

Franklin and Kathie Felch

v.

Town of Kensington

Docket No.: 18175-99LC

DECISION

The "Taxpayers" appeal, pursuant to RSA 79-A:10, a land-use-change tax ("LUCT") of \$25,200 assessed by the "Town" on three acres of land (the "Property") removed from current use to be "excavated for gravel pit operations." The LUCT was based on a "full and true value" assessment of \$252,000 for the Property as of July 29, 1999, the date of change in use. For the reasons stated below, the appeal for abatement is granted.

The Taxpayers have the burden of showing the Town's LUCT assessment was erroneous or excessive. See TAX 205.07. We find the Taxpayers satisfied this burden.

The Taxpayers argued the LUCT was erroneous or excessive because:

- (1) the Property should be valued as rear or excess land rather than as a buildable house lot, because it is part of a larger parcel (Map 9, Lot 2) of approximately 26 acres that has not been subdivided and the Property lacks both permanent driveway access and adequate frontage based on the Town's requirements;
- (2) in 1999, the Taxpayers received permission to excavate gravel and, in "Phase I" over the next

three years, plan to excavate an estimated 150,000 cubic yards (50,000 cubic yards per acre) from the Property;

(3) the gravel to be excavated is of relatively poor quality and can be sold for \$1 per cubic yard, making the total value, before considering reclamation costs, approximately \$150,000;

(4) the Town applied inconsistent valuation methods, using an overly high value per acre (\$84,000) applied to all three acres, in comparison to a lower value per acre (\$56,000) applied to the primary acre of buildable house lots and \$2,500 per acre for excess acreage; and

(5) the residual value of the Property (after removal of the gravel) is quite negligible as “backland” only and should be valued at no more than \$1,500 per acre.

The Town argued the LUCT was proper because:

(1) the Taxpayers have already expended over \$187,000 on the permitting and site preparation process and can be expected to want to recoup these expenses if the Property is sold, in addition to obtaining the market value of the gravel (\$150,000); and

(2) even after proration of the permitting costs (3/8 of \$97,000), these sums exceed the value assessed by the Town (\$252,000).

Board's Rulings

Based on the evidence, the board finds the corrected LUCT should be \$10,700, based upon an estimated “full and true value” assessment of \$107,000 (rounded) on the Property.

RSA 79-A:7, I requires payment of the LUCT “at the rate of 10 percent of the full and true value . . . as of the actual date of the change in land use.” The parties do not dispute the date of change in land use (July 29, 1999) or the nature of the change (use of forest land to excavate gravel), but only the “full and true value” of the Property as of that date.

The board finds merit in the Taxpayers' position that the Town's assessment is excessive. The Town, after rejecting several lower values recommended by its assessment consultants, appears to have multiplied a per-acre base value of \$84,000 to each of the three acres, resulting in an assessment of \$252,000 for the Property. The Taxpayers object to this valuation because the base value per acre is much higher than the \$56,000 base rate used by the Town for other properties in 1999, as reflected on the assessment records cards submitted as part of Taxpayer Exhibit 1. These cards show four multiple-acre properties (Map 9, Lot 12, Map 8, Lot 3, and Map 3, Lots 21 and 54) where the Town used the \$56,000 base rate for the first acre (with little or no "Fctr" or "Cnd" adjustments), and \$2,500 per acre for excess acreage. This approach yields a substantially lower assessment ($\$61,000 = \$56,000$ for first acre plus two excess acres \times $\$2,500$), but is based on the assumption the Property is a buildable lot, which it is not, and ignores the value of the gravel that will be extracted over the next three years.

Instead of adopting either extreme approach (\$252,000 versus \$61,000), the board finds the full and true value of the Property can be estimated more fairly by taking into account two components: (i) the present value of the future revenues less expenses to be generated by the gravel excavation activity over the next three years; and (ii) the residual value of the three acres as excess land. Conceptually, this is how a disinterested third party investor is likely to value the Property, especially since permit approvals have already been obtained for gravel excavation, but the Property has not been subdivided from the remaining acreage in current use and is not a buildable house lot.

Contrary to the Town's argument, the board finds such a third party would not be willing

to pay additional amounts for the significant permit approval (\$97,000 for a total of eight acres, including the Property) and site preparation (\$90,000 for the Property) costs already expended by the Taxpayers, since these are now, in essence, “sunk” costs. Once the permits are obtained, these costs will not alter the future revenue stream accruing to a third party investor purchasing the Property.¹

Applying this conceptual approach, the board finds the estimated revenues from the gravel to be excavated from the Property to be \$150,000 (50,000 cubic yards per acre x three acres x \$1 per cubic yard). Since the testimony at the hearing indicates the excavation will occur over a three-year time span, it would be reasonable for an investor to assume the receipt of equal revenues of \$50,000 each year and perhaps apply a customary discount factor (e.g., 10%, for the time value of money) to the revenues to be received in the second and third years. This yields a total of approximately \$136,800 (\$50,000 + \$45,500 + \$41,300), against which estimated land reclamation costs of approximately \$22,500 (\$7,500 per acre, assumed to be present values) should be deducted. A third party investor valuing the Property is also likely to deduct the monitoring costs (\$5,400), excavation activity tax (\$6,500) and excavation tax (\$3,000) expenses

