The later submitted documents also show changes in classification. The Town should know that a change of classification by the Kinsons could be addressed by treating the Kinsons' application as an amendment to the 1979 approval.

The board will schedule both a prehearing conference call and a hearing to resolve this matter.

2) The argument raised in paragraph 2 does not warrant rehearing. The 1991 letter raised a procedural question about whether the Taxpayers could file a late LUCT appeal. The board correctly answered, "no." After hearing this case and making factual findings, the board realized it could assert jurisdiction to enable the board to fashion a fair remedy. (Double jeopardy, mentioned by the Town, is a constitutional principle in criminal cases and does not apply here.)

3), 4) & 5) These paragraphs do not present any issue that warrants rehearing.

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RSA 71-B:16 II provides the board with broad authority to oversee taxation and to order corrective action when appropriate. Appeal of Wood Flour, 121 N.H. 991, 994 (1981). It is an authority that we exercise only after careful deliberations and only in rare instances. Current-use assessments raise issues different from ad valorem assessments. Ad valorem assessments are a yearly matter. Conversely, current-use taxation envisions an effect over several years with very limited ways to qualify and to be disqualified. RSA chapter 79-A makes this clear. For example, current-use approvals are recorded at the registry of deeds. Moreover, as discussed in the decision, neither the municipality nor the landowner can remove a property from current use. Rather, land under certain defined situations no longer qualifies. Because of these factors, the board decided here to correct the Town's error in not complying with the law.

The Town is incorrect in asserting that: a) the Taxpayers could have applied under RSA 71-B:16 I; and b) the board, therefore, cannot assert jurisdiction under paragraph II. Paragraph I concerns complaints filed by other taxpayers (called "complainants") against property the complainant does not own.

The Taxpayers here owned the property, and thus, they could not file under paragraph I.

References in the decision to RSA 79-A:12 were provided as evidence of the legislative intent to give the board broad authority over current-use issues. Whether the Town's complete "declassification" allows it to avoid the board's

RSA 79-A:12 oversight is an open issue, which we need not address given our clear RSA 71-B:16 II authority.

6) The argument in paragraph 6 does not warrant rehearing. The board's decision was an attempt to fashion a remedy that was fair to all parties. The

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board has this authority under RSA 76:16-a ("make such order thereon as justice requires\*\*\*") and under RSA 71-B:5 I ("take such other action as it shall deem necessary."). The Taxpayers would not have been liable for the 1991 ad valorem taxes if the Town had not improperly removed the property from current use.

It is unfortunate the Town still has not recognized and admitted its role in this matter. If the Town had followed the law and left the property in current use, this entire proceeding would have been unnecessary. The board is always reluctant to assert its broader powers and to tell a municipality what to do. We concluded, however, that we had to act here, and we fashioned a just remedy. We acknowledge that administering current use can be difficult and sometimes more uncertain than desired, but the Town's error here was clear and required correction.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS.

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George Twigg, III, Chairman

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Ignatius MacLellan, Esq., Member

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Michele E. LeBrun, Member

CERTIFICATION

I hereby certify that copies of the foregoing order have this date been mailed, postage prepaid, to Harold C. and Alice J. Nowill, Taxpayers; Chairman, Selectman of Marlow; and David and Linda Kinson.

Dated: August 14, 1995

Valerie B. Lanigan, Clerk

0005

**Harold C. and Alice J. Nowill**

**v.**

**Town of Marlow**

**Docket No.: 10921-91CU**

**ORDER OF NOTICE**

The board of tax and land appeals notices David and Linda Kinson that an appeal is pending that raises issues that may affect the Kinsons' rights. This appeal was filed in 1991 by Harold C. and Alice J. Nowill (copy of appeal document attached). The board held a hearing and issued a decision (copy of decision attached). The "Town" filed a rehearing motion (copy attached), which the board has granted in part (copy of order attached). The full file may be reviewed in the board's office.

This proceeding could affect your rights in the property in Marlow designated tax map 8, lot 43. The specific question involves the property's

current-use status and the Town's action with the current-use application originally filed in 1979, which the Town erroneously released in 1987.

The board has scheduled a conference call and a hearing on this matter (see attached hearing notice). You should participate in the conference call and attend the hearing or the board will decide this matter without your input.

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Please contact the board's deputy clerk, Lynn M. Wheeler, at 271-2578 if you have questions about this order or cannot participate in the conference call or attend the hearing.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS.

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George Twigg, III, Chairman

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Ignatius MacLellan, Esq., Member

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Michele E. LeBrun, Member

CERTIFICATION

I hereby certify that copies of the foregoing order have this date been mailed, postage prepaid, to Harold C. and Alice J. Nowill, Taxpayers; Chairman, Selectman of Marlow; and David and Linda Kinson.

Dated:

Valerie B. Lanigan, Clerk

0005

August 9, 1995

Mr. and Mrs. David Kinson  
46 Eastview Road  
Keene, NH 03431

RE: Nowill v. Town of Marlow  
Docket No.: 10921-91CU

Dear Mr. and Mrs. Kinson:

The board has a case involving your predecessors in title, Harold and Alice Nowill. An issue has arisen that may affect the current-use assessment on your property (tax map 8, lot 43). The board will be sending you official notice of this proceeding by certified mail. The board asked me to write an informal letter before the orders of notice were delivered to inform you of this matter, to minimize alarm and to give you my name and number to call if you have any questions. The board will hold an informal conference call on Monday, September 11, 1995 at 11:00 AM to more fully address this matter. The board has also scheduled a formal hearing on Monday, October 16, 1995 at 2:00 PM.

The official notice will include most of the important facts, but you may call me now or later with any questions. If you chose to send anything to the board, you must also copy the town and the Nowills at the addresses below.

Thank you.

Sincerely,

BOARD OF TAX AND LAND APPEALS

Valerie B. Lanigan, Clerk

cc: Chairman, Selectmen of Marlow  
Box 16  
Marlow, NH 03456

Harold C. and Alice J. Nowill  
P.O. Box 136  
West Chesterfield, NH 03466