

Richard J. and Virginia Daschbach

v.

Town of Westmoreland

Docket No.: 17731-98LC

DECISION

The "Taxpayers" appeal, pursuant to RSA 79-A:9, the "Town's" December 18, 1998 land-use-change tax (LUCT) of \$4,012 on a 5.63-acre lot (the "Property"). The LUCT was based on a \$40,000, full-value assessment. 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. We find the Taxpayers failed to carry this burden.

The Taxpayers argued the LUCT was erroneous or excessive for the following reasons:

(1) the Town was aware that a portion of the Property was wetland as the Town had installed a culvert under Glebe Road funneling water onto the Property thereby diminishing its utility and value;

(2) the areas of the wetlands with a one hundred foot buffer around them should have remained in current use; and

(3) the value of the land that should not be in current use (home site) was estimated by a local

realtor to be between \$20,000 and \$25,000.

The Town argued the LUCT was proper for the following reasons:

- (1) the ad valorem value of the entire 5.63 acres should be the basis for the calculation of the LUCT as the land was classified as farm land at the time the change occurred; and
- (2) the Town used sales of other similar vacant tracts of land to estimate the value of the Property.

Board's Rulings

Based on the evidence, we find the Taxpayers failed to satisfy their burden and prove the Property's LUCT was erroneous or excessive. The Town did support the Property's LUCT with sufficient evidence of comparables and ad valorem value.

In accordance with RSA 79-A:7 I, a LUCT is assessed against any land classified as open space land when it is changed to a use which no longer qualifies for open space assessment. The tax which applies to land classified as open space land on or after April 1, 1974, is taxed at the rate of 10% of the full and true value of the real property.

The LUCT is due and payable at the time of the change in use to the municipality in which the property is located. RSA 79-A:7 II.

There are exceptions to the LUCT being assessed when there is a change in use in several circumstances, including one when land designated as qualified for current use in one category is changed in use to any other qualifying category. RSA 79-A:7 VI (c) (1998 Supp.).

In the case before us, the Taxpayers contend that the Town erred in removing the

Property from current use when the Town knew that a considerable portion of the Property is wetland. The Taxpayers further argue the Town knew of a culvert that had been placed under Glebe Road in the 1960s that caused a substantial amount of water to cross the Property and further diminish its utility and value. This contention is not persuasive because the burden is not on the selectmen to determine whether land changed in use now qualifies in another qualifying category, the burden is on the Taxpayers. Here the Taxpayers subdivided their 20 plus or minus acres into two lots in July 1998, one lot of 15 acres and the other lot retained by the Taxpayers of 5.63 acres. The actual date of change in use occurred on August 25, 1998, when the 15-acre parcel was conveyed to Stephen Seraichick and Laura Seraichick.

The evidence before the board is that the Taxpayers did not apply to have their land changed to another qualifying category in 1998. Accordingly, since the prior qualifying use as farm or forest land requires at least 10 acres to retain the current-use assessment benefit, the entire 5.63-acre subject Property was disqualified at the time of the change in use. See RSA 79-A:7 IV (c). If the Taxpayers had desired to have the subject Property qualified as wetland, an application should have been filed for the tax year 1998, followed by a determination from the assessors. The Taxpayers did not file such an application.

Having determined that the LUCT is applicable in this case, the board now turns to the amount of the LUCT. In order to determine the amount of the tax, it is necessary to determine the full and true value of the Property. In accordance with RSA 79-A:7 I, this value is determined without regard to the open space assessed value of the land. Although the Taxpayers argued that the land valuation was excessive in comparison to other comparable properties, the

Taxpayers did not present any comparables that convinced the board the Town's assessment was inaccurate. Furthermore, the Taxpayers' broker opinion of value was not supported by any analysis (i.e., adjustments made for differences in properties - location, etc.). The board does not find the Taxpayers met their burden of proving the Town erred in finding an assessed value of \$40,000 on the Property. The Town supported its assessed value with comparable land sales and neighboring property assessments.

The board further notes that the Town did reduce the original assessment from \$50,000 to \$40,000 on December 18, 1998.

Accordingly, the board finds the LUCT due in the amount of \$4,000 (\$40,000 x 10%).

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

Michele E. LeBrun, Member

Douglas S. Ricard, Member

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Steven H. Slovenski, Esq.

Certification

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to Richard J. and Virginia Daschbach, Taxpayers; and Chairman, Board of Selectmen of Westmoreland.

Date: February 22, 2000

Lynn M. Wheeler, Clerk

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