Virginia A. Soule

v.

Town of Sunapee

Docket No.: 14773-93PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1993 assessment of $205,524 (land $122,700; buildings $101,300; current-use credit $18,476) on a 12.3-acre lot with a single-family house (the Property). The Taxpayer also owns, but did not appeal, another lot in the Town with a $1,122 current-use assessment. For the reasons stated below, the appeal for abatement is denied.

The Taxpayer has the burden of showing the assessment was disproportionately high or unlawful, resulting in the Taxpayer paying an unfair and disproportionate share of taxes. See RSA 76:16-a; TAX 203.09(a); Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985). We find the Taxpayer failed to carry this burden.

The Taxpayer argued the assessment was excessive because:

(1) the value of the one-acre lot and house is high and the Town has ignored the current use status of the remaining land;

(2) the 1830 house is seasonal, has its original electricity, has no heat, no septic system (just a cesspool) and the Town turns on water in early May and turns it off on Columbus Day;

(3) the mud cellar fills with water in the spring and most of the house sits on the ground or on supporting beams;

(4) it is 800 feet from the house across the current use land to the small 14 foot dock;

(5) the assessment went up 25% as a result of the revaluation when comparable neighbors' assessments all went down;

(6) since it is clear the waterfront was being assessed in 1989, there is no reason for the assessment to go up in 1993 and in fact it should go down like the neighbors' assessments; and

(7) the assessment should be reduced by 15%.

The Town argued the assessment was proper because:

(1) the differences between the 1989 and 1993 assessments are that in 1989 the Town did not consider any waterfront value to the Property;

(2) all property with frontage on Lake Sunapee was classified as having a neighborhood code of "T" which produces a factor of 3.00 with a further adjustment of 4.50 for a total site value of $391,500 for a 1-acre site on Lake Sunapee;

(3) the subject Property was underassessed in that it was given a neighborhood code of "E" with a factor of 1.00 despite the 212 feet on the lake;

(4) the Town should have accounted for the waterfront value and then made appropriate adjustments from that value; and

(5) the Property was underassessed in 1993 and the proper site assessment should have been $217,500.

FACTS

The facts of this appeal are disputed. In 1989 the Town stated they did not consider any waterfront value to the Property because the water-front was considered to be in current use. In 1993, the Town toured the water-frontage by boat and determined that some use of the water-frontage should be captured in the ad valorem site value (land not in current use). The subject has 212 feet of water-frontage approximately 800 feet from the house. Of this frontage, 25 feet is disturbed by a 14 X 10 foot dock and 10 feet beside it.

The Taxpayer stated that the only part of the waterfront in any way developed is the 14 feet where the dock is located and claimed that the Town did assess the water frontage in 1989 and that the assessment should have decreased along with all other neighbors whose assessments went down in 1993. The Taxpayer argued that in 1993 the Town ignored the current use situation and the slope from the back of the Property and the area on top of the ledge where there is an abandoned quarry. The Taxpayer stated the waterfront is approximately 800 feet from the house; although it is accessible by a vehicle across the old pasture. Further, the Taxpayer argued that the house has little value because it is only a summer vacation home, useable only three months out of the year, and is beyond any comfortable living by today's standards. The Taxpayer stated she had no market evidence because none of the properties have turned over.

Board's Rulings

Based on the evidence, we find the Taxpayer failed to prove the Property was disproportionately assessed.

The board rules that the Taxpayer's use and improvement of the waterfront Property exceeds the passive recreational intent of the current use statute (RSA 79-A:1). In valuing property, all real estate rights, tangible and intangible, are assessed.

RSA 21:21 Land; Real Estate.

I. The words "land," "lands" or "real estate" shall include lands, tenements, and hereditaments, and all rights thereto and interests therein. (emphasis added)

While they vary from property to property, these ownership rights are often viewed as a "bundle of rights". "Ownership rights include the right to use real estate, to sell it, to lease it, to enter it, to give it away, or to choose to exercise all or none of these rights. The bundle of rights is often compared to a bundle of sticks, with each stick representing a distinct and separate right or interest." Appraisal Institute, The Appraisal of Real Estate 10th Edition, 6 (1992). When appraising a property that has no restrictions of rights (beyond being subject to taxation, eminent domain, police power and escheat), these rights are normally viewed collectively (as a bundle) and valued after a highest and best use analysis of the entire property.

The highest and best use must be one that is legally permissible, physically possible, and financially feasible. In most properties there are many factors that influence value and contribute to the determination of the

highest and best use. Such factors are nearly endless but commonly include influences, both internal and external, to the property such as location, size, utility, access, improvements, topography, view and zoning. In valuing an unrestricted property, the effect of various value influencing factors are normally viewed collectively. However, in reality, such factors are rarely distributed evenly throughout the property. Some portions of a property may embody certain factors more than other portions. For example, the area of a lot that contains improvements is more valuable than unimproved areas, and the location on a lot from which a view is obtained is generally more valuable than obscured locations.

However, when a property is subject to current use assessment, certain rights and value influencing factors are temporarily veiled and not valued for taxation purposes. N.H. CONST. pt. II, art. 5-B; RSA 75:1; chap. 79-A. These rights and factors still exist and are held by the owner, but they are suppressed or restricted by current use for tax purposes until sometime in the future when the land that embodies those rights or value influencing factors no longer qualifies for current use and is then assessed at market value.

Land not in current use (LNICU) does not have its rights or factors restricted by current use assessment and should be valued at its highest and best use considering the rights and factors directly inherent in the LNICU and <u>any effect the balance of the property has on the LNICU</u>. Here again the factors influencing LNICU are both internal and external to that portion of the property. <u>Arnold v. Francestown</u>, 8718-90PT (December, 1994).

