

Richard E. and Catherine A. Lambert

v.

Town of Marlow

Docket No.: 11173-91 CU

DECISION

The "Taxpayers" appeal, pursuant to RSA ch. 79-A, various decisions made by the "Town" concerning the current-use status of the Taxpayers' three lots. The Taxpayers have also moved for consideration of the board's March 22, 1993 order, which dismissed the Taxpayers' RSA 79-A:10 land-use-change tax appeal as untimely. There was also an issue of whether the Taxpayers had timely filed their RSA 79-A:9 appeal. For the reasons stated below, the rehearing motion is granted, and the appeal is granted in part. This decision will begin with a recitation of the facts followed by discussions on the rehearing motion, the timely appeal issue and finally the merits of the appeal.

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Facts

The Taxpayers own three contiguous lots:

lot 201/32 (Lot 32), 48 acres;

lot 403/001 (Lot 1), 48 acres; and

lot 403/004 (Lot 4), 60 acres.

From 1987 to 1990, all of the lots were assessed in current use and classified as managed forest. In 1987, the Taxpayers submitted to the Town a forest-management plan. In 1990, the Taxpayers contracted to cut timber on Lot 32, and this action triggered the Town to take action, including assessing an RSA 79-A:7 land-use-change tax (LUCT Tax) on 15 acres and changing the classification of the remaining land. Following the Town's actions, the Taxpayers filed with the Town a request to abate the LUCT Tax and a request to keep most of the land in the managed-forest classification. Concurrently, the Taxpayers requested that the assessments be revised in accordance with such classification. The following is a chart that summarizes the status of the land and its current-use classifications, including a column with the Taxpayers' request.

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<u>LOT</u>	<u>87-90</u>	<u>91</u>	<u>Taxpayer's Request</u>
201/32 TOTAL 48 Acres	48 acres managed forest \$2,400 CU assess.	19 acres unmanaged forest 14 acres inactive farmland 15 acres NICU \$14,624 (91)	21.5 acres managed forest 12.5 acres wetlands 14 acres inactive farmland
403/001 TOTAL 48 Acres	48 acres managed forest \$2,400 CU assess.	48 acres unmanaged forest \$3,840 (91)	48 acres managed forest
403/004 TOTAL 60 Acres	60 acres managed forest \$3,000 CU assess.	60 acres unmanaged forest \$4,800 (91)	60 acres managed forest

Because the Town did not grant the Taxpayers' requests, the Taxpayers appealed to the board. In their appeal the Taxpayers stated, "the Town wrongfully reclassified our property so as to remove portions from current-use

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classification and to reclassify portions as unmanaged-forest land." We now
turn to the issues raised by this appeal.

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Rehearing Motion

The Taxpayers move for a rehearing of the board's dismissal of their RSA 79-A:10 appeal of the LUCT Tax, which the board dismissed as untimely. Upon review of the motion and the board's file, the board denies the motion.

The board initially dismissed the LUCT Tax appeal because the Taxpayers appealed untimely from the first LUCT Tax bill. Upon review, the board concludes because the Town sent the Taxpayers a second bill with changes from the first bill, instead of simply abating a portion of the tax, the Taxpayers could appeal from the second bill. The Taxpayers' appeal was timely from the second bill under the following chronology. See RSA 79-A:10; RSA 76:16, 16-a.

October 28, 1991 - second LUCT tax bill sent

December 24, 1991 - application filed with town within 2 months

March 31, 1992 - appeal filed with the board within 8 months

Timely filing of RSA 79-A:9 appeal

The board finds the Taxpayers timely filed their RSA 79-A:9 appeal with the board. The Taxpayers stated they were notified of the Town's action on October 28, 1991. Their appeal with the board was filed on March 31, 1992, which was within the six-month period provided by RSA 79-A:9.

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Appeal of disqualification and reclassification and assessment of LUCT Tax

At long last, we reach the Taxpayers' substantive appeal under RSA 79-A:9 and RSA 79-A:10. The Taxpayers appeal three Town actions:

1) the change in classification of 127 acres, on all three lots from managed forest to unmanaged forest;

2) the disqualification from current use of 15 acres on Lot 32; and

3) the assessment of the LUCT Tax on the 15 disqualified acres on Lot 32.

For the reasons that follow:

1) we grant the Taxpayers' appeal of the reclassification;

2) with the exception of one acre, we deny the appeal of the disqualification of the 15 acres on Lot 32; and

3) with the exception of the LUCT Tax assessed on one acre, we grant the abatement of the LUCT Tax on Lot 32.

Additional facts are now required to explain the underlying circumstances. From 1987 to 1990, the Taxpayers had all of this land -- 156 acres -- classified in current use as managed forest. The Taxpayers submitted to the Town a forest-management plan in 1987. Taxpayers' Exhibit 1, Tab 1. From 1987 - 1990, the Taxpayers performed steps A, D, F, and G in the plan. They had not, however, instituted the other steps in the plan.

In 1990, the Taxpayers hired a contractor to cut a certain number of acres of timber. According to the Taxpayers, the contractor breached the

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contract by cutting more acres and more trees. The contractor clear cut approximately 29 acres on Lot 32. Following the cutting, the Taxpayers cleared, grubbed and reclaimed all but 14 acres and the additional area cleared for the road. Because the Taxpayers had not fully complied with the plan and because of the clear cutting, the Town reclassified 127 acres from managed forest to unmanaged forest. The Taxpayers argued the land should not have been reclassified because:

- 1) the 1987 forestry plan was a six-year plan, some work had been done and the six years had not yet run;
- 2) the Town never requested a successor plan; and
- 3) the Town never explained the basis for reclassification.

The Taxpayers were concerned about the reclassification because the assessment increased somewhat, but more importantly, the reclassification to unmanaged forest prevents the Taxpayers from undertaking forestry operations for five years. See Rev 1204.06(a)(2)(All Rev. cites are 1990).

The Taxpayers argued the Town erred in assessing the LUCT Tax. The Taxpayers argued the Town had no basis for disqualifying the 15 acres, and since the land was improperly disqualified, no LUCT Tax was due.

Concerning the 127 acres that were reclassified as unmanaged forest, we find the Taxpayers' arguments persuasive. Forest management requires a long-range view. The Taxpayers acted with good intent to follow the 1987 plan and

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had complied with some of the plan's steps. Because of this long-range view and the Taxpayers' compliance, we find the Town lacked grounds to reclassify the land. To the extent the 1990 cut was inconsistent with the plan, as discussed below, that should have been dealt with solely on the acres that were cut. The remainder of this decision deals with the disqualified land the LUCT Tax.

Concerning the Town's disqualification of 15 acres from current use and assessment of the LUCT Tax thereon, we find the Town's decision was correct with the exception of the one acre removed because of the road. (The 14 acres that did not qualify for current use shall be called the "Disqualified Land.")

To qualify as "forest land," and more specifically as "managed forest land," the land must be subject to and receiving silvicultural treatment. RSA 79-A:2 V; Rev 1205.03(a). "Silviculture" means maintaining the on-going productivity of forest trees and land." Rev 1201.06. Thus, the concepts of managed forest and silvicultural treatment envisions two distinct things: 1) an active management of the land; and 2) a plan for a continuing supply of harvestable timber. The Taxpayers' actions on the clear-cut land failed to meet either criteria.

Rev 1205.03(1) states three conditions for land to qualify as managed forest:

- (1) Qualifying forest land shall be a tract, as defined in Rev 1201.07, of undeveloped land actively devoted to the practice of silviculture, subject to the following conditions:

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- a. The tract of land shall be primarily used for the growing and harvesting of repeated forest crops, including timber products, maple sap and naturally seeded Christmas trees.
- b. The tract of land shall support a reasonable stand of commercial forest trees for the location, topography, and soil conditions, or show evidence that the owner has taken or is taking steps to bring stocking of commercial forest trees to levels reasonable for this site.
- c. The tract of land shall show evidence that the owner is following generally accepted forest improvement and harvest practices and is complying with state and local forest laws and with rules adopted by the commissioner of the department of resources and economic development under RSA 218:5, III.

In this case, all commercially valuable timber had been harvested from the Disqualified Land, and there had not been any reclamation or replanting. It would be 30-60 years before a good commercial stand of trees would again exist. Such clear cutting was addressed in Foster v. Town of Henniker, 132 N.H. 75, 82 (1989) where the court stated:

With respect to forest land, the statute contemplates management with a view toward stability and conservation of forest resources. It does not, unless silvicultural practices would in rare cases dictate, contemplate clear cuts and harvesting to the extent that a recovery period of 20-30 years is required to return the land to its status as a forest.

Before the Taxpayers clear cut, the Disqualified Land had a good crop of mature trees and had been capable of stable yields of timber. When the Taxpayers clear cut the Disqualified Land, especially without any replanting, the Disqualified Land lost its status as a forest and its stability of yielding

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repeated timber crops, thereby failing to meet the criteria to be classified as managed forest land.

For the reasons stated next, the Disqualified Land does not qualify for any other current-use classification.

1) The Disqualified Land did not qualify as farmland, Rev 1205.02(a) because it was not being actively devoted to agricultural or horticultural use.

2) The Disqualified Land did not qualify as unproductive wildland Rev 1205.04(a)(1), because it was capable of producing commercial forest crops.

3) The Disqualified Land did not qualify as productive wildland, Rev 1205.04(a)(2), because it had not been left in its natural state for at least five years (unmanaged forest); the Disqualified Land was not in its natural state as farmland (unmanaged farmland); and the Disqualified Land was not devoid of woody growth (inactive farmland).

Concerning the one acre of Lot 32 that was disqualified because the Taxpayers expanded the road, we find the Town erred. Under RSA 79-A:7 IV (a) roads are allowed through otherwise qualified land provided the road's construction and use is consistent with the lot's current-use status. We find the road's expansion did not disqualify it from current use. The expansion was required to take the timber off the lot and some of the road work was required by the state as part of the wetlands remediation. There was no evidence that the road work was done for any other purpose. Thus, the one acre should have remained classified as managed forest.

Conclusion

For the reasons stated above, we find:

- 1) the Town erred in reclassifying the 127 acres; and
- 2) the Town correctly assessed the LUCT Tax against Lot 32, except for the one acre of the road.

The Town shall:

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- 1) correct the classification consistent with this decision;
- 2) recalculate the 1990 assessments consistent with this decision;

and

3) shall issue a refund, with interest under RSA 76:17-a, of all taxes paid in excess of the assessments ordered herein.

The Town shall carry this decision forward to 1991 and 1992 assessments, with adjustments as warranted due to the Taxpayers' soils potential index data if it has been supplied to the Town for those tax years.

Because the Town erred in assessing the LUCT Tax against the acre for the road, the Town shall refund, with interest under RSA 76:17-a, the LUCT Tax attributable to road acre.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Paul B. Franklin, Member

Ignatius MacLellan, Esq., Member

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I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Richard E. and Catherine A. Lambert, Taxpayers; and Chairman, Board of Selectmen, Town of Marlow.

Date: June 9, 1993

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Valerie B. Lanigan, Clerk