¹In other valuation contexts, an investor who needed to incur additional costs for permit approvals and site preparation would *deduct* (rather than *add*) such costs from the amount he or she was willing to pay for land with gravel excavation potential but no permits or site preparation. Alternatively, any additional costs could be calculated as a reduction in the net revenues to be received by the property owner (if the gravel excavator were to absorb these costs).

estimated by the Taxpayers and detailed in Taxpayer Exhibit 1. When all of these costs are deducted from the present value of the anticipated revenue stream (\$136,800), the remainder is approximately \$99,400, which represents an estimate of the net value of the gravel to be excavated from the Property to a third party investor.

The second component is, of course, the residual value of the Property after excavation and reclamation. The Taxpayers presented testimony valuing the Property as “wood lot” or “backland” at \$1,500 per acre. The board finds, however, the Town’s base value of \$2,500 per acre for excess acreage—a total of \$7,500 for three acres—is a more reasonable (present value) estimate.²

Adding each component, the board finds the resulting “full and true value” for the Property as of the date of the LUCT is \$107,000 (rounded), resulting in a corrected LUCT of \$10,700.

If the taxes have been paid on the LUCT in excess of this amount, the excess 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(f), unless the Town has undergone a general reassessment, the Town shall also refund any overpayment for property taxes for the year 2000. Until the Town undergoes a general reassessment, the Town shall use the ordered

² Under RSA 79-A:7, IV.(b), after gravel is excavated and “[f]ully reclaimed” (through mitigation of the “environmental and aesthetic effects of the excavation”), the Property “may be eligible for current use assessment if it meets open space criteria . . .”

assessment for subsequent years with good-faith adjustments under RSA 75:8. See 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 and shall be limited to questions of law. RSA 79-A:9, VI.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

CERTIFICATION

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to Franklin and Kathie Felch, Taxpayers; and Chairman, Board of Selectmen of Kensington.

Date: May 25, 2001

Lisa M. Moquin, Temporary Clerk

Franklin and Kathie Felch

v.

Town of Kensington

Docket No.: 18175-99LC

ORDER

The board has reviewed the letter from the “Town” dated June 18, 2001, submitted as a “motion for reconsideration” (“Motion”) of the board’s Decision dated May 25, 2001. Although the Motion is timely and seeks an appropriate clarification, in the main the Motion is without merit and is denied for the reasons indicated below.

Clarification of Decision

This case involves a land-use-change tax (“LUCT”) appealed by the “Taxpayers.” The Town imposed the LUCT on three acres (the “Property”) previously in current use; the Taxpayers became subject to the LUCT when they decided to excavate the Property for its gravel and received permits for this change in use. In the Decision, the board abated the LUCT from \$25,200 to \$10,700.

As the last paragraph of the Motion correctly points out, the LUCT requires a “one time

payment” and may not have direct “relevance” to assessments of the Property in prior or subsequent years. See RSA 79-A:7, I. As a result, the parties should disregard three sentences included in the Decision that inadvertently refer to such assessments³: this discrete part of the Decision is stricken and shall have no force or effect.

Denial of Motion

The board finds the remainder of the Motion, however, to be without merit or substance. The board’s rules require reconsideration motions to “state with specificity any points of law or fact the moving Party contends the Board overlooked, misapprehended, or requires clarification”; motions “shall only be granted for ‘good reason’ pursuant to RSA 541:3, and a showing shall be required that the [b]oard overlooked or misapprehended the facts or the law and such error affected the [b]oard’s decision.” TAX 201.37(b), (c) and (d). The board’s rules further require, in TAX 201.37(f):

Additional Facts or Arguments. Parties shall submit all evidence and present all arguments at the hearing. Therefore, rehearing motions shall not be granted to consider evidence previously available to the moving [p]arty but not presented at the original hearing or to consider new arguments that could have been raised at the hearing. Except by leave of the [b]oard, [p]arties shall not submit new evidence with rehearing motions . . .

While the Motion mentions several issues still disputed by the Town, it fails to satisfy these requirements.

³ These three sentences appear on the bottom of page 5 and the top of page 6 of the Decision, beginning with “[p]ursuant to . . .” and ending with the reference to RSA 76:17-c, I. These sentences, applicable to ad valorem appeals but not LUCT appeals, were inadvertently included in the Decision.