Current use is a temporary easement, but in its effect on LNICU, is similar to that of more permanent conservation easements. Conservation easements often have a positive affect on the market value of land nearby not encumbered by the easement. This increase in value due the easement is often referred to as the "enhancement value" or "easement shadow" and must be accounted for in valuing the unencumbered land. See Vicary, Appraising Conservation Easements, The Appraisal Journal 138, (January 1994); Arnold v. Francestown, (1994).

The board has weighed the evidence and finds:

1) The highest and best use of the Property as improved is as a summer vacation residence with access to Lake Sunapee. The Property enjoys a private setting on 12.3 acres of land (11.3 acres in current use). (Note: The April 1994 assessment-record card indicates total acreage of 16.6 acres with a notation of current use acreage change. The board has based its decision on the April 1993 acreage.) The residence enjoys access approximately 800 feet across pasture land (land in current use) to a small beach area and dock used to canoe, sunfish and swim. Intrinsic in the value of the improved lot (LNICU) is its access to the lake.

2) The current use board's rules under the heading of "Farm Land" (CUB 304.02) states the land "shall be a tract of undeveloped land, devoted to, or capable of the production of agricultural or horticultural crops..." and "land containing roads constructed for the purpose of harvesting agricultural or horticultural crops." Under the heading of "Unproductive Land" (CUB 304.02), the rules state "Unproductive land, as defined in RSA 79-A:2, XIII, shall be one of the following: (1) A tract of unimproved land, upon which there are no

structures, which by its nature is incapable of producing agricultural or forest crops, and which is being left in its natural state without interference with the natural ecological process. and (2) A tract of unimproved wetland, as defined in RSA 79-A:2, XIV, which by its nature is incapable of producing agricultural or forest crops and which by reason of wetness is being left in its natural state." It is clear that the intent of the current use rules was for there to be no structures, improvements or uses that in any way significantly modified the land for it to qualify.

3) The Taxpayer argued that the dock only encompasses 14 feet and is generally accessed by foot through the pasture land. The current use statutes are clear in that to be eligible for unmanaged land, there should be no structures present regardless of size. The dock is a structure related to the land in question regardless of the fact that it is located some 800 feet from the house site because the right to construct that dock runs with the Property on which the Taxpayer requested current use assessment.

4) Because of the alteration by the Taxpayer and the recreational use, the area adjacent to the dock is curtilage as defined in CUB 301.04 and is necessary to support the structure in its recreational use.

5) The board looks at the general intent of the current use statute in arriving at its decision. In Michael H. Foster v. Henniker, 132 N.H. 75, 82 (1989), the court reinforced the concept that rules do not modify a statute, but only serve to effectuate its purpose. The board does not believe the legislature's intent that intensely used land should qualify as open space land under the current use statutes. The recreational structure (dock) and

use of this land are intensive and single purposed as opposed to the complimentary passive use the drafters of the current use statute envisioned.

Therefore, the board finds that the area along the waterfront encompassing the dock, 10 feet to each side, and the beach area does have an impact on the land NICU. The board finds the Town's application of an additional condition factor to the primary site value of the land NICU was an appropriate means to capture the value in 1993. Further, the board does agree with the Town that the current use map should be revised depicting the exact area of the cleared land adjacent to the water frontage that would not qualify under current use. Further, because the evidence was vague, the board will not comment on and the Town should determine whether or not any road area should be excluded from the current use land.

With respect to the Taxpayer's arguments that the depreciation on the house should be increased based on adjustments made to similar properties and that the total assessment should be decreased by 15%, the board finds the Taxpayer presented no credible evidence of the Property's fair market value. To carry her burden, the Taxpayer should have made a showing of the Property's fair market value. This value would then have been compared to the Property's assessment and the level of assessment generally in the Town. See, e.g., Appeal of NET Realty Holding Trust, 128 N.H. 795, 796 (1986); Appeal of Great Lakes Container Corporation, 126 N.H. 167, 169 (1985); Appeal of Town of Sunapee, 126 N.H. at 217-18. Further, the board reviewed the evidence submitted and finds the depreciation determined by the Town to be reasonable.

Lastly, to respond to the Taxpayer's argument that the 1993 assessment was increased from the 1989 assessment while all neighbors' assessments went down, increases from past assessments are not evidence that a taxpayer's property is disproportionally assessed compared to that of other properties in general in the taxing district in a given year. See Appeal of Sunapee, 126 N.H. 214 (1985). The board is not obligated or empowered to establish a fair market value of the Property. Appeal of Public Service Company of New Hampshire, 120 N.H. 830, 833 (1980). Rather, we must determine whether the assessment has resulted in the Taxpayer paying an unfair share of taxes. See Id. Arriving at a proper assessment is not a science but is a matter of informed judgment and experienced opinion. See Brickman v. City of Manchester, 119 N.H. 919, 921 (1979). This board, as a quasi-judicial body, must weigh the evidence and apply its judgment in deciding upon a proper assessment. Paras v. City of Portsmouth, 115 N.H. 63, 68 (1975); see also Petition of Grimm, 138 N.H. 42, 53 (1993) (administrative board may use expertise and experience to evaluate evidence).

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 in 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 appealing to the supreme court, and the grounds on appeal are limited to those stated in the rehearing motion. RSA 541:6. Generally, if the board denies the rehearing motion, an appeal to the supreme court must be filed within thirty (30) days of the date on the board's denial.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

_____
George Twigg, III, Chairman

_____
Michele E. LeBrun, Member

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Virginia A. Soule, Taxpayer; and Chairman, Selectmen of Sunapee.

Date: May 23, 1996

_____
Valerie B. Lanigan, Clerk

0006

Virginia A. Soule

v.

Town of Sunapee

Docket No.: 14773-93PT

ORDER

The board has received the "Taxpayer's" rehearing motion. Due to Chairman Twigg's retirement, Board Member Ignatius MacLellan will now sit with Member Michele LeBrun on this file. Member MacLellan has reviewed the record and has listened to the entire hearing tape.

