

James C. and Doris E. Falconer Revocable Living Trust
James C. and Doris E. Falconer, Trustees

v.

Town of Kensington

Docket No.: 15726-94LC

DECISION

The "Taxpayer" appeals, pursuant to RSA 79-A:10, the "Town's" September 26, 1994 land-use-change taxes (LUCT) of: \$3,765 on "Lot 3", a 2.06-acre lot; and \$5,320 on "Lot 2", an 8.14-acre lot (the LUCT lien release form indicates 8.28 acres were disqualified; however, a survey, Taxpayer Exhibit 1, shows Lot 2 as 8.14 acres). For the reasons stated below, the appeals for abatement are denied.

The Taxpayer has the burden of showing the Town's LUCT assessments were erroneous or excessive. See TAX 205.07. We find the Taxpayer failed to carry this burden.

The Taxpayer argued the LUCT was erroneous or excessive because:

- (1) in 1985, the "Property" was enrolled in current use;
- (2) in 1994, a manufactured home was moved onto Lot 2 which triggered a land use change tax;
- (3) the Town told the Taxpayer that to have the house lot be less than one

acre the Taxpayer would be required to submit a survey plan;

(4) the remaining land should not have been removed from current use by the Town because there is sufficient land to continue to qualify for current use; and

(5) the Selectmen's actions were arbitrary and capricious.

Page 2

Falconer v. Town of Kensington

Docket No.: 15726-94LC

The Town argued the LUCT was proper because:

(1) the original application was for everything to be in current use (10.2 acres) with the exception of a one-acre parcel with the homestead;

(2) based upon a different survey, the Assessors determined that the manufactured home and curtilage took up approximately 30,000 square feet; and

(3) there was only 8,400 square feet remaining above current use's 10-acre minimum and, therefore, the remaining land is disqualified from current use.

Board's Rulings

Based on the evidence, the board finds the Taxpayer failed to show the LUCTs assessed by the Town were without legal basis or in excess of market value.

Chronology of Appeal

The Taxpayer filed its appeal of the LUCTs on July 10, 1995 with the board. After determination of timely filing, the board scheduled a hearing for October 17, 1996. During deliberations after the hearing, the board requested its review appraiser, Mr. Scott Bartlett, to review the Property and submit a report as to the dimensions of the land no longer qualifying for current use. Mr. Bartlett filed his report on December 6, 1996 with copies provided to the parties and time for them to comment. On January 29, 1997,

the board held a telephone conference with the parties to determine if there was the possibility of holding a settlement conference. The parties agreed and the board noticed a settlement conference for May 14, 1997. During the settlement conference the parties were unable to reach an agreement and the board proceeded to deliberate and issues the following decision.

Chronology of Facts and Events

Based on the evidence submitted, the board finds the following facts relative to this appeal. In April 1985, the Taxpayer submitted an application to place 11.2 acres in current use comprised of a 9.14 acre tract identified as parcel A on the current use application and map (Taxpayer Exhibit 3) and

Page 3
Falconer v. Town of Kensington
Docket No.: 15726-94LC

Lot 1 of 2.06 acres¹. The Town granted the current-use assessment on 10.34 acres and kept out approximately one acre around the existing building and shed on Lot 1. The Taxpayer stated that it had disagreed with the Town's requirement that the land not in current use (LNICU) must coincide with the Town's zoning requirements. However, the Taxpayer never appealed the Town's reserving an acre out of current use.

In August 1988, the Taxpayer applied for and was granted a subdivision of parcel A into two lots; Lot 1 comprised of one acre encompassing the

¹ Conflicting evidence was submitted as to the exact acreage of the initial lot 1. On the Taxpayer's current-use map it is noted as 2.06 acres and the Town has assessed it based on 2.06 acres. However, on an August 1988 plat (Taxpayer Exhibit 1) the Taxpayer identified the acreage of this lot as 2.2 acres. A definitive finding of acreage is not critical to the board's conclusion in this appeal; however, based on all the evidence, the lot most likely is 2.06 acres and the initial current-use acreage should have been 10.2 acre, not 10.34 acres.

existing dwelling and shed and Lot 2 of 8.14 acres of all undeveloped land. This subdivision was created, apparently, to correspond with the one acre of LNICU and the remaining 8.14 acres of parcel A in current use. Beginning in 1988, the Town assessed the Taxpayer for three separate lots of record: the one-acre parcel with dwelling, the 8.14-acre parcel and the 2.06-acre parcel (for ease of future reference, the one-acre parcel shall be referred to as Lot 1, the 8.14-acre parcel as Lot 2 and the 2.06-acre parcel as Lot 3). In September 1994, the Taxpayer placed a manufactured home, well and septic system on a portion of Lot 2. The Town determined the curtilage (CUB 301.04 (1994)) no longer qualified for current use and consequently all of Lot 2 and Lot 3 no longer qualified because the curtilage reduced the remaining land eligible for current use in those lots to below the 10-acre minimum. See CUB 304.01. The Taxpayer then filed a timely request for abatement and an appeal with this board.

