

Lorna S. Philley and Martha L. Peabody

v.

Town of Danville

Docket No.: 16619-96LC

DECISION

The "Taxpayers" appeal, pursuant to RSA 79-A:10, the "Town's" 1996 land-use-change tax (LUCT) assessment of \$44,503.50 on Map 3, Lot 88, a 47-acre lot subdivided into 15 lots (the Property). For the reasons stated below, the appeal for abatement is denied.

The Taxpayers have the burden of showing the Town's LUCT assessment was erroneous or excessive. See TAX 205.07. The Taxpayers failed to carry this burden.

Chronology of Facts and Events

In March 1975, Lester Peabody placed 47 acres of land in current use and the Property was assessed as such from 1975 forward. The Taxpayers took title to the Property in December 1975 from their father.

In 1995, the Taxpayers entered into a purchase-and-sale agreement with Formula Development Corporation (Formula) who agreed to purchase 55 acres of undeveloped land for \$225,000 contingent upon obtaining subdivision approval

from the Town. Final subdivision approval was obtained from the Town in February 1996 and the subdivision plan was recorded in the Rockingham County registry of deeds. The Taxpayers conveyed fifteen separate deeds to Formula which were recorded in the registry of deeds reflecting a \$15,000 per lot purchase price. The lots ranged in size from 0.99 to 4.11 acres and included a 1/15th interest in a 12.34 acre lot designated as open space. Road

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construction had not commenced on the date of transfer but a bond adequate to approve the road had been obtained by Formula. Construction of the roadway began shortly after the transfer.

The Taxpayers requested the Town remove the land from current use and issue a LUCT bill. On September 1, 1996 the Town issued a LUCT bill in the amount of \$44,503.50 based on the Town's determination of a \$30,000 per lot value for each of the 15 lots.

An appraisal was performed by Stephan W. Hamilton dated August 1, 1997 who estimated the market value of the Property as of July 15, 1996 as a 15-lot subdivision with all approvals for development in the amount of \$200,000. The Taxpayers stated that Mr. Hamilton performed the appraisal for the purchase by Formula. The board notes that Mr. Hamilton's appraisal states the purpose was for a current use tax abatement.

Parties' Arguments

The Taxpayers argued the LUCT assessment was erroneous or excessive because:

(1) the transfer of title rendered each parcel less than the 10-acre minimum requirement of Cub 307.01 (a) thereby triggering the removal of the Property from current use and a LUCT;

- (2) no improvements had been made to the Property on the date of transfer and no roadway construction had commenced; therefore, the ad valorem assessment of the Property should not have included any betterment value to the land (Cub 308.01 (b));
- (3) Cub 307.01 (a) (1) does not apply because the Taxpayers did not request the Property remain in current use;
- (4) the LUCT should be based on the sale price of \$225,000 (\$15,000 per lot ad valorem value) for a LUCT of \$22,500.

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The Town argued the LUCT assessment was proper because:

- (1) the Taxpayers asked (and the Town agreed) to have the land removed from current use at a time when it should not have come out; the Town should have assessed the individual lots as they were removed from current use (the first lot removed was in January 1997);
- (2) the Town calculated the LUCT based on the value of the lots as fully developed or \$30,000 per lot;
- (3) the Taxpayers' appraiser indicated in his report that lots in approved subdivisions were typically selling in a range of \$25,000 to \$40,000 yet estimated a value per lot of \$15,000 for purposes of determining the LUCT;
- (4) although the Town's process was flawed, the net result benefits the Taxpayers because the Town assessed the lots as fully developed and the LUCT reflected the low side of market value; and
- (5) the board should dismiss the appeal because the overall intent of the

Legislature has been satisfied.

Board's Rulings

Based on the evidence submitted, the board finds the Taxpayers failed to show the LUCT assessed by the Town was without legal basis or in excess of market value.

The basis for assessing the LUCT is contained in RSA 79-A:7 and CUB 307.

In reviewing RSA 79-A:7, the board applies the following rules of interpretation.

In construing statutes, the board should first examine the language and, where possible, ascribe plain and ordinary meaning to the words unless the statute itself suggests otherwise. Appeal of Astro Spectacular, 138 N.H. 298, 300 (1994); Appeal of Campton School District, 138 N.H. 267, 269 (1994).