Before ruling on the rehearing motion, the board will have its board inspector, Mr. Scott Bartlett, view the property and prepare a report. Mr. Bartlett has contacted the parties and has arranged to view the property on Tuesday, June 25, 1996 at 2:00 p.m. The Town may send a representative as an observer only. If scheduling permits, the board will also attend the view. During the view the board will only be looking at the property. The board will not receive new arguments or evidence. Mr. Bartlett will review the question of whether the property was properly assessed, and he will consider the "Town's" assertion that the property was underassessed.

Once the inspector's report is completed, a copy shall be mailed to the

parties along with a board order giving the parties an opportunity to comment

on the report. At the board's discretion, these comments will either be received in writing or at another hearing. After this process is finished, the board will decide the rehearing motion and will, if warranted, revise the decision.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

_____
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 Virginia A. Soule, Taxpayer; and Chairman, Selectmen of Sunapee.

Date: June 24, 1996

_____
Valerie B. Lanigan, Clerk

Virginia A. Soule

v.

Town of Sunapee

Docket No.: 14773-93PT

ORDER

On June 25, 1996 Board Members Ignatius MacLellan and Michele LeBrun viewed the "Property" with its inspector, Scott Bartlett, and the "Taxpayer," Virginia Soule. After viewing the Property, the board has questions about the Property under appeal and the portion in current use.

Therefore, prior to ruling on the rehearing motion, the board orders the Town to submit copies of the following:

1) the original 1982 current-use application and map for the subject Property (Map 0004, Lot 0054);
2) the original current-use application and map for Map 0004 Lot 0046, an 18 acre parcel owned but not appealed by the Taxpayer;
3) any revisions or new current-use applications filed from 1982 to 1993; and
4) a map delineating Lots 54 and 46.

In short, copies of any and all documents regarding the application for current use or any revisions from 1982 to 1993 for the above Property should be forwarded to this board within ten (10) days from the date of this order. Upon review of these documents, the board will decide the rehearing motion and, if warranted, revise the decision.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

_____
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 Virginia A. Soule, Taxpayer; and Chairman, Selectmen of Sunapee.

Date: July 8, 1996

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Valerie B. Lanigan, Clerk

Virginia A. Soule

v.

Town of Sunapee

Docket No.: 14773-93PT

ORDER AND NOTICE OF PREHEARING CONFERENCE

DATE/TIME: Wednesday, September 11, 1996 at 9:00 a.m.

PLACE: Board of Tax and Land Appeals
State Office Park South, 107 Pleasant Street
Concord, New Hampshire 03301

The board has taken the "Taxpayer's" rehearing motion under advisement. The board will decide the rehearing motion as promptly as possible, but the board cannot decide the rehearing motion until it has a clear understanding of the underlying facts, especially concerning the property's current-use status. To this end, the board has scheduled a prehearing conference on the following issues.

1) The property's current-use history.

The information received at the hearing and with the parties' July 1996 submittals do not clearly describe the property's current-use history.

2) The property's present current-use status.

The board has questions about the property's present (1993 - 1996) current-use status. The "Town" raised an issue about whether the waterfront

should be in current use. Additionally, the board has questions about: 1) the current-use category that the land is in and its qualifications to be in that category; and 2) the issues of what land does not qualify for current use because of the use of that land. For example, the map supplied at the hearing shows one acre not in current use, but the board is unclear about whether the driveway from the end of the town road to the house is part of the appealed property or not. There is also a roadway behind the house, and the board does not know whether that is on the appealed property and whether that land is assessed in current use or not. Additionally, on the view, the board saw a path that the Taxpayer uses to access the waterfront. At the waterfront, there was a small storage compartment, and sand that was brought in for a beach and a dock. The board needs to more fully understand the property's current-use status to decide this matter.

The parties should be prepared to address all of the Taxpayer's land in the Town. The board understands the Taxpayer owns at least two lots. To thoroughly review the Taxpayer's current-use status and ad valorem status, the board must review all of the Taxpayer's property in the Town.

3) The correct *ad valorem* assessment.

The board cannot decide the ad valorem assessment issue until the areas subject to current use and subject to ad valorem are clearly defined. The parties are responsible to gather, organize and explain any documents that are required to answer the underlying questions in this appeal. Unfortunately, the presentations have not yet been well researched or well presented to the board. The parties should come to the prehearing conference with their best description on the current-use issues discussed above. Hopefully, a clear

explanation on the current-use issues will help guide the board on the ad valorem issues.

4) Other Matters.

This appeal raises unique issues that could require a third board member to hear this case. RSA 76:16-a ad valorem appeals require a two-member quorum. RSA 71-B:6 I. However, if the appeal raises issues outside of RSA 76:16-a, the quorum is three members. Id. The Town has asserted the ad valorem assessment on the property was too low. If the board finds this to be so, the board would assert jurisdiction under 71-B:16 II, which requires a three-member quorum. Additionally, the Town's argument of underassessment and the board's questions concerning the property's current-use status could trigger 71-B:16 II and RSA 79-A:12 II, which authorize the board to review and correct current-use assessments.

Presently, there are only three board members because of a former member's retirement. On the day of the original hearing, Member Franklin stated that he had a past professional association with a present Town official. The Taxpayer stated she did not want Mr. Franklin to sit on the case. While Mr. Franklin's past association does not constitute grounds for recusal, Mr. Franklin has voluntarily recused himself, requiring the board to now wait until a third board member can review and participate in any further hearings. The board can at this time, however, hold a prehearing conference with only two members because RSA 541-A:31 authorizes prehearing conferences without a quorum.

