

Richard J. and Virginia Daschbach

v.

Town of Westmoreland

Docket No.: 17998-99CU

DECISION

The “Taxpayers” appeal, pursuant to RSA 79-A:9, the “Town's” June 15, 1999 denial of the Taxpayers' application to place 4.66 acres of the Taxpayers’ 5.63-acre tract in current use. The Taxpayers have the burden of showing the denial of the current-use application was in error. See TAX 206.06. For the reasons stated below, the Taxpayers’ appeal is denied.

The subject property, Map R7/Lot 34, is a 5.63-acre lot (the “Property) assessed at \$40,000.

The Taxpayers argued the Town erred in denying the current-use application for the following reasons:

- (1) the Property is 4.66 acres of wetland and buffer area;
- (2) any improvements on the Property are not within the 100-foot buffer zone; and
- (3) the Taxpayers’ consultant, Clough, Harbour and Associates, identified wetland and buffer areas on the Property.

The Town argued its denial of the current-use application was proper for the following reasons:

- (1) the Property has been classified previously, prior to subdivision, in the forest/farmland current-use category;
- (2) the 100-foot buffer claimed by the Taxpayers is “believed” to be improved and not in its natural state; and
- (3) trees and crops can be grown on the Property and cattle and sheep have grazed in the pasture in the past.

Board's Rulings

Based on the evidence, the board finds the Town properly denied the Taxpayers’ current-use application. The Taxpayers have the burden to show that the subject Property is wetland and, therefore, subject to current-use assessment. See RSA 79-A:9; TAX 206.06. The Taxpayers failed to satisfy this burden.

The current-use statute, RSA 79-A, declares that it is in the public interest to encourage the preservation of open space in this state and to prevent the conversion of open space to more intensive use by the pressure of property taxation at values incompatible with open space usage. The means the statute employs to preserve open space with a minimum impact on the concept of ad valorem taxation is to assess the land value on the basis of current use. Open space land is described in RSA 79-A:2 as any or all farmland, forest land, or unproductive land.

Although the Property was previously classified as forest or farm land, the Taxpayers now argue that the correct current classification is wetland, which is a type of unproductive land

described in the statute. Unproductive land is described in RSA 79-A:2 XIII as any "... land, including wetlands which by its nature is incapable of producing agricultural or forest products due to poor soil or site characteristics, or the location of which renders it inaccessible or impractical to harvest agricultural or forest products, as determined and classified by criteria developed by the board..." RSA 79-A:2 further describes wetlands as "... those areas of farm, forest and unproductive land that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." See RSA 79-A:2 XIV and Cub 304.04.

As we apply the law to the facts of this case, we find that the Property does not satisfy the legal definition of wetland or unproductive land. In the case before us, the Taxpayers' Property originally consisted of approximately 20 acres, which was subdivided in 1998 into two lots as shown on a plat of land entitled "Plat of Richard J. and Virginia H. Daschbach Subdivision," dated July 9, 1998, by Thomas J. Flavin, Jr.. Lot 1 consists of 5.36 acres, more or less, retained by the Taxpayers and Lot 2 consists of 15.24 acres, more or less, that was conveyed in August of 1998 to Stephen and Laura Seraichick.

The board held a hearing on December 29, 1999, and conducted a view of the Property on January 3, 2000. After reviewing the evidence, the board does not find that the areas pointed out by the Taxpayers as wetland were "... inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." RSA 79-A:2 XIV.

During the view, the board did not observe saturated or inundated conditions in the large field near Glebe Road, as shown on the said Daschbach subdivision plan. The board walked across the field to the wooded area with relative ease. In the wooded area, the board noted an established grove of coniferous trees that could produce timber surrounding a small, wet area.

Since the unproductive land classification includes wetlands, we also need to examine the Property to see if it meets the broader classification of unproductive land. Here again, the board's review of the evidence and its view of the Property indicates that the Property is by its nature capable of producing agricultural or forest products. The board noted that portions of the Property are currently being used for agricultural purposes, including the raising of sheep (area behind the fence being used by the Seraichicks). Moreover, the Property has been hayed numerous times in the past and is by its nature capable of producing hay and other agricultural products. For the reasons stated above, the Property does not qualify for current-use assessment.

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

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

Richard J. and Virginia Daschbach

v.

Town of Westmoreland

Docket No.: 17998-99CU

ORDER

In response to the board's decision dated February 22, 2000, the "Taxpayers" filed a Motion for Rehearing and Reconsideration (motion) on March 22, 2000. For the following reasons, the board denies the Taxpayers' motion.

In accordance with RSA 541:3, the Taxpayers may seek a motion for rehearing or reconsideration specifying all grounds in the motion. The board's administrative rules further require the moving party to state with specificity "any points of law or fact the moving party contends the board overlooked, misapprehended or requires clarification." The board may reconsider or rehear the case only for "good reason." See RSA 541:3, 4 and TAX 201.37. In the case before us, the Taxpayers did not demonstrate the board erred in its decision, and thus, failed to establish any "good reason" to grant a rehearing or reconsideration.

The Taxpayers' argue the board erred in finding "the Property does not satisfy the legal definition of wetland or unproductive land." The Taxpayers contend the board substituted its

judgment for the wetland delineation report of a wetland scientist licensed by the State of New Hampshire.

The New Hampshire Supreme Court has held the board of tax and land appeals “must assess conflicting evidence, its credibility and the weight to be given the various portions thereof.” Paras v. City of Portsmouth, 115 N.H. 63, 68 (1975). Thus, the board has an obligation to weigh all the facts and testimony presented in evidence in order to render its decision.

In this case, the board did consider all the evidence, including the wetland location report by Clough, Harbour & Associates, L.L.P.. The board gave less weight to the wetland location report in relation to other evidence because it was an unsigned, cursory report that did not establish the credentials of the author or what current-use standards were applied.

The Taxpayers then argue the board’s reference to an established grove of coniferous trees that could produce timber is irrelevant. The board considered the current-use regulations and determined the wetland area, by its nature, included trees capable of producing forest crops. The Taxpayers further argue the board erred in its assertion that portions of the “Property” are currently being used for agricultural purposes. Based on the board’s own personal observations at the view, the board determined sheep were actively grazing on a portion of the Taxpayers’ Property located between the fence line and the neighboring Seraichik property.

Although the Taxpayers claimed at the hearing the property had never been hayed, the evidence suggests otherwise. The board listened to the relevant portions of the tape recording of the hearing and heard both selectmen testify the Property had been mowed and cows had pastured there. The Taxpayers acknowledged the field had been cut about two years ago.

Accordingly, the Property does not satisfy the criteria for wetland or unproductive land because it is capable of producing agricultural or forest crops. See CUB 304.04.

Based on a review of the Taxpayers' motion and file, the board reaffirms its decision and denies the Taxpayers' motion.

An appeal of this order must be made by petition to the supreme court within 30 days of the clerk's date recited below. RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Michele E. LeBrun, Member

Douglas S. Ricard, Member

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: March 30, 2000

Lynn M. Wheeler, Clerk

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