

Hampton Water Works Co.

v.

Town of Stratham

Docket No.: 17468-97LC

Final Decision

This decision addresses the "Taxpayer's" appeal, pursuant to RSA 79-A:10, of the "Town's" October 21, 1997 land-use-change tax (LUCT) of \$8,500 on an 11.5-acre lot based on an \$85,000, full-value assessment. After a hearing on June 10, 1999, the board issued a Preliminary Decision on June 28, 1999, in which it ruled that the area disqualified from current use was approximately .19 acre, encompassing the well site and the drive access (Disqualified Area). The board retained jurisdiction and remanded the appeal to the Town to assess the LUCT for the Disqualified Area. The Town reassessed the Disqualified Area at \$72,900 which the Taxpayer disagreed with. Consequently, on January 7, 2000, the board heard the parties' arguments relative to the valuation of the Disqualified Area.

The Taxpayer argued the LUCT should be \$95 based on a market-value estimate of \$950 as of July 11, 1997, prepared by Vern J. Gardner, Jr. (Gardner Appraisal). The Gardner Appraisal assumed a highest and best use of the .19 acre as excess residential land and used the sales

comparison approach in arriving at a conclusion of value.

The Town argued the LUCT should be \$7,290 based on a market-value estimate of \$72,900 performed by Mr. Andrew Blais (Blais Estimate). The estimate was based on a highest and best use assumption for the .19 acre as being a well site for a community water system. The value estimate was derived from the Taxpayer's purchase price of the water right easements acquired for \$85,000 in July 11, 1999.

Board Ruling

This final decision incorporates by reference the board's findings in the Preliminary Decision and rules on the market value on which to assess the RSA 79-A:10 LUCT. First, for clarification, while the LUCT was originally calculated on 11.5 acres, the parties agreed in their Agreed Statement of Facts (Taxpayer Exhibit 1) submitted at hearing, that the easement the Taxpayer acquired from Charles W. and Katherine S. Peabody ("Peabodys") on July 11, 1997, burdened a total of 10.32 acres (Easement Area) in Stratham (Taxpayer Exhibit #1, I). The Easement Area includes the well site, protective area of a 400-foot radius around the well and approximately 387 linear feet (527 feet - 140 feet) of the access road. Approximately 140 feet of the access road (or approximately .04 acre [12 feet wide x 140 linear feet]) lie outside the Easement Area as shown on Taxpayer Exhibit 1, G and I. Consequently, the Disqualified Area includes .15 acre within the Easement Area and .04 acre outside the Easement Area.

Based on the evidence the board finds the market value of the Disqualified Area to be \$42,500, and consequently, the RSA 79-A:7 ten-percent LUCT to be \$4,250.

In assessing a LUCT tax RSA 79-A:7, I and RSA 21:21 must be considered in concert.

RSA 79-A:7, I provides:

“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.”...

RSA 21:21, I defines “land” as:

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

The exercise of having to value a certain area not in current use (NICU) which is part of a larger tract in current use is a difficult assignment. However, the board has consistently held that the process of valuing such land should not be tied to any technical methodology¹, but rather the exercise must be one in which the property rights embodied in the land NICU should be assessed at market value and those rights remaining in the land veiled by current use should not. (See John M. Lovett v. Town of Sutton, Docket No.: 15100-94PT; Virginia A. Soule v. Town of Sunapee, Docket No.: 14773-93PT; and John L. Arnold v. Town of Frankestown, Docket No.: 8718-90PT).

¹“The statute makes the proceeding for the abatement of a tax a summary one, free from technical and formal obstructions. The question is, does justice require an abatement? . . . The justice to be administered is to be sufficiently exact for the practical purposes of the legislature, who did not intend to invite the parties to a struggle for costs, or a ruinous contention about trifles. The points to be considered are such as the nature of each particular case presents. They cannot be fixed by an invariable rule. Manchester Mills v. Manchester, 58 N.H. 38, 39 (1876).”

We find neither of the parties' approaches properly value the rights associated with the Disqualified Area because their values are based on exclusive and different highest and best use assumptions. The Taxpayer's Gardner Appraisal values the Disqualified Area as supplemental residential land while the Town's Blais Estimate values it as containing the majority of the rights as a commercial well site. The Town relied on the Taxpayer's purchase price of the easement but only deducted \$1,000 per acre for the well protective area. As a consequence, the .19-acre Disqualified Area value is "heavy-loaded" with some value that is still associated with the residential rights remaining in the well protective area. Conversely, the Gardner Appraisal "light-loads" the value of the Disqualified Area by not including the rights associated with that area as a commercial well site.