One final note, given the unique issues raised by this case and the apparent difficulties the parties have had in presenting the required

information, the parties may consider retaining counsel for assistance. Specifically, the Taxpayer should know that the Town's assertion of underassessment and the board's requirement to review not only the ad valorem assessment but also the current-use assessment could result in a tax increase to the Taxpayer. The Taxpayer, and the board, may therefore benefit from the assistance of counsel. As previously noted, until the board receives a better explanation of the current-use status, the board does not know how this case will proceed and what, if any, corrective steps will be taken that may affect the Taxpayer's tax burden.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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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 Virginia A. Soule, Taxpayer; and Chairman, Selectmen of Sunapee.

Date: August 8, 1996

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Valerie B. Lanigan, Clerk

Virginia A. Soule

v.

Town of Sunapee

Docket No.: 14773-93PT

ORDER

This order addresses the issues discussed in the board's October 24, 1996 prehearing conference order and the parties' submittals pursuant to that order. This order sets out the board's proposed findings and raises other issues that will be addressed at the hearing. A separate hearing notice will be issued.

Facts

In 1982, the "Taxpayer" owned two abutting parcels. The subject "Property" is shown on tax map 4 as lot 54. The "Adjacent Property" is shown on tax map 4 as lot 46. In 1982, the Property was approximately 13.6 acres.

The Taxpayer was granted current use on 12.6 acres, leaving one acre not in current use (NICU). The current use categories were as follows.

4 acres	productive and unmanaged forest and farm land
8.6 acres	productive inactive farm

The "CRITERIA FOR CURRENT USE ASSESSMENT FOR USE DURING TAX YEAR 1982" stated the criteria for placing land in current use in 1982. The section on productive wild land stated as follows.

b. "Productive" wild land

(1) Unmanaged "forest land": A tract of unimproved forest land of at least ten (10) contiguous acres upon which there are no detrimental structures which by its nature is capable of producing commercial forest crops, and which has been for at least the last five years left in its natural state without substantial interference to the natural ecological process. Harvesting of trees for the landowner's personal domestic use for fuel wood purposes is allowed, subject to compliance with generally accepted forest management and utilization practices.

(2) Unmanaged "farm land": A tract of farm land of at least ten (10) contiguous acres upon which there are no detrimental structures which by its nature is capable of producing commercial agricultural crops but which is not being actively farmed, is now and will be kept in its natural state without substantial interference to the natural ecological process.

(3) Inactive "farm land":

(a) A tract of land of at least ten (10) contiguous acres which is being kept open by generally accepted methods, but not cropped. It is devoid of woody growth and has potential for growing livestock forage or food and fiber for human use. The intent being to preserve scenic qualities, improve wildlife habitat, and maintain an agricultural land reserve.

Original Qualification

Concerning the 4 acres in productive forest or farm land, there is a question about whether the land originally qualified. The board does not know if this is a significant question because the board is unaware of the factual conditions of the Property in 1982. Under the unmanaged forest criteria, the Property should have been capable of producing commercial forest crops and should have been left in its natural state "without substantial interference to the natural ecological process" for the past five years. The board does not know whether this was in fact the case. Under the unmanaged farm criteria, the Property should have been capable of producing commercial agricultural crops and should have been kept in its natural state without

"substantial interference to the natural ecological process."

Concerning the inactive farm criteria, the board assumes the Property was placed in under (3) (a), but the board does not know whether the portion placed in this category was devoid of woody growth and had the potential of growing livestock forage or food and fiber.

Except for the issue of the roadways and driveways and the waterfront (discussed below), the board does not anticipate that the above issues will be major stumbling blocks, but the board is performing a comprehensive review in this case, and the board would prefer to receive statements from the Taxpayer concerning the Property's initial qualification.

Rolling Rock Road

One specific issue that must be addressed is whether the area shown on the tax map as Rolling Rock Road should have been placed in current use or whether it should have been excluded as owned by the Taxpayer if it is a Town road. Additionally, although it appears to be a minor issue, there is a question about whether the pathway down to the water that is used for walking and driving should have been initially placed in current use. The board will assume, unless it hears otherwise, that this area was initially qualified.

The Waterfront

The major issue will be whether the Taxpayer was entitled to place all of the waterfront in current use. While the board does not know the specific dates of the alterations that occurred at the waterfront, the waterfront has been altered from its natural state as follows:

1) a portion has been cleared of woody growth;

2) sand was brought in and deposited to form a beach;

3) a storage bin was placed on the beach area; and

4) a dock was installed on the beach area.

The board's initial conclusion is that this area, which the Town calculated to be approximately 17 feet of waterfrontage, did not qualify in the inactive farm land category and should have been assessed NICU. While the

area may have been devoid of woody growth, the board does not think the area was capable of "growing livestock, forage or food or fiber for human use." Moreover, the intent for the inactive criteria is plainly spelled out. "The intent being to preserve scenic qualities, improve wildlife habitat, and maintain an agricultural land reserve ***." It would appear to the board that

the alteration of the waterfront area for use as a beach and docking area does not meet the intent expressed in the regulations. In addition, while the regulations are generally looked at, the board must always reexamine the statutory basis of current use. RSA 79-A:2 defines "wildland" as "any unimproved land upon which there are no detrimental structures and on which the owner is not substantially interfering with the natural ecological processes as determined and classified by criteria developed by the [current use] board." While the storage bin and the dock are arguably minor structures, they have no relationship to the category in which the land was placed. The board reads the term "detrimental structures" to, at a minimum, refer to structures that are not normally associated with the current-use category in which the land is placed. It is not the norm that inactive farm land would have a dock and a storage bin for recreational use.

The board will give the parties an opportunity to address these issues.

Grandfathering

The Taxpayer has argued that because that Town granted current use, that granting is grandfathered. It is true that the current-use regulations provide grandfathering for land assessed under prior regulations. CUB 309.01. The board reads this regulation to apply only to property that legally and factually qualified for current use when the land was granted current use. Simply put, the grandfathering provision does not provide protection to land that never should have been in current use in the first place. This has been the board's interpretation in one other case -- Rufo v. City of Concord, Docket No.: 16069-95CU December 24, 1996 decision (copy attached).