Page 4
Falconer v. Town of Kensington
Docket No.: 15726-94LC

Board's Rulings

The basis for assessing the LUCT is contained in RSA 79-A:7 and CUB 307.01.

79-A:7 Land Use Change Tax

- I. Land which has been classified as open space land and assessed at current use values on or after April 1, 1974, pursuant to this chapter shall be subject to a land use change tax when it is changed to a use which does not qualify for current use assessment. Notwithstanding the provisions of RSA 75:1, the tax shall be at the rate of 10 percent of the full and true value

determined without regard to the current use value of the land which is subject to a non-qualifying use or any equalized value factor used by the municipality or the county in the case of unincorporated towns or unorganized places in which the land is located. Notwithstanding the provisions of RSA 76:2, such assessed value shall be determined as of the actual date of the change in land use if such date is not April 1. This tax shall be in addition to the annual real estate tax imposed upon the property, and shall be due and payable upon the change in land use. Nothing in this paragraph shall be construed to require payment of an additional land use change tax when the use is changed from one non-qualifying use to another non-qualifying use.

Cub 307.01 WHEN IS LAND CHANGED. Land under current use classification shall be considered changed and the use change tax imposed, in accordance with RSA 79-A:7, V, when a physical change, which is contrary to the requirements of the category under which the land is classified, takes place as follows: ... (b) When development occurs which changes the physical condition of the land so as to disqualify it from open space assessment.

Since 1985, 10.34 acres has been granted current-use assessment and since the 1988 subdivision that acreage was clearly delineated as Lot 2 and Lot 3. The resulting curtilage around the manufactured home, well and septic system on Lot 2 is best described in Mr. Bartlett's report as encompassing the entire 150 feet of frontage to a depth of approximately 148 feet or approximately .51-acre. This land had received current use assessment since 1985, and thus, when developed in 1994, no longer qualified for current use. Further, because the remaining acreage is less than 10 acres (10.34 acres - .51), all of Lot 2 and Lot 3 no longer meet the acreage requirements of RSA 79-A:4 I and CUB 304.01 and are subject to land use change taxes.

The Taxpayer argued that because the Town incorrectly required a full acre to be kept out of current use (in other words more than the actual yard and grounds around the existing building on Lot 1), the Taxpayer should not be

Page 5
Falconer v. Town of Kensington
Docket No.: 15726-94LC

required nine years hence to pay the LUCTs. The board rules the Taxpayer is

prohibited by the doctrine of laches to raise this as an argument at this time to avoid the LUCTs. The Taxpayer slept on its rights for a significant length of time, had adequate knowledge of the law to remedy the current-use status and configuration of its land and, in fact, took affirmative action in 1988 by subdividing Lot 1 around the existing dwelling to be in conformance with the current-use assessment of the Property. It would not be equitable to all the other taxpayers within the Town to allow the avoidance of LUCTs due to the change in conditions and time that has elapsed since the initial 1985 application for this Property. E.g., Healey v. Town of New Durham, 140 N.H. 232, 241 through 243 (1995); State v. Weeks, 134 N.H. 237, 240 (1991); Wood v. General Electric Company, 119 N.H. 285, 289 (1979).

The detailed reasons for finding the doctrine of laches applies follows.

First, when the Taxpayer applied in 1985 to place its land in current use, the map it submitted with the application did not comply with the general current-use rules for applying for land for current use. See General Rules

Applying to All Tracts of Land, Part One, Sect. II, B.

B. The application for current use assessment shall be accompanied by a map or drawing of the entire parcel, adequately identified and oriented to establish its location, and sufficiently accurate to permit computation of acreages. Besides showing overall boundaries and computation of acreages, the map shall show interior boundaries and acreages of land and forest type categories for which the applicant is seeking qualification, differentiating land uses within each category and all non-qualifying portions.

Clearly the map attached to the Taxpayer's 1985 current-use application (Taxpayer Exhibit 3), did not delineate any land be kept out of current use; it simply noted that there was an existing house on the southeasterly portion of parcel A. The Taxpayer presented no documentary evidence that it had submitted a more detailed map to the Town prior to the hearing showing the actual curtilage area around the existing house. Further, the Taxpayer did

not at that time or in any years subsequent to 1985, appeal pursuant to RSA 79-A:9 the Town's action of requiring a full acre be kept out of current use.

Second, the Taxpayer had the opportunity in each of the intervening years (between 1985 and 1994) to submit a new application to the Town by April 15th reconfiguring the actual LNICU. However, no evidence was submitted that such reapplication was ever made. In 1988, the Taxpayer actually took an affirmative action subdividing parcel A into Lot 1 and Lot 2 thereby creating two separate transferrable lots of record that conformed with the manner in which the current use had been assessed. This creation of separate lots allowed the Taxpayer to receive several benefits. First, Lot 1 could have been sold separately with the existing home and no LUCT would have been incurred. Second, the Taxpayer avoided ad valorem taxes on Lot 2, specifically avoiding the site value of a separate lot of record created on Lot 2 as a result of the 1988 subdivision. The board finds it would not be equitable to allow the Taxpayer not to pay a LUCT after having enjoyed the benefits of these reduced tax liabilities due to the uncontested current-use assessment.