The Town first claims error in the application of a “\$2,500 per backland acre” value because the Town’s “1999 equalization ratio [was] 89 percent” and the “figure” used should be “\$2,800 per acre” when this ratio is applied. The Town’s representative at the hearing (Howard Promer) made no mention of this argument and did not make the computation now advanced by the Town. The Town, contrary to TAX 201.37(f), did not request “leave” to submit new evidence and has not explained why it was not presented at the hearing.

Moreover, the Town is incorrect in its assumption that the board used \$2,500 as the future value of the “backland” (also referred to as rear or excess land). In fact, the board’s determination of “full and true value” for purposes of the LUCT determination utilized a present value approach, assigning a “present value” of \$2,500 to each of the three acres valued as of the date of the LUCT. See Decision at pp. 3 and 5. The \$2,500 figure mentioned by the board (when discounted by a factor of 10% and in relation to year three in the valuation model) is equivalent to a future dollar value of \$3,025. In other words, if the Property is assumed to be worth \$3,025 per acre after removal of the gravel in year 3, the present value of this element of the cash flow would be \$2,500. The \$3,025 figure is actually higher than the “indicated market value” of \$2,800 per acre asserted by the Town in its Motion. For \$2,800 to grow to \$3,025 by the third year would require an assumption the land in the Town will appreciate at the rate of about four percent per year over the next two years.⁴ Since there was, and is, no evidence excess land in the Town will appreciate at a four percent or a higher rate, the Town has failed to show

⁴ The discount factor used by the board (10%) measures the time value of money and is, of course, distinct from the rate of appreciation or inflation. In addition, the model used by the board makes the simplifying assumption that all cash flows are realized at the start, rather than the end, of each year.

how the board's use of the \$2,500 estimate in its valuation model is erroneous.

The Town's second argument is somewhat confused in its presentation, but seems to emphasize the questionable proposition that the Property must be a "buildable lot" due to adequate "frontage." While the Town's representative also made this argument at the hearing, the board found the Taxpayers' contrary evidence to be more credible. As one of the Taxpayers and their expert witness testified, the Property is part of a larger parcel of 26 acres and has not been subdivided. The Taxpayers' expert, who resides in the Town and is presumably familiar with the Town's zoning and other requirements, specifically expressed the opinion the Property should be valued as excess land, not a buildable lot, and only for \$1,500 per acre.

While some frontage for "driveway access" is available, and is being used for the gravel operations through a temporary driveway permit, it is far from clear that it is sufficient to permit the Taxpayers to have a buildable lot with a permanent driveway. Among other things, the access requirements of the remaining undivided 23 acres of land owned by the Taxpayers, also served by this "frontage," would have to be addressed in planning how to make use of the Property as a "buildable lot." It is also far from clear whether subdivision and other required approvals could be obtained from the Town if applied for sometime in the future. (In this regard, a permanent driveway permit is but one of many steps in the development process.) Because of these considerations, the board did not value the Property as a "buildable lot" but instead used an alternative valuation model.

In addition, the Motion takes issue with the board's calculation of the value of the Property after taking into account the estimate of the amount and worth of the gravel to be excavated over the next three years. At best, the Town's argument presupposes the value of the

gravel to the excavator should be added to the value of the land containing the gravel, thereby “doubling” the land value. Such ‘double counting’ is improper. Value of gravel to the excavator also includes value added due to activities such as excavation, processing and stockpiling. The value of the gravel to the excavator, or on the open market, is irrelevant to the valuation of the land from which the gravel is taken, once the supply price is negotiated between the excavator and the landowner.

Necessary site preparation or reclamation costs payable by the landowner are not relevant to the excavator unless, of course, he has agreed to reimburse the landowner for those costs. The board can envision certain gravel excavation contracts, for example, where the excavator pays a lower price per cubic yard excavated in exchange for absorbing the land reclamation costs after removal of the gravel. In this case, however, the unrefuted testimony is to the opposite: the excavator will not reimburse the Taxpayers for these costs. Thus, they can and should be deducted, along with the other expenses discussed in the Decision at pp. 4-5 and footnote 1, from the gross revenues to be received by the Taxpayers from the excavators in the valuation model used by the board to estimate the value of the Property for LUCT purposes.

Finally, the Town’s reference to the administrative rules of the Current Use Board [“CUB”], including CUB 380:01 in support of the Motion, is inapposite. The CUB rules that were in effect in 1999 pertain to specific items of “betterments” not at issue here.⁵

For all of these reasons, the Motion is denied. Pursuant to RSA 541:6, any appeal of this

⁵ In CUB 308.01(b), effective in tax year 1999, the enumerated betterment items are: paving; water lines; sewage lines; and other utility lines. This regulation has subsequently been amended by the CUB in several respects, including deletion of specific mention of these items.

order by the Taxpayer to the supreme court must be filed within thirty (30) days of the date on this order.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

CERTIFICATION

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to Franklin and Kathie Felch, Taxpayers; and Chairman, Board of Selectmen of Kensington.

Date: August 1, 2001

Lisa M. Moquin, Clerk