Amending the Map

The Taxpayer also asserted that if the board finds certain areas of the current-use land should not have been assessed in current use, the Taxpayer should be given an opportunity to redraw the current-use map because the location of the one acre NICU can be adjusted. The board has no objection to the Taxpayer presenting information at the hearing on this point and

asking for an opportunity, in a rehearing motion, to redraw the current use and NICU portions so the Property complies with the statute, the regulations and the board's ultimate decision.

Valuation

At the hearing, the board will also address the valuation issue. Both parties are free to submit valuation information. The board wanted to provide the parties with its proposed ruling on what land was in current use and what land was NICU to assist the parties in obtaining valuation information. On this point, the board will look at whether the valuation evidence properly considers the enhanced value attributable to the NICU property because of its location to the CU property. For example, the board will not view the NICU portion in a vacuum. Rather, we will view the NICU portion in the situation in which it actually exists. That is, when the board reviews the valuation information on the homesite, the board will consider the fact that the Property enjoys and controls a view even though the view is over CU land and the board will consider that the homesite has water access. This approach was adopted by the board in Arnold v. Francestown, Docket Nos.: 8718-90PT, 11152-91PT and 13819-93PT December 8, 1994 decision (copy attached).

The board will ask the question: is $250,000 (approximately) a reasonable value on a 1-acre homesite with a seasonal dwelling that enjoys and controls nice views and has water access and a dock? Quite frankly, the board finds the Town's revised assessment calculations to be reasonable.

Revised Tax Bills

Finally, the board has asserted 71-B:16 II and RSA 79-A:12 II jurisdiction over this case. If the board finally decides, consistent with

the above analysis, that a portion of the waterfront should have been assessed NICU, the board must decide what is the appropriate remedy concerning previously assessed taxes. The board has the authority to order new bills under the just-cited statutes and under Appeal of Wood Flour, Inc., 121 N.H. 991, 994 (1981) (the board has broad authority to remedy the inequities of

improper and illegal taxation). While the board might have the authority to order a recalculation, and thus the issuance of supplemental tax bills for years before 1994, the board is inclined to have the Town reassess the Property from 1994 forward, issuing supplemental tax bills to the extent the assessment increased from the assessment used in the billing. Again, if the parties resolve this matter based on the above outline, the parties would be free to craft the remedy concerning past taxes provided the current-use law is followed.

Settlement

The board recommends that the parties resolve this case by correcting the current-use application, consistent with the board's conclusions expressed above, and that the parties use the Town's revised assessment. If the parties agree a settlement conference would aid in resolving this appeal, the parties may file a request with the board. If the parties do not, a hearing will be held, and the board will issue the decision, which might include sending the board's review appraiser to perform an independent valuation.

Rehearing

Because the board is not making any final determinations or issuing any orders in this document, the board will not accept any RSA 541:3 rehearing motions. Rather, to the extent the parties disagree with the board's proposed findings and analysis presented above, the parties may present a memorandum, evidence and arguments at the hearing.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Ignatius MacLellan, Esq., Member

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Michele E. LeBrun, Member

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Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to James E. Morris, Esq., counsel for the Taxpayer; and Chairman, Selectmen of Sunapee.

Date: March 5, 1997

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Valerie B. Lanigan, Clerk

Virginia A. Soule

v.

Town of Sunapee

Docket No.: 14773-93PT

ORDER

This order 1) responds to the "Taxpayer's" oral continuance motion that was made at the scheduled May 7, 1997 hearing; 2) constitutes the notice of the new hearing date; and 3) corrects an error in the March 5, 1997 order.

Concerning the continuance request, the board finds the Taxpayer's attorney, James Morris, inadvertently did not see the hearing notice that was sent with the March 5, 1997 order. Therefore, the board confirms its oral grant of the motion.

Attorney Morris has an exemplary record of attendance and representation of various parties before the board. The board is convinced Attorney Morris' error was unintentional. Nonetheless, the "Town" incurred some expense due to the continuance, and the board orders Attorney Morris to personally pay the Town's reasonable costs. The Town stated it spent 6 hours @ $55 per hour preparing for and attending the scheduled hearing. Some of the preparation time will, however, lessen the Town's preparation for the June hearing.

Therefore, we order Attorney Morris to pay the Town $220 (4 hours x $55) for the Town's costs.

THE CASE IS RESCHEDULED FOR MONDAY, JUNE 30, 1997 AT 8:30 A.M.

As discussed, the board hopes the parties will present a corrected current-use map, and the board encourages the parties to explore a comprehensive settlement. All parties would be served by settlement that could include a written methodology for assessing the property.

Concerning the correction of the March 5, 1997 order (page 5), the board discovered the 1994 dates should have been 1993. The corrected sentence reads:

> While the board might have the authority to order a recalculation, and thus the issuance of supplemental tax bills for years before 1993, the board is inclined to have the Town reassess the Property from 1993 forward, issuing supplemental tax bills to the extent the assessment increased from the assessment used in the billing.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

_____
Ignatius MacLellan, Esq., Member

_____
Michele E. LeBrun, Member

_____
Douglas S. Ricard, Member

Certification

I hereby certify that a copy of the foregoing order has been mailed this date, postage prepaid, to James E. Morris, Esq., counsel for the Taxpayer; and Chairman, Selectmen of Sunapee.

Date: May 13, 1997

_____
Valerie B. Lanigan, Clerk

Virginia A. Soule

v.

Town of Sunapee

Docket No.: 14773-93PT

DECISION

Introduction

This decision addresses the "Taxpayer's" RSA 76:16-a appeal of her *ad valorem* taxes, and this decision addresses the board's assertion of its 71-B:16 I and RSA 79-A:12 II jurisdiction. This decision begins with the procedural history, then the facts and then the board's conclusion and analysis.

