

Stephen and Karen Nottonson

v.

Town of Derry

Docket No.: 17700-98CU

DECISION

The "Taxpayers" appeal, pursuant to RSA 79-L:5 II and RSA 79-A:9, the "Town's" August 18, 1998 denial of the Taxpayers' application for a discretionary easement under RSA 79-C:4, on Map 12/Lot 6 with an assessment of \$176,000 (land \$42,600; building \$133,400). The property consists of a total of 9.9 acres improved with a dwelling, septic, well and driveway (the Property). For the reasons stated below, the appeal is remanded to the Town for a determination on the merits of whether the Property meets the tests of public benefit in RSA 79-C:3 II.

The Taxpayers have the burden of showing the Town's actions in denying the application were in bad faith, discriminatory or applied criteria other than those set forth in RSA 79-C:3 and RSA 79-C:5 I. The Taxpayers carried this burden.

The Taxpayers argued the Town erred in denying the discretionary easement application because:

(1) 8.9 acres of the Property qualifies under RSA 79-C:3 II (b) (1) and (2);

- (2) the Town acted in bad faith and used criteria not set forth in the statute;
- (3) the Town failed to act in a timely matter;
- (4) the Town did not base its decision on the merits of the case;
- (5) the prior owners received a discretionary easement on a portion of the Property and the easement should be renewed; and
- (6) the Town's new policy (created subsequent to the denial of this request) is constructed to make it impossible for the average citizen to take advantage of RSA 79-C.

The Town argued its denial of the discretionary easement application was proper because:

- (1) the Taxpayers did not demonstrate a public benefit under RSA 79-C:3 (b) (1) and (2) and for preservation of the tax base and tax dollars;
- (2) the Town felt that public access was essential and the Taxpayers indicated there would be no public access to the Property;
- (3) the Town admits it did not timely respond to the application because they needed additional time to discuss the issue;
- (4) the prior discretionary easement could not be renewed because RSAs 79-A:15 - 21 were repealed in 1996 and RSA 79-C passed and the application must be submitted under the new criteria;
- (5) the Town has a program in place to purchase open space; and
- (6) the Town feels this is an unfunded mandate by the Legislature.

Board's Rulings

RSA 79-C:5 II allows the board to set aside a town's denial of a discretionary easement only on "bad faith, discrimination or application of criteria other than those set forth in RSA 79-C:3 and paragraph I of this section." It is clear from a plain reading of RSA 79-C:5 I that the local governing body has discretion in weighing the public benefit to be gained by granting an easement against the tax revenue to be lost. The board finds the Town focused primarily on the tax revenue to be lost if an easement was granted and did not adequately or properly review the Property to see if a portion qualified for a demonstrated public benefit as described in RSA 79-C:3 II.

The Taxpayers' application had requested a discretionary easement for the unimproved 8.9 acres (Requested Acreage) and had argued the Requested Acreage's public benefit comported with RSA 79-C:3 II (b) (1) and (2).

79-C:3 Qualifying Land.

II. A discretionary easement on open space land shall be considered to provide a demonstrated public benefit if it provides at least one of the following public benefits:

(b) A relatively natural habitat for fish, wildlife, or plants, or similar ecosystem, where:

- (1) The property is in a relatively natural state; and
- (2) Rare or endangered or threatened species are present; or the property contributes to the ecological viability of a park or other conservation area; or otherwise represents a high quality native

terrestrial or aquatic ecosystem.

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While the Town's written denial of the application did not contain a written explanation of the reasons for the denial, it is clear from the town council's August 18, 1998 minutes that discussion focused on the potential for lost tax revenue, the unlikely developability of the Requested Acreage and the Taxpayers' expressed desire to have no public access to the Requested Acreage.

Loss of tax revenue is certainly one side of the equation the legislature envisioned municipalities to consider. RSA 79-C:5 I. However, public access is specifically required in only two of the six public benefits listed in RSA 79-C:3 II and is not a requirement under the benefit (RSA 79-C:3 II (b) (1) and (2)) argued appropriate by the Taxpayers. Also, the development potential of a parcel is not specifically mentioned as a criteria to be considered by the Town in its review of an application. Both the written record and testimony at the hearing revealed the town council made little, if any, inquiry as to whether the inherent attributes of the Requested Acreage would justify a finding of a public benefit under RSA 79-C:3 II (b).

