

Dale L. Eichorn

v.

Town of Durham

Docket No.: 10981-91 PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 79-A:10, the "Town's" April 12, 1991 abated RSA 79-A:7 land-use-change tax (LUCT) of \$12,735 on a vacant, 4.28-acre lot (the Property). For the reasons stated below, the appeal for abatement is denied.

The Taxpayer has the burden of showing the LUCT was excessive. Tax 205.07. We find the Taxpayer failed to carry this burden.

The Taxpayer argued the LUCT was excessive because:

- (1) the Property was uniquely affected by the change in zoning in February, 1990, which set up a Wetlands Conservation District and a Shoreland Protection District;
- (2) the zoning change created problems in constructing and locating a building and septic system;

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- (3) the Town's analysis of valuation was misleading;
- (4) the Town's comparable sales that took place prior to February, 1990 were not reflective of the impact of zoning;
- (5) the Town's comparables indicated that waterfront properties were assessed substantially less than their fair market value and the Property should be similarly assessed;
- (6) the zoning restrictions results in only 20,000 - 22,000 square feet of buildable land and not the 1-acre house site assessed by the Town; and
- (7) the Taxpayer asserted the LUCT should be \$6,000, consistent with the Property's true value and her purchase price.

The Town presented:

- a) a list of comparable sales;
- b) a spread sheet showing the Property and the comparables and various units of comparison; and
- c) photos and the assessment cards of the Property and the comparables.

The Town argued the LUCT was proper because:

- (1) the Town adjusted the site value to account for the restrictions on the Property and adjusted the excess acreage to account for the less desirable soils;
- (2) the Property's \$60,000 sales price was not an arms-length transaction because it was between relatives; and

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(3) the assessment was based on sales activity between 1986 and April 1, 1988.

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Board's Rulings

We find the Taxpayer failed to prove the LUCT was excessive. We also find that the Town made adjustments for the numerous issues raised by the Taxpayer that affected the Property's value.

Specifically addressing the Taxpayer's evidence, the board finds the Taxpayer did not submit sufficient valuation evidence to show the Property was worth only \$60,000. First, the Taxpayer's purchase was not an arms-length sale nor a fair market sale because: (a) it was a sale between related parties; (b) it was based on an appraisal; and (c) it was not based on exposure to the market. Additionally, the Town's Wittner \$60,000 sale for a property with a significantly inferior location -- Wittner being located on the Lamprey River with limited water utility and the Property being directly on the bay -- demonstrated that the Taxpayer's purchase price (and her appraised value) were significantly below the Property's value.

Having not accepted the Taxpayer's valuation evidence, the board turns to the other arguments raised by the Taxpayer. We conclude the Taxpayer's other issues, including the affect of the zoning ordinance, were recognized by the Town and adjustments made. The Taxpayer did not introduce any evidence to show those adjustments were insufficient.

Concerning the Taxpayer's claim that the Property should be assessed similar to other waterfront properties, we find the Property was correctly

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assessed. However, there was evidence indicating certain surrounding properties may have been underassessed. The underassessment of other waterfront properties does not prove the overassessment of the Taxpayer's Property. See Appeal of Michael D. Canata, Jr., 129 N.H. 399, 401 (1987). For the board to reduce the Taxpayer's assessment because of underassessment on other properties would be analogous to a weights and measure inspector sawing off the yardstick of one tailor to conform with the shortness of the yardsticks of the other two tailors in town rather than having them all conform to the standard yardstick. Finally, the Taxpayer's argument that the Town's 1-acre home site should be reduced since the zoning ordinance results in only a 1/2-acre house site is without merit because, as the Town pointed out, all homesites include areas that cannot be used due to zoning setback requirements.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Ignatius MacLellan, Esq., Member

Michele E. LeBrun, Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this

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date, postage prepaid, to James H. Schulte, Esq., Attorney for Dale L. Eichorn, Taxpayer; and Chairman, Selectmen of Durham.

Dated: November 8, 1993

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Valerie B. Lanigan, Clerk

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ORDER

This order responds to the "Taxpayer's" rehearing motion, which is denied.

NOTIFICATION ISSUES

The Taxpayer first argued the board erred by applying two different sets of procedural rules -- one set to the "Town" and another set to the Taxpayer.

The Taxpayer made this argument because the board did not admit the Taxpayer's appraisal. The Taxpayer's appraisal was not admitted because the Taxpayer failed to comply with TAX 201.35 (effective September 1, 1993), which required the Taxpayer to send the Town a copy of the appraisal 14 days before the hearing. This requirement was not only stated in the board's rule but was also stated in the hearing notice. It cannot be disputed that the Taxpayer did not comply with this requirement. Nonetheless, the Taxpayer asserted a

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rehearing was required because the board admitted the Town's comparables without requiring the Town to comply with the board's new rules concerning notification.