As outlined below, the board:

1) denies the Taxpayer's RSA 76:16-a appeal;

2) denies the "Town's" request to increase the *ad valorem* assessment;

3) finds that part of the Taxpayer's waterfront was improperly placed in current use in 1982;

4) finds that the right-of-way that begins at Rolling Rock Road and traverses the "Property" (the ROW) was improperly placed in current use in 1982; and

5) orders the Taxpayer and the Town to amend the 1982 current-use application by: (a) showing part of the waterfront as detailed below as not being in current use (NICU); (b) showing the ROW as NICU; and (c) showing the Property's additional acreage gained in the 1988 subdivision as being in current use.

Procedural History

To place this decision in context, the following is a summary of key steps in this matter.

September 1994 Taxpayer filed an RSA 76:16-a appeal.

March 1996 Hearing held before Chairman Twigg and Member LeBrun.

May 1996 Decision issued denying RSA 76:16-a appeal.

May 1996 Taxpayer filed for rehearing.

June 1996 Due to Chairman Twigg's retirement, Member MacLellan reviewed the record, and Members MacLellan and LeBrun viewed the Property.

August 1996 Board informed parties that appeal raises a current-use issue because board cannot decide *ad valorem* appeal without deciding what land is or is not in current use.

October 1996 Board held prehearing conference to attempt clarification of the issues, to explain the board's initial position and to encourage resolution within boundaries of the law but without a hearing. (Board encouraged resolution at the conference and in the board's prehearing conference order. See also board's May 13, 1997 order where settlement was again encouraged.)

October 1996 Board rescinded original May 1996 decision, and board asserted RSA 71-B:16 II and RSA 79-A:12 II jurisdiction. As the board asserted jurisdiction

under these statutes a quorum of three was required. New board member Ricard reviewed the record and then viewed the Property accompanied by the Taxpayer and the board's review appraiser.

March 1997 Following receipt of parties' memorandum, board issued preliminary findings and again encouraged resolution without a hearing.

June 1997 Hearing on the merits held.

At this time, the board would like to disagree with the Taxpayer's comment that this case has been a tempest in a teapot.

The board, unfortunately, could not decide this case with a simple process, and the board did its best to apprise the parties of the board's preliminary analysis and to encourage early and simple resolution. As we stated many times, the board could not decide the *ad valorem* appeal until it addressed the current-use issue. Why? Because the first step in valuing any

property is defining what constitutes the property. This basic requirement by necessity implicated a review of the Property's current-use status, an issue raised by the Town. Having jurisdiction over this matter initially by the Taxpayer's appeal, the board thought it was appropriate to correct any discovered errors in the appealed Property's current-use status. The board did not want to waste time with this case, but the board thought it had an obligation to correctly decide the appeal and to correct the current-use status.

The above procedural outline demonstrates that the board made numerous attempts to encourage settlement of this case without a hearing. Settlement was not possible because the parties could not agree on the pivotal issue in this case -- whether the entire lakefront was entitled to current-use

assessment or whether part of the lakefront should have been assessed *ad valorem*. Given the parties' poor performance in providing required documentation, the board concluded prehearing steps were required to ensure the hearing would fully represent the case.

This entire process could have been substantially shorter if the Taxpayer would have considered the board's initial impression that part of the waterfront and the ROW probably did not qualify for current use. The board shared its impression with the parties, but settlement was not accomplished. We now decide this case.

Facts

In 1982 the Taxpayer owned two abutting parcels. The appealed Property was shown on tax map 4 as lot 54, and the Taxpayer's "Adjacent Property" was shown on tax map 4 as lot 46. See Attachment A to this decision for a sketch of the parcels as of 1982. In 1982, the Property was approximately 13.6 acres, and the Taxpayer was granted current use on 12.6 acres, leaving one acre NICU.

The Property's 1982 current-use classifications were as follows.

4.0 acres	productive and unmanaged forest and farmland
8.6 acres	productive inactive farmland

Attachment A shows the location of the current-use land and the NICU land.

At some time, the Adjacent Property was also placed in current use, but the board did not receive any information about that.

In 1988, the Taxpayer obtained subdivision approval that changed the

configuration of the Property and the Adjacent Property, resulting in the Property gaining approximately 3.0 acres for a new total size of 16.6 acres +/-. See decision Attachment B for sketch of Property as of 1988. Despite the subdivision, the current-use applications for the Property and the Adjacent Property were not amended.

The Property is accessed by a right-of-way (the ROW) because the town road -- Rolling Rock Road -- stops at the Property's northeast boundary. The ROW continues over the Property, providing access to other private homes. See Attachment B for ROW's location; see Exhibit I-A for photographs of ROW's general condition; and see red line on photograph that indicates where the town road ends. The ROW was placed in current use in the original 1982 application.

The Property includes an 1830's farmhouse. Attachment B shows the house's location, and Exhibit I-B is a photograph of the house. The house has a promontory setting, affording excellent views of the Taxpayer's field, of the lake and of the surrounding hills, including Mount Sunapee. See Exhibit I-C, photographs of the Property's view.

The house is approximately 650 feet from Lake Sunapee. To access the lake, one must cross the "Field" that the Taxpayer generally mows once a year, keeping it free of woody growth. See Attachment B for Field's location, and see Exhibit I-C for photographs of Field. There is also a "Path" across the Field that the Taxpayer uses for foot and vehicular access to the lake. The

Taxpayer mows the Path on a more frequent basis than the surrounding Field. See Attachment B for Path's location, and see Exhibit I-D and Taxpayer Exhibit

14-C for photographs of Path.