We find the sale of the easement highlights the fact that the Easement Area has dual highest and best uses: residential land and commercial well development². In purchasing the easement, the Taxpayer acquired all the rights enumerated in the easement deed (Taxpayer Exhibit 1, F) to construct and maintain a commercial well site including the protective radius as required by New Hampshire Department of Environmental Service's (DES) administrative rules. The Peabodys, on the other hand, gave up certain rights to develop the property for residential uses for the term of the easement. The purchase price of the easement for \$85,000 is indicative

² Highest and best use is the use that is legally permissible, physically possible and "**** which will most likely produce the highest market value, greatest financial return or the most profit****." Steele v. Town of Allenstown, 124 N.H. 487, 490 (1984). Both commercial well and residential uses are legally permitted under the Town's zoning and would generate similar financial returns; thus, we conclude both should be considered as equally viable highest and best uses.

of both the value gained by the Taxpayer as a commercial well site and the value forgone by the Peabodys for its residential potential either as part of a potential subdivision or as a 10-acre residential lot. The Taxpayer and the Peabodys struck an arm's-length agreement at \$85,000 reflecting the respective rights each party acquired or relinquished³. Also, the sales of various sized residential lots contained in the Gardner Appraisal support this conclusion that an accessible 10-acre parcel of this quality would have a value of approximately \$85,000.

Consequently, the board finds the sale price is the best evidence of the value of the total rights in the Easement from both parties' perspectives. The task, however, is to estimate what rights, and thus what value, are embodied in the Disqualified Area only. This entails identifying and balancing the different rights the Taxpayer acquired and Peabodys relinquished in the Disqualified Area.

The Taxpayer acquired more rights in the Disqualified Area than it did in the balance of the Easement Area. The easement deed enumerates a "well easement," "protective easement," "water line easement," "easement for underground electric and radio communication facilities," "access easement," "construction easement" and "other rights" such as paving part of the access

³ Based on the testimony of Mr. Keith Bossung, Manager of Hampton Water Works Company, the board concludes that while the Taxpayer purchased an easement for a 30-to-45-year period, its acquisition price was as if fee title had been acquired. Thus, the board has considered the \$85,000 purchase price as representative of the total fee interest in the Easement Area.

road and erecting a gate. With the exception of the “protective easement” and “construction easement” and a portion of the “water line easement,” the balance of the rights the Taxpayer acquired are contained in the Disqualified Area. Further, the fact that the geography of the Disqualified Area is such that a gravel-pack overburden commercial well can be installed is a significant right and of significant value. While certainly the right to develop a well site within the Disqualified Area could not occur without the protective area, the board concludes from the Taxpayer’s perspective approximately 70 to 80 percent of the easement’s purchase price could be allocated to the Disqualified Area.

On the other hand, the Peabodys’ potential residential rights largely lie in the protective area rather than the Disqualified Area. The testimony indicated that the neighborhood was being developed residentially with lot values in the \$60,000-to-\$75,000 range. The photographs and the soil descriptions contained on the site plan (Taxpayer Exhibit 1, G) certainly indicate the protective area is comprised largely of well-drained soils and open fields very conducive to residential development⁴. The well, associated improvements and the drive access affect the utility of the Disqualified Area for residential development in that area but certainly not to the

⁴ It is interesting to note that the land-use restrictions inherent in the “protective easement” paragraph of the easement deed and the DES rule (Env-Ws 379.06 Sanitary Protective Area) that relates to such protective areas ensure that for the term of the easement the land will remain undeveloped open space. This supports the board’s finding in the Preliminary Decision

extent the restrictions do in the much larger protective area. Consequently, the board concludes that from the Peabodys' perspective approximately 70 to 80 percent of the purchase price of the easement could be allocated to the non-disqualified protective area.

Giving equal weight to the two highest and best uses and the respective counter-balancing allocation of rights, the board concludes that half the purchase price of the easement reasonably estimates the value of the Disqualified Area.

Lastly, the board considered the acquisition by the Taxpayer of another property in North Hampton (Municipality Exhibit B) in December, 1997, for \$164,000. The property consists of 38.6 acres and was also purchased for commercial production of water. The property was developed with a single well but has the capability and protective areas (to some extent overlapping) for three additional wells. The parcel is accessed only by a right-of-way and, due to its limited access and extensive wetlands, does not have alternative development potential. Consequently, the board concludes this sale can be analyzed on a "well site" basis since the additional acreage does not embody any significant rights other than protecting the well sites. Dividing the sale price of \$164,000 by the four potential well sites indicates a value per "well site" of \$41,000. This value is generally supportive of the board's value conclusion of \$42,500 for the Disqualified Area. This analysis, given its general nature, should not be viewed by the parties as any more than a secondary supportive indication of value.

that this land remains unchanged open space and not subject to the LUCT.