If the language is clear and unambiguous, the board must apply such interpretation and not modify it by construction. State v. Dushame, 136 N.H. 309, 313 (1992); Penrich, Inc. v. Sullivan, 136 N.H. 621, 623 (1993).

The board must read the language at issue in the context of the entire statute and the statutory scheme. Barksdale v. Town of Epsom, 136 N.H. 511, 514 (1992); Great Lakes Aircraft Co., Inc. v. City of Claremont, 135 N.H. 270, 277 (1992).

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RSA 79-A:7 IV (Supp. 1996) addresses the issue of when land no longer qualifies for current use, requiring the imposition of the LUCT and RSA 79-A:7 V, **amended in 1991**, addresses how much land is removed from current use. Prior to 1991, the statute could be interpreted (supported by supreme court cases¹) whereby the entire land encompassing the subdivision would be removed

¹ Frost v. Candia, 118 N.H. 923, 924 (1978) (change in use occurs when actual physical construction occurs); Appeal of Town of Peterborough, 120 N.H.

from current use when a physical change occurred on the property resulting in a LUCT on the entire subdivision. The 1991 amendment clearly requires the imposition of a LUCT if construction has begun on the road with the exception that subdivided lots under the same ownership, if they individually or collectively meet the 10-acre minimum requirement, remain in current use.

79-A:7, V (a). When a road is constructed or utilities installed pursuant to a development plan which has received all necessary local, state or federal approvals, all lots or building sites, including roads and utilities, shown on the plan and served by such road or utilities shall be considered changed in use, with the exception of any lot or site, or combination of adjacent lots or sites under the same ownership, large enough to remain qualified for current use assessment under the completed development plan; ... (Emphasis added.)

Further, Cub 307.01 defines when land shall be considered changed and the LUCT 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: (a) When the parcel of land is sold or transferred to another owner and no longer meets the minimum acreage requirements as described in the category in which the land is classified, that land shall be considered changed and the use change tax assessed..."

(Emphasis added.) In this case, although separate deeds were issued, the entire subdivision was sold to Formula. The law is clear, the Property was sold to a single owner, the combination of the lots under the same ownership continued to meet the minimum acreage requirements and therefore no land

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325, 329 (1980) (when roadwork and other sitework begins assess LUCT against the subdivided parcel); Dana Patterson, Inc. v. Town of Merrimack, 130 N.H. 353, 355-57 (1988) (sitework on current-use parcel necessary for overall subdivision development requires imposition of the LUCT upon physical construction on the current-use parcel; case decided under the 1979 amendments).

should have been removed from current use until January 31, 1997, the date the first lot sold. The Taxpayers argue that Cub 307.01 (a) (1) should apply and no request was made to have the Property remain in current use within the 60 day window. The board does not interpret this rule to allow an entire subdivision to be removed if a taxpayer does not request its continuance in current use. The board interprets this rule to allow a taxpayer who has land in current use to purchase less than 10 acres of an abutting larger tract of land in current use. Under CUB 307.01(a) (1) the buyer could request that the land purchased not be assessed a LUCT but be added to existing land in current use.

Therefore, the board finds the Town erred when it assessed a LUCT on the entire subdivision as the statute was specifically amended and redefined to not allow the removal from current use at that time. However, the board agrees with the Town that to attempt to correct this situation would be of minimal benefit because (1) the Town assessed the lots based on their value as if fully developed, (2) all of the lots have now been sold, and (3) it would cause undue hardship for the Town and the Taxpayers to retrace the steps that should have been followed to achieve a result that would not significantly differ from that which has already been attained.

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.

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Town

1. Granted.
2. Neither granted nor denied.
3. Neither granted nor denied.
4. Neither granted nor denied.
5. Granted.
6. Granted.
7. Granted.
8. Granted.
9. Granted.
10. Granted.
11. Granted.
12. Granted.
13. Granted.
14. Granted.
15. Granted.
16. Granted.
17. Granted.
18. Granted.

Rehearing Motion

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

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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

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 Sumner F. Kalman, Esq., Counsel for Lorna S. Philley and Martha L. Peabody, Taxpayers; Peter J. Loughlin, Esq., Counsel for the Town of Danville; and Chairman, Selectmen of Danville.

Date: September 5, 1997

Valerie B. Lanigan, Clerk

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