The Property has approximately 212 feet of frontage on Lake Sunapee. Approximately 17 feet of the waterfront has been somewhat cleared as compared to the remaining frontage. This area includes a dock, imported sand and a small storage locker that is approximately 4 feet wide, 8 feet long and 4 feet tall (the Locker). See Exhibit I-E for photograph of lakefront, and see Taxpayer 14-B for photograph of the Locker. This waterfront area was in its altered state when the Town granted current use in 1982. At some point, the Town reinspected the Property and concluded that a small area (approximately 17 feet of frontage and extending 50 feet back from the lake) should have been assessed *ad valorem* and should not have been in current use. This is the issue that caused the board to assert RSA 71-B:16 II and RSA 79-A:12 II jurisdiction.

In addition to its position concerning the waterfront area, the Town asserted that even if the waterfront was entitled to be in current use, the NICU part of the Property could be assessed as waterfront or water access property. This is another issue that the Taxpayer disputed.

Board's Findings

The Taxpayer's RSA 76:16-a Appeal

The board denies the Taxpayer's RSA 76:16-a appeal because the Taxpayer conceded that the Property's 1993 assessment was not excessive.

Town's Request to Increase the Assessment

The board denies the Town's request that the Property's assessment be increased. The board finds the Town did not present any property-specific market analysis to show the original assessment was in error. Without property-specific value evidence -- such as an appraisal or at a minimum a sales comparison analysis -- the board is reluctant to increase a taxpayer's

assessment and send supplemental bills.

Current Use Issues

General Current Use Overview

In 1982 (the year the Property was placed in current use), there were six current-use categories. See decision Attachment C, which are excerpts from the 1982 current-use rules. The Taxpayer placed the Property into the wild land category. The wild land category had two subcategories: unproductive and productive. The Taxpayer placed the Property in the productive category, which had three specific types. The Taxpayer placed part of the Property in the unmanaged forest and farmland category and part in the inactive farm category. Table A below summarizes the discussion with the Property's categories in blocks.

In 1992, the legislature changed the classification system by reducing the six categories to three categories. Chapter 281:27, Laws of 1991. The three 1992 categories were: forest land, farmland and unproductive land. Pursuant to the 1991 legislation, previously accepted current-use land was to be automatically requalified without the loss of current use. The law stated: "No land shall be removed from current-use assessment due to mere passage of this act ***."

The current-use board adopted rules to accomplish the reclassification. Part CUB 309 of the 1992 current-use rules included transitional rules to implement the 1991 legislation. CUB 309.01 stated:

> **CUB 309.01 Grandfather Provisions.** Land assessed under RSA 79-A prior to the enactment of Chapter 281, Laws of 1991, shall remain in current use regardless of whether the land meets the criteria established by this chapter. Such land shall remain in current

use until a change in use takes place pursuant to RSA 79-A:7 and PART CUB 307.

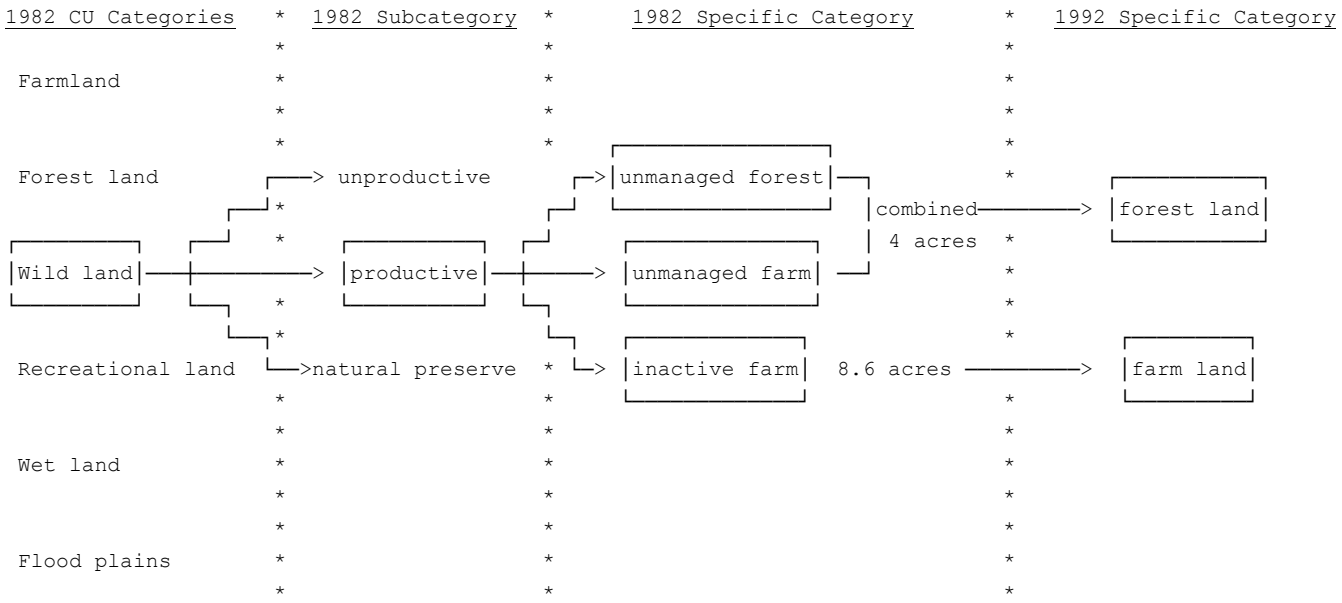
Further under CUB 309.02 (1992), the Property was automatically reclassified as follows.

1982	**1992**
Unmanaged Forest	Forest Land
Unmanaged Farm	Farm Land
Inactive Farm	Farm Land

Table A presents the Property's current-use categories in 1982 and 1992.

TABLE A

CURRENT USE AND TAXPAYER'S CATEGORIES



Thus, in 1992, the Property was reclassified as follows.

4.0 acres in forest land

1) The board assumes the 4.0 acres was in the forest land category even though the 1982 application combined the forest and farm category together.

8.6 acres in farmland

2) Because of the 1988 subdivision of the Property, the Property's size was increased approximately 3.0 acres.

