

Pasquale V. and Katharine L. Rufo

v.

City of Concord

Docket No.: 16069-95CU

**DECISION**

The "Taxpayers" appeal, pursuant to RSA 79-A:9, the "City's" 1995 denial of its current-use application. For the reasons stated below, the appeal for abatement is denied.

The Taxpayers have the burden of showing the City erred in denying its application for current use. See RSA 79:A-9; TAX 206.06. The Taxpayers failed to carry this burden.

The Taxpayers argued the denial of their current-use application was erroneous because:

- (1) pursuant to current use rule CUB 309.01, the "Property's" current-use status was grandfathered because it was placed in current use in April 1978;
  - (2) the Taxpayers had not changed the Property's use yet the City reduced the land in current use and assessed a land-use-change tax (LUCT);
  - (3) the City erroneously calculated the land qualified for current use;
  - (4) 15,417 square feet of the lot should have been assessed in current use;
- and
- (5) the previous regulations allowed land under greenhouses to be assessed in current use even though the plants were raised in flats or hanging (as compared to plants grown in the ground).

The City argued its denial of the current-use application was proper because:

- (1) the area assessed in current use was based on an inspection, allowing current use in the areas where plants were grown in the ground but not allowing current use for the areas where plants were grown in flats or pots or in greenhouses;
- (2) the board's prior decisions in similar cases supported the City's decision; and
- (3) the City's decision was consistent with the policy behind the current-use law.

#### **Board's Rulings**

The board finds the City correctly assessed the Property in terms of current use.

The Taxpayers' main argument was that they were entitled to continue to have the same current use treatment they had received pursuant to their original 1978 current-use application. The Taxpayers asserted the Property's use had not changed since 1978, and therefore, the City was without justification to reduce the area in current use. Specifically, the Taxpayers asserted CUB 309.01 grandfathered their use of the Property. Furthermore, the Taxpayers asserted the City had allowed additional land, including the land under any greenhouses or upon which potted plants were grown in cold frames, to be assessed in current use, and thus, the City could not now assess that land at ad valorem values.

Responding to the Taxpayers' argument concerning whether this Property had any grandfathered status requires a review of RSA chapter 79-A and the current-use regulations. Reading RSA chapter 79-A as a whole, which is required by statutory construction, it is clear that the legislature never intended that land underneath any building be entitled to current-use taxation. The principle purpose of RSA chapter 79-A is "to encourage the preservation of open space \*\*\*." RSA 79-A:1 (supp. 1979) (emphasis added).  
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RSA chapter 79-A does not specifically state that land under buildings does not qualify for current use. But RSA 79-A:7IV(a) (supp. 1979) states that a change in use occurs when site work begins for a building on any open space. This clearly shows that the legislature did not intend for land underneath

buildings to be in current use. This reading is supported by the current-use rules. The 1978 current-use rules (section II, paragraph e) specifically stated: "Yards and grounds around buildings together with the building will be assessed at market value." Taken together, the board finds even in 1978, the Taxpayers were not entitled to current-use assessment for any area underneath any building. The Taxpayers, therefore, can not be entitled to any grandfathered status because a grandfathered status presumes a legal entitlement at an earlier time<sup>1</sup>.

The board also finds nothing in either the statutes or the regulations that allowed current use for less than a ten-acre parcel where the land was used for growing potted or flatted plants. This board, as demonstrated in the City's report, has consistently held that the gross value of products produced on a parcel must actually be derived from the direct use of the land such as a plant that is grown in the ground. The 1991 amendments did not materially change the criteria for this classification. CUB 304.01 (1994) is more explicit that to qualify for this classification the tract must be actively devoted to the growing of "crops," which implies the direct use of the ground for growing and producing the valued product.

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Another way to look at this is through RSA 79-A:1, the declaration of public purpose. It is implausible to argue that the legislature intended to preserve land that is used for growing plants in pots or in flats, because that does not advance the overall purpose of preserving open space for the

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<sup>1</sup> We also note that CUB 309.01 ("Grandfather Provision" (1994)) was a transitional rule required when RSA chapter 79-A was amended, resulting in the elimination of some reclassifications. The Taxpayers' Property was not in any of the classifications that previously existed but were not carried forward after the 1991 amendments. Therefore, the Taxpayers are not entitled to the benefit of CUB 309.01.

public's benefit.

In their requests for findings, the Taxpayers asserted they were entitled to the benefit of CUB 304.05 (b)(2), the board disagrees. First, the board has already concluded that any land under the buildings, including the greenhouses, is not entitled to any current-use status. Second, the board considers the remaining land (the land not in current use and not underlying the buildings) to be in essence curtilage of the buildings. Finally, the board reads CUB 304.05 (b)(2) to require that the contiguous land also qualify as either farmland, forest land or unproductive land, except for the ten-acre requirement. The Taxpayers did not show that the contiguous land was entitled to be classified under these categories, and our review of those categories shows the land would not be qualified.

Based on the above, the board finds the City has properly assessed the Property, allowing current use only for the area specifically devoted to growing horticultural products in the ground.

One final note. The board considered whether the Taxpayers should be refunded their LUCT because the land upon which the LUCT was assessed should not have been in current use. However, the board concluded that for eighteen years the Taxpayers received the benefit of current-use taxation, and therefore, justice does not require a refund. See RSA 71-B:5I (board may "take such other action as it shall deem necessary."); RSA 79-A:9II ("The board shall make such order thereon as justice requires \*\*\*.")

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**Findings of Fact and Rulings of Law**

In these responses, "neither granted nor denied" generally means one of the following:

- a. the request contained multiple requests for which a consistent response could not be given;

- b. the request contained words, especially adjectives or adverbs, that made the request so broad or specific that the request could not be granted or denied;
  - c. the request contained matters not in evidence or not sufficiently supported to grant or deny; or
  - d. the request was irrelevant.
1. Granted.
  2. Granted.
  3. Granted.
  4. Denied, constructed temporary greenhouses.
  5. Neither granted nor denied.
  6. Granted.
  7. Denied.
  8. Granted.
  9. Granted.
  10. Neither granted nor denied.
  11. Neither granted nor denied.
  12. Denied.
  13. Denied.
  14. Denied.
  15. Denied.
  16. Granted.
  17. Denied.
  18. Denied.
  19. Granted for CUB 304.05(b)(1), denied for CUB 304.05(b)(2).

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**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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Paul B. Franklin, Chairman

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Ignatius MacLellan, Esq., 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 John W. Barto, Esq., Counsel for Pasquale V. and Katharine L. Rufo, Taxpayers; and Chairman, Board of Assessors, City of Concord.

Date: December 24, 1996

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Valerie B. Lanigan, Clerk

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