

City of Dover

v.

City of Somersworth

Docket No.: 18288-99EX

DECISION

The City of Dover (