Because the Property has not changed physically since 1982, the board must examine whether some of the Property's land that was granted current use legally qualified for such treatment in 1982.

Concerning the Taxpayer's grandfathering argument, the board does not read the grandfathering provisions of the statute or the rules to allow unqualified land to remain qualified. Rather, the statute and the rules were intended to allow originally qualified land to remain qualified even though the statute changed. The board's decision was not affected at all by the statutory changes.

The board will now review the three land areas that were discussed to determine whether those areas were correctly placed in current use in 1982.

An alternative way to analyze this issue would be to review the following hypothetical:

1) Assume, for analysis, the area under review is in current use but the alterations that actually exist did not exist. For example, assume the waterfront is in its natural state.

2) Now ask: "Would a change in use occur if the landowner altered the

land so the area looks like it does today?" For example, would the alteration of the waterfront from its natural state to the current state trigger a change in use under RSA 79-A:7 and the imposition of the land-use-change tax (LUCT)?

The Path

The Path is on the inactive farmland area. Under CUB 1982, the landowner must keep such land "devoid of woody growth ***." The Taxpayer cuts the Field through which the Path runs once a year. The Path, however, is cut on a more frequent basis. Additionally, the Path is used for access to the waterfront. The board concludes the Taxpayer's extra cutting and access use of the Path does not disqualify the Path from current use.

Viewing this area under our alternative analysis, i.e., would the present use constitute a disqualifying event had the use just begun on current-use land, the board concludes a disqualifying event would not occur if the Taxpayer had simply just begun cutting the Path on a more regular basis or using the Path for water access.

Right of Way

The ROW is apparently on the boundary between the forest and farm land. The ROW is a dirt road that provides access from the end of the town road to the Property's house, continues past the house and then provides access to other parcels located beyond the Property.

The ROW is basically a driveway and is not entitled to be in current use. It is not open space but rather is a road that is used to access several homes. RSA 79-A:8 III (b) only exempts roads for "agricultural, recreational,

watershed or forestry purposes ***." This ROW does not qualify. See also 1982 Current Use Rules, II E ("Yards and grounds around building together with the building shall be assessed at market value.")

Performing the alternative analysis, there is no question that the installation of the ROW on current-use land and the ROW's use for access to the Property and to other lots would certainly disqualify current-use land and would require the imposition of the LUCT.

Waterfront

As the board indicated in its March 5, 1997 order, the waterfront area that has been altered does not qualify for current use. The waterfront has been altered from its natural state as follows:

1) a portion has been cleared;

2) sand was brought in and deposited to form a beach;

3) a storage bin (the Locker) was placed on the beach area; and

4) a dock was installed on the beach area.

While the waterfront area was devoid of woody growth, the board does not think the area was capable of "growing livestock, forage or food or fiber for human use." Additionally, the board does not see how the area would qualify under any other current-use category. See 1982 Current Use Rules II b (otherwise qualified land in one category may include 10% of land qualified under another classification). Moreover, the intent for inactive land is plainly spelled out. "The intent being to preserve scenic qualities, improve wildlife habitat, and maintain an agricultural land reserve ***." The alteration of the waterfront area for use as a beach and docking area does not meet the intent expressed in the regulations.

In addition, while the regulations are generally looked at, the board must always reexamine the statutory basis of current use. RSA 79-A:2 defines "wildland" as "any unimproved land upon which there are no detrimental structures and on which the owner is not substantially interfering with the natural ecological processes as determined and classified by criteria developed by the [current use] board." While the Locker and the dock are arguably minor structures, they have no relationship to the category in which the land was placed. The board reads the term "detrimental structures" to, at a minimum, refer to structures that are not normally associated with the current-use category in which the land is placed. It is not the norm that inactive farm land would have a dock and a storage bin for recreational use.

The alternative analysis confirms this waterfront area does not belong in current use. If the Taxpayer had made the changes to the waterfront area that presently exist, the land would most certainly have been disqualified from current use, and the LUCT would have to be imposed.

Remedy

Based on the above conclusions, the board enters the following orders.

1) Within 60 days of the clerk's date below, the Taxpayer shall file an amended current-use application with the Town. This amended current-use application shall include correcting the Property's land area given the 1988 subdivision. (The board is not ordering a correction of the current-use application on the Taxpayer's Adjacent Property, but we hope the parties will nonetheless also correct that application.) The amended application shall also specifically comply with the board's conclusions that the ROW and part of the waterfront are not qualified for current use. The Taxpayer shall file an

appropriate plan with the amended application. The Taxpayer shall send a copy of the amended application to the board.

2) The Town shall approve the amended application if it complies with the board's order and the 1982 current-use regulations, and the Town shall take appropriate steps to see to the proper recording of the amended application. This shall be accomplished within 30 days of the Town's receipt of the amended application. The board encourages the parties to state in the new application the reason for the amendment so the registry records and the Town records will be clear about the changes from the original application.

3) The Town shall, within 90 days of the clerk's date below, file the amended application with the board along with a statement about the Town's actions to approve and record the amended current-use application.

4) If the Taxpayer fails to comply with this order, the board will issue an order that will be recorded at the registry of deeds. That order, in essence, would amend the recorded current-use application without the Taxpayer or the Town acting.

Rehearing

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 in 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 appealing to the supreme court, and the grounds on appeal are limited to those stated in the rehearing motion. RSA 541:6. Generally, if the board denies the rehearing motion, an appeal to the supreme court must be filed within thirty (30) days of the date on the board's denial.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Ignatius MacLellan, Esq., Member

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Michele E. LeBrun, Member

_____
Douglas S. Ricard, Member

Certification

I hereby certify that a copy of the foregoing order has been mailed this date, postage prepaid, to James E. Morris, Esq., counsel for the Taxpayer; and Chairman, Selectmen of Sunapee.

Date: August 20, 1997

_____
Valerie B. Lanigan, Clerk