

Alan R. and Carol Phenix

Docket No.: 17713-98CU

and

**Alan R. Phenix, Trustee
Crowlands Trust.**

Docket No.: 17714-98CU

v.

Town of Tamworth

PRELIMINARY DECISION

These appeals were consolidated at hearing.

The "Taxpayers" appeal, pursuant to RSA 79-B:5, the "Town's" denial of the following applications for conservation restriction assessments:

"Alan R. and Carol Phenix" - Map 402, Lot 5, a 5.89-acre lot assessed at \$98,600, with 5.5 acres to be classified under conservation restriction assessment;

"Crowlands Trust" - Map 402, Lot 8, a 7-acre lot assessed at \$98,100, with 6.66 acres to be classified under conservation restriction assessment;
(the Properties).

For the reasons stated below, the board grants the conservation restriction assessments.

The Taxpayers have the burden of showing the Town erred in denying their applications

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for conservation restriction assessment. See 79-B:5, TAX 206.06. The Taxpayers carried this burden.

The Taxpayers argued the Town erred in denying the conservation restriction assessment applications because:

- (1) the applications for conservation restriction were timely filed and the Town failed to respond;
- (2) the land has been protected since 1970 and meets the criteria in RSA 79-B:3;
- (3) the Town has taken conservation restrictions into account for other taxpayers; and
- (4) because of the Town's lack of response, the Taxpayer requests costs.

The Town argued its denial of the conservation restriction assessment applications was proper because:

- (1) the Town's assessor reviewed the Properties and did not feel they qualified; and
- (2) there is a public way over the Properties.

Board's Rulings

Based on the evidence, the board finds the Properties qualify for conservation restriction assessments.

The Taxpayers timely filed conservation restriction assessment applications for the Properties in April 1998. The Properties are subject to a conservation covenant agreement with the Chocorua Lake Conservation Foundation which restricts among other things the density of development to one residence per eight acres. The Properties are improved and those areas occupied by the improvements are being reserved from the conservation restriction assessment request. The balance of the land is wooded except for a right-of-way crossing a portion of the Properties for the public to access a larger property to the north owned by the Nature

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Conservancy of New Hampshire, Inc..

The board finds the Properties qualify for conservation restriction assessments pursuant to chapter RSA 79-B. Specifically, based on the testimony, the board finds the area applied for has a demonstrated public benefit as required in RSA 79-B:4 VI. The public path crossing the Properties certainly provides scenic enjoyment for the general public as provided in RSA 79-B:4 VI (c). Because RSA 79-B:4 VI only requires that one of the several public benefits be met, the board need not rule on any other possible public benefits the land may provide.

Consequently, the board remands the case to the Town to revise the assessments in line with the board's findings. The Town shall make its value estimates within 30 days from the date on this preliminary decision notifying the Taxpayers' counsel and copying the board. The Taxpayers shall have an additional 30 days from receipt of the value estimates to notify the Town and the board whether it agrees with the revised value estimates. If the Taxpayers agree with the Town's new estimate, it shall notify the board and the Town, and the board shall incorporate those value estimates in a final decision. If the Taxpayers do not agree with the Town's revised value estimates, the board shall hold a hearing for the parties to present their valuation arguments. Ultimately, the board will issue a final decision with RSA 79-B:3 assessments and the Town shall at that time properly record the conservation restriction assessments in accordance with RSA 79-B:4 IV. Either party wishing to appeal the board's decision on either its legal or valuation findings, should do so from the board's final decision and not this preliminary decision.

After receipt of a written motion with itemization of costs pursuant to Tax 201.39 (c), the board will rule on the Taxpayers' motion for costs at the time it issues its final decision.

SO ORDERED.

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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 Paula J. Werme, Esquire, counsel for Alan R. and Carol Phenix, Taxpayers and Alan R. Phenix, Trustee for Crowlands Trust, Taxpayer; and Chairman, Board of Selectmen of Tamworth.

Date: October 26, 1999

Lynn M. Wheeler, Clerk

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FINAL DECISION

On October 26, 1999, the board granted the conservation restriction assessments requested by the “Taxpayers” in the above-captioned appeals. In an October 26, 1999 Preliminary Decision, the board remanded the cases to the “Town” to revise the assessments in line with the board’s findings. The Town’s assessor reviewed the assessment-record cards for the “Properties” and revised them to reflect the board’s rulings.

The Taxpayers were allowed an opportunity to respond if they found the revisions unacceptable. The Taxpayers reviewed the revised assessments and, through their attorney,

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indicated they were acceptable.

Therefore, the board issues this Final Decision incorporating by reference its findings in the Preliminary Decision. The board orders the Town, within 60 days of this Final Decision, to properly record the conservation restriction assessments in accordance with RSA 79-B:4 IV.

Based on the revised assessment-record cards submitted by the Taxpayer, the board finds the assessments to be:

Alan R. and Carol Phenix; Map 402, Lot 5
Land in Current Use\$ 67
Land Not in Current Use \$30,150
Buildings\$38,600
Total\$68,817

Crowlands Trust; Map 402, Lot 8
Land in Current Use\$ 78
Land Not in Current Use\$58,500
Buildings\$24,800
Total\$83,378

The Town shall notify the board subsequent to recording the conservation restriction assessments, copying the Taxpayers.

In a January 19, 2000 letter, the Taxpayers' attorney included a bill addressed to her client for legal fees which the board has treated as a motion for costs. The board denies the Taxpayers' motion for costs.

The board's authority to assess costs is contained in two statutes:

1) RSA 76:17-b, which states, "(W)henever, after taxes have been paid, the board of tax and land appeals grants an abatement of taxes because of an

incorrect tax assessment due to a clerical error, or a plain and clear error of fact, and not of interpretation, as determined by the board of tax and land appeals, the person receiving the abatement shall be reimbursed by the city or town treasurer for the filing fee paid under RSA 76:16-a, I."; and

2) RSA 71-B:9, in part, which states, "(c)osts may be taxed as in the superior court."

Analysis

Generally, the court and this board do not have the authority to award costs against a municipality in a tax abatement case unless there is a specific statute authorizing such an assessment of costs. See Tau Chapter of Alpha XI Delta Fraternity v. Town of Durham, 112 N.H. 233, 235 (1978).

RSA 76:17-b

RSA 76:17-b does give the board specific authority to have the filing fee reimbursed by the Town if the tax assessment was due to a "clerical error or a plain and clear error of fact and not of interpretation as determined by the board of tax and land appeals ***." In the present case, the board finds the reason for the eventual abatement by the board was not such a clerical error or a plain and clear error of fact, but was rather an issue that is subject to interpretation.

RSA 71-B:9

In addition to RSA 71-B:9, TAX 201.39 allows the board to order the other party's costs to be paid when the board finds the matter was frivolously brought or defended. The board does not find that this case was frivolously defended by the Town.

If the taxes have been paid, the amount paid in excess of the assessment found above shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Pursuant to RSA 76:17-c II, and board rule TAX 203.05, unless the Town has undergone a general reassessment, the Town shall also refund any overpayment for 1999. Until the Town undergoes a general reassessment, the Town shall use the ordered assessment for subsequent years with good-faith adjustments under RSA 75:8. RSA 76:17-c I..

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 Paula J. Werme, Esquire, counsel for Alan R. and Carol Phenix, Taxpayers and Alan R. Phenix, Trustee for Crowlands Trust, Taxpayer; and Chairman, Board of Selectmen of Tamworth.

Date: February 9, 2000

Lynn M. Wheeler, Clerk

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