Because the Town did not review in good faith whether a demonstrated public benefit, as defined by the statutes, existed on the Requested Acreage, the board finds the Town's denial is not based upon a proper and adequate review of the application and Requested Acreage. To legitimately review the application, the Town must first determine whether, and to what extent, a demonstrated public benefit exists on the Requested Acreage, and then weigh the public benefit to be gained against the tax revenue to be lost by the granting of a discretionary easement before

the Town can make its ultimate decision to grant or deny the discretionary easement.

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Consequently, the board orders the Town to review the Taxpayers' discretionary easement application based on the criteria contained in RSA 79-C:3 and 79-C:5 I within 60 days of this order and to provide a written explanation of its decision to the Taxpayers copying the board. If the Taxpayers are dissatisfied with the Town's decision, they may appeal, pursuant to RSA 79-C:5 II, from the Town's decision.

Lastly, the Town raised a technical question of whether the Taxpayers' application was complete inasmuch as they did not provide an appraisal of the value of the easement to be conveyed as required by RSA 79-C:4 II. Without definitively ruling on whether the information supplied by the Taxpayers was adequate to meet the statute, the board believes the Town's assessment and the Taxpayers' appraisal provide the Town with adequate information to understand the potential magnitude of the value of any easement that might be conveyed, and thus, the Town has reasonable information before it to estimate the tax revenue that might be lost if an easement was granted.

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

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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 Stephen and Karen Nottonson, Taxpayers; and Chairman, Board of Assessors of Derry.

Date: September 20, 1999

Lynn M. Wheeler, Clerk

Stephen and Karen Nottonson

v.

Town of Derry

Docket No.: 17700-98CU

ORDER

This order relates to both the “Town’s” October 18, 1999 motion for reconsideration (Motion) and the Town’s November 17, 1999 response (Response) to the “Taxpayers’” discretionary easement application. This order also clarifies procedurally the status of this case.

The board declines to respond to the Motion at this time as it would be premature to do so. The board’s decision of September 20, 1999 (Decision) required the Town to substantively review the Taxpayers’ discretionary easement application and provide an explanation of its decision to the Taxpayers, copying the board. The Town’s Response documents such review and denial. As further provided in the Decision, if the Taxpayers do appeal the Town’s denial in a timely manner, the board will docket the appeal under the current docket number. (In retrospect, the board should have captioned the Decision as only a preliminary decision and not included the statutory provisions for rehearing and appeal.) Obviously, the issues raised in the Motion are moot if the Taxpayers decide not to appeal the Town’s denial. If the Taxpayers do appeal the Town’s denial, the board will issue a final decision after its review as provided in

RSA 79-C:5 II. The Town may then, if dissatisfied with the final decision on the substantive matters of this case, file a timely rehearing motion pursuant to RSA 541:3 raising issues such as those presented in the Motion.

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 Stephen and Karen Nottonson, Taxpayers; and Chairman, Board of Assessors of Derry; and Edmund J. Boutin, Esq., counsel for the Town.

Date: December 1, 1999

Lynn M. Wheeler, Clerk

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Stephen and Karen Nottonson

v.

Town of Derry

Docket No.: 17700-98CU

ORDER

On September 20, 1999, the board issued a preliminary decision finding the “Town’s” denial of the “Taxpayers’” application for discretionary easement was not based on a proper and adequate review of the application considering the statutory criteria contained in RSA 79-C:3 and RSA 79-C:5, I. The board ordered the Town to review the application again and respond within 60 days, explaining its decision to the Taxpayers.

On October 18, 1999, the Town filed a rehearing motion of the board’s September 20, 1999 decision. In an order dated December 1, 1999, the board declined to rule on the Town’s rehearing motion, finding it would be premature to do so because the issues raised in the rehearing motion would be moot if the Taxpayers failed to appeal the Town’s denial after a substantive review.

After its substantive review of the application, the Town, in its November 17, 1999 letter, denied the Taxpayer’s discretionary easement application. In its September 20, 1999 preliminary decision, the board stated the Taxpayers could appeal the Town’s denial pursuant to RSA 79-C:5, II. and RSA 79-A:9 which provide for an appeal deadline of 6 months after denial

by the assessing officials. In this case, the Town's denial is contained in its November 17, 1999 letter; the filing deadline to this board, therefore, is May 17, 2000. Having received no appeal from the Taxpayers by this deadline, the board dismisses the appeal.

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 Stephen and Karen Nottonson, Taxpayers; and Chairman, Board of Assessors of Derry; and Edmund J. Boutin, Esq., counsel for the Town.

Date: June 2, 2000

Lynn M. Wheeler, Clerk