In summary, the board finds the market value of the Disqualified Area to be \$42,500 and the RSA 79-A:7 tax to be \$4,250. The Town shall, within 30 days of the board's decision, refund the difference in the LUCT with RSA 76:17-a interest (6% from date of payment to date of refund) and file an amended lien release form reflecting the revised Disqualified Area at the county registry, copying the board.

Findings of Fact and Rulings of Law

The board responds to the Taxpayer's requests as follows:

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;
- d. The request was irrelevant; or
- e. The request is specifically addressed in the decision.

Findings of Fact

- 1. Granted.
- 2. Granted.
- 3. Neither granted nor denied.
- 4. Granted.
- 5. Granted.
- 6. Granted.

7. Granted.

Rulings of Law

1. Granted.
2. Granted.
3. Granted.
4. Granted.
5. Granted.
6. Denied.
7. Granted.
8. Denied.
9. Denied.
10. Denied.
11. Denied

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

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Certification

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to Timothy E. Britain, Esq., Counsel for Hampton Water Works Co., Taxpayer; John J. Ryan, Esq., Counsel for the Town of Stratham; and Chairman, Selectmen of Stratham.

Date: February 9, 2000

Lynn M. Wheeler, Clerk

Hampton Water Works Co.

v.

Town of Stratham

Docket No.: 17468-97LC

ORDER

This order responds to the “Town’s” motion for reconsideration (Town Motion) and the “Taxpayer’s” cross motion for reconsideration (Taxpayer Motion), both of which are denied.

Generally, the issues raised in both the Town’s Motion and the Taxpayer’s Motion were addressed in the board’s preliminary and final decisions. The board, however, takes this opportunity to clarify two of the points raised by the parties in their rehearing motions.

First, the Town’s argument that the well-protective area should be subject to the land-use-change tax because it is similar to the undeveloped land of a cluster development as addressed in Dana Patterson v. Town of Merrimack, 130 N.H. 353 (1998), is not entirely unreasonable. However, as addressed in the preliminary decision, the board finds this well-protective area is more similar to the zoning lot dimensional and setback requirements that Cub 303.01 and 02 rules state are not necessarily excluded from qualifying for current use. Just as these zoning requirements provide certain health and safety buffers to the portions of lots that are developed and disqualified from current-use assessment, so does the well-protective area provide a similar buffer around the developed well site as required by the department of environmental services’ regulations. Further, the well-protective area does not facilitate any intensified development such as occurred in the “development site” in Patterson. Consequently, the board reaffirms its findings in its preliminary decision (which was incorporated by reference in the

final decision) that the well-protective area is not subject to a land-use-change tax.

The issues raised in the Taxpayer's Motion were all addressed in either the board's preliminary or final decision with the exception of paragraph #9. There the Taxpayer argues for rehearing because the Town's assessment methodology results in lower values of \$18,000 or \$23,000 based either on the Town's commercial land charts for a .15-acre parcel or on the subsequent assessment of the 11.5-acre well site. This issue was raised during the hearing and while not specifically addressed in the final decision, the board during deliberations did extensively review the evidence and testimony relative to that argument. We conclude that a value of either \$18,000 or \$23,000 is not an appropriate basis for the land-use-change tax because market evidence (the sale of the easement itself and the North Hampton sale) more pertinent to this unique property than general mass appraisal values was available on which to base a land-use-change tax.

RSA 79-A:7 III provides some guidance in this area.

III. Whenever land of nonuniform value shall be subject to the land use change tax under this section, or whenever the full value assessment for the land subject to the tax shall not be readily available then the local assessing officials shall assess the RSA 75:1 full value of such land and the land use change tax shall be paid upon such assessed value.

Even if the disqualified area is considered "land of nonuniform value," the board concludes that, because market data was "readily available" on which to determined the full-value assessment of the disqualified area, relying upon RSA 75:1 assessed value was not necessary or appropriate.

Any appeal to the supreme court must be filed within 30 days of the date of this denial

for rehearing. RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Certification

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to Timothy E. Britain, Esq., Counsel for Hampton Water Works Co., Taxpayer; John J. Ryan, Esq., Counsel for the Town of Stratham; and Chairman, Selectmen of Stratham.

Date: March 17, 2000
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Lynn M. Wheeler, Clerk