Third, one of the Taxpayer's trustees, James Falconer, stated that he was a former selectmen in an adjoining town for 15 years and was familiar with the current-use laws and rules. Consequently, the Taxpayer can hardly claim that it was unfamiliar with the provisions of current use and the effect of placing land in current use.

The board acknowledges that it is conceivable that the Taxpayer could in

the future apply for current use on Lots 1, 2 and 3 as long as they remain in the same ownership, comply with the current-use application requirements and

Page 7
Falconer v. Town of Kensington
Docket No.: 15726-94LC

have a minimum of 10.0 acres qualifying for current use². This, however, does not negate the fact that current-use land was disqualified by development and the remaining acreage receiving current-use assessment no longer met minimum acreage requirements at the time the manufactured home was moved during September 1994.

The board was presented with no evidence relative to the value basis of the two LUCTs other than the assessment-record cards. Consequently, the board finds the Taxpayer failed to show that the values on which the LUCTs were calculated were excessive.

A motion for rehearing, reconsideration or clarification (collectively "rehearing motion") of this decision must be filed within thirty (30) days of

² The board also notes that the current-use board envisioned a not totally dissimilar situation in rule CUB 307.01 which allows an abutting purchaser of a portion of current-use land that no longer meets the ten-acre minimum acreage to notify the town within 60 days of the date of the sale of an intent to file for current use on the assemblage of the parcel with other contiguous land that qualifies for current use. This rule however, does not apply to the current situation because no sale of property was involved in this case. The board's jurisdiction is strictly controlled by statutes and/or rules. Appeal of Gillin, 132 N.H. 311, 313 (1989); Appeal of Town of Sunapee, 126 N.H. 214, 216 (1985); RSA 541-A:22 II. Consequently, the board does not have the latitude to apply current-use board rules for a specific situation (i.e., a sale and assemblage of current-use land) to this situation.

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.

Page 8
Falconer v. Town of Kensington
Docket No.: 15726-94LC

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to James C. and Doris E. Falconer, Trustees; and Chairman, Selectmen of Kensington.

Date: June 12, 1997

0006

Valerie B. Lanigan, Clerk

James C. Falconer

v.

Town of Kensington

Docket No. 15726-94LC

ORDER

This order responds to the "Taxpayer's" rehearing motion, which is denied. The motion did not demonstrate that the board erred in its decision, and thus, the motion failed to show any "good reason" to grant a rehearing. See RSA 541:3.

The Taxpayer's rehearing motion placed substantial focus on the board's laches discussion. While laches was an issue, the parties should not forget the first step in the board's analysis -- deciding whether the law required disqualification of the current-use land and assessment of the land-use-change tax (LUCT).

It is undisputed that as of 1994 the Taxpayer had only 10.34 acres in current use. The placement of the manufactured home and the installation of its amenities triggered a change in use (the Disqualifying Event). The Taxpayer's properties then had less than 10 acres actually in current use. When a current-use parcel becomes less than 10 acres, RSA 79-A:7 IV (c)

requires that the current-use status end and that the LUCT be assessed. This is what happened here.

This would be a simple case but for the Taxpayer's assertion that he owned additional land that qualified for current use and that could have been added to the then existing current-use land. He asserted that with the additional land

Page 2

Falconer v. Town of Kensington

Docket No.: 15726-94LC

the total size would have been 10 acres or more after the Disqualifying Event, meaning the LUCT would not have been imposed. This may be true, but the Taxpayer did not amend its current use application before the Disqualifying Event.

The Taxpayer's argument is in essence: "Part of the lots were in current use. Upon work on the lots, the current-use parcel was disqualified due to size. Nonetheless, the board should rescind the disqualification and the assessment of the LUCT and let the Taxpayer now amend the recorded and released current-use application to add additional land so the property could be treated as if it was always in current use." The board rejected this argument in the decision, and there is no reason to change it.

Initially, there is an issue of whether the board even has the authority to grant the Taxpayer's requested relief. See Appeal of Gillin, 132 N.H. 311, 313 (1989) (board's jurisdiction strictly statutory). The Taxpayer did not present any legal basis for its principle argument that the board could ignore the Disqualifying Event, rescind the current-use disqualification and forgive LUCT, all of which is akin to allowing retrospective reapplication.

Assuming the board does have such authority, the board concluded the Taxpayer's defense was barred by laches. The decision adequately explained

the basis for the board's conclusion. Suffice to say that after weighing the various factors, the board decided laches barred the defense because the result required by law was not unfair to the Taxpayer or the Town, especially given the clear requirements of the law -- if less than 10 acres remains in current use after a disqualifying event, the remaining land is automatically disqualified and the LUCT must be assessed.

To appeal this matter, an appeal must be filed with the supreme court within thirty (30) days of the clerk's date below. RSA 541:6.

Page 3
Falconer v. Town of Kensington
Docket No.: 15726-94LC

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Certification

I certify that copies of the within Order have this date been mailed, postage prepaid, to James C. Falconer, Taxpayer; and Chairman, Selectmen of Kensington.

Date: August 5, 1997
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Valerie B. Lanigan, Clerk