

Frank and Rosalie Knutkowski

v.

Town of Derry

Docket No.: 17779-99CU

DECISION

The "Taxpayers" appeal, pursuant to RSA 79-C:5 II and RSA 79-A:9, the "Town's" June 3, 1999 denial of the Taxpayers' application for a discretionary easement under RSA 79-C:4, on Map 56/Lot 3, a .7025-acre lot with a boat house, assessed for \$58,000 (land \$57,200; buildings \$800). A discretionary easement was granted for Map 9/Lot 43, a 4.11-acre lot with a house and barn, assessed for \$114,200 (land \$38,700; buildings \$75,500); however, the Taxpayers appeal the value of the granted discretionary easement. For the reasons stated below, the appeal for Map 9/Lot 43 is dismissed and the appeal for Map 56/Lot 3 is denied.

The Taxpayers have the burden of showing, by a preponderance of the evidence, the Town's actions were in bad faith, discriminatory or applied criteria other than those set forth in RSA 79-C:3 and RSA 79-C:5 I. We find the Taxpayers failed to carry this burden.

The Taxpayers argued the Town erred in denying the discretionary easement for Map 56/

Lot 3 because:

- (1) the land is not posted and public access is available on an individual basis;
- (2) the lot is one of a very few, if not the last, vacant, undeveloped lots on the lake and has some wildlife, such as beavers, on it;
- (3) the lot is mowed and kept as pasture land; and
- (4) the loss in revenue to the Town would be about \$535 which represents the Town's portion of the total taxes.

The Town argued its denial of the discretionary easement for Map 56/Lot 3 was proper because:

- (1) the lot is not adjacent to other public land;
- (2) there are no significant wetlands on the lot;
- (3) the loss of revenue would be almost the entire tax bill, not just the Town portion; and
- (4) the net public benefit does not outweigh the loss of revenue to the Town, therefore, the benefit to the public does not justify an easement.

The Taxpayers argued the Town erred when it put an inappropriate value on the discretionary easement it granted for Map 9/Lot 43.

The Town argued the board does not have jurisdiction to review the value of the granted discretionary easement.

Board's Rulings

The board's standard of review in cases involving discretionary easements is limited by RSA 79-C:5, II to a review of whether or not the denial was made in bad faith, as a result of an act of discrimination or the misapplication of criteria other than those set forth in RSA 79-C:3 or RSA 79-C:5, I. As the term implies, discretionary easements are given and the values set at the discretion of the municipality. RSA 79-C:5, II reads in full as follows:

II. If the governing body denies the application to grant a discretionary easement to the municipality, such denial shall be accompanied by a written explanation. The local governing body's decision may be appealed using the procedures of either RSA 79-A:9 or 79-A:11, provided, however, that such denial shall be deemed discretionary and shall not be set aside by the board of tax and land appeals or the superior court except for bad faith, discrimination, or the application of criteria other than those set forth in RSA 79-C:3 and paragraph I of this section.

If the municipality grants a discretionary easement, the amount granted is governed by RSA 79-C:7, III, which reads as follows:

III. The local governing body shall have the discretion to set the value of the discretionary easement at a level within this range which it believes reflects the public benefit conferred by the property, under the criteria set forth in RSA 79-C:3 and RSA 79-C:5, I.

Map 9/Lot 43

The municipality granted a discretionary easement for Map 9/Lot 43, however, the Taxpayers rejected the amount of the reduction in assessment for the easement as insufficient. As previously discussed, the board does not have jurisdiction to review or revise the value of a discretionary easement set by the local governing body. The Town has total discretion to set the value within the assessment range prescribed by RSA 79-C:7 and that value is unappealable. Therefore, the board dismisses the appeal of the value of the discretionary easement of Map

9/Lot 43 for lack of jurisdiction.

Map 56/Lot 3

The board denies the Taxpayers' appeal of the Town's denial to grant a discretionary easement for Map 56/Lot 3. The board finds the Town acted appropriately in reviewing the discretionary easement criteria developed by the Derry Conservation Commission when determining whether or not the net public benefit provided by the lot would offset the loss of tax revenue. The board finds the Town did not show bad faith or discriminate against the Taxpayers. The Town applied the statutory criteria and RSA 79-C:5, I and weighed the balance between loss of tax revenue and net public benefit. Each municipality must make this determination when deciding whether or not to grant such an easement. In the instant case, the board finds the Town has been procedurally consistent and not discriminatory.

The board finds the Taxpayers' argument that the Town does not grant any discretionary easements is without merit. As noted in the previous discussion of Map 9/Lot 43, in that situation, the Town did grant a discretionary easement to the Taxpayers.

Findings of Fact and Rulings of Law

The Town submitted requests for findings of fact and rulings of law and the board makes the following findings:

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. Granted.

4. Granted.

5. Granted.

6. Granted.

7. Granted.

8. Granted.

9. Granted.

10. Granted.

11. Granted.

12. Granted.

Rulings of Law

1. Granted.
2. Granted.
3. Granted.
4. Granted.
5. Granted.
6. Granted.
7. Granted.
8. Granted.
9. Neither granted nor denied.
10. Neither granted nor denied.
11. Neither granted nor denied.

Rehearing

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 Frank and Rosalie Knutkowski, Taxpayers; Steven A. Clark, Esq., Counsel for the Town of Derry; and Chairman, Board of Assessors of Derry.

Date: January 11, 2001

Lynn M. Wheeler, Clerk