The Town provided the Taxpayer with notice of the Town's comparables. The Taxpayer, however, asserted the notice was defective under TAX 201.33(b) (effective September 1, 1993) because the Town's notification was not made after the Town's receipt of the notice for the October 1993 hearing. The board finds no merit in the Taxpayer's argument.

Effective September 1, 1993, the board promulgated a complete new set of administrative rules. This appeal was originally scheduled for a June 30, 1993, which would have been held under the board's prior rules. Under the board's prior rules, the Town was required to notify the Taxpayer, at least 10 days before the hearing, of the comparables the Town intended to rely upon. The Town complied with this requirement. However, the Taxpayer moved for a continuance, which was granted. The continued hearing was scheduled for October 13, 1993, which was after the effective date of the new rules. The new rules require prior exchanges of comparables (TAX 201.33) and appraisals (TAX 201.35). The Town did not renotify the Taxpayer of the comparables.

The board's rules require notification of comparables and exchange of appraisals to allow parties the opportunity to prepare a response to the other party's evidence. TAX 201.33(a). Under TAX 201.33(b) such notice must be

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provided after the hearing notice so the opposing party realizes what evidence will be introduced at the hearing as compared to what material has been previously submitted to the Town or the board but which will not be presented at the hearing. In this case, the Town, in compliance with the board's prior rules and also in comport with TAX 201.33(b), had notified the Taxpayer of its comparables after the Town received the first hearing notice. We conclude it was not necessary for the Town to renotify the Taxpayer.

In summary on this issue, the board finds the Taxpayer failed to comply with TAX 201.35(a), and thus the board properly excluded the appraisal under TAX 201.35(c). Additionally, the board finds the Town complied with the board's earlier notification rule and TAX 201.33(b) when the Town provided written notification to the Taxpayer after the Town had received the first hearing notice.

TOWN'S METHODOLOGY

The Taxpayer also challenged the Town's methodology in arriving at the full value upon which the land-use-change tax was based. First, we note the burden is on the Taxpayer to show the full value assessment was excessive. As stated in the decision, the only evidence concerning value that was admitted by the Taxpayer was the Taxpayer's \$60,000 purchase price. Page three of the decision discusses why that valuation evidence was insufficient to carry the Taxpayer's burden. Thus, the appeal was properly denied for failure of proof.

Nonetheless, for purposes of completeness, the board disagrees with the Taxpayer's assertion that the Town's methodology was unacceptable. The Taxpayer's main argument was that the Town failed to adequately consider the effect of the soil types on the lot and the effect the zoning changes had on the buildable area. The Taxpayer then argued the Town's valuation on per-square-foot basis was excessive when compared to the Town's comparables, assuming one uses only one-half acre as the initial home site. The board rejects these challenges for two reasons. First, as pointed out in the decision, all one-acre home sites include some area that is not buildable for

various reasons. The initial home-site assessment assumes the lot will support a building and its utilities. This lot certainly supported a building and its utilities. Second, the Taxpayer incorrectly assumed that if the home site were reduced from one acre to one-half acre that the same per-square-foot figure would be applied. This is simply not how smaller lots are assessed. The board has consistently seen and held that differing square-foot assessments occur in the market based on many factors, including the lot size.

Specifically, the market generally indicates higher per-square-foot prices for smaller lots than for larger lots. Therefore, even if the board were to accept the Taxpayer's first argument -- that only one-half acre should have been assessed as a homesite -- the board cannot accept the Taxpayer's argument that the same square-foot price should have been applied to one-half acre as was applied to one acre. This is just not the case. The property's main attribute is its location directly on Little Bay. The property's second attribute is its size -- 4.28 acres. The Taxpayer failed to recognize that while the buildable area may be reduced, the lot still affords significant acreage, privacy, and water frontage.

Based on the above discussion, the board finds the Taxpayer's second argument to be without merit.

WITTNER PROPERTY

The Taxpayer's rehearing motion placed more reliance upon the Wittner sale than the board had in its decision. The principle basis for the board's decision was the Taxpayer's failure to produce any competent valuation

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evidence. The board than examined the Town's comparables and concluded the full-value assessment used by the Town was not excessive. The Wittner sale was mentioned by the board only to show that the Taxpayer's assertion that the property was

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only worth \$60,000 was not supported by the market data. As discussed on page three of the decision, the Wittner lot was far inferior to the property, and yet it sold for \$60,000.

For the reasons stated above, the board finds the Taxpayer's third argument to be without merit.

CONCLUSION

Based on the original decision and the above order, the board finds there was no error in law or in fact, and thus, the Taxpayer's rehearing motion is denied.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Michele E. LeBrun, Member

Ignatius MacLellan, Esq., Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to James H. Schulte, Esq., Attorney for Dale L. Eichorn, Taxpayer; and Chairman, Selectmen of Durham.

Date: December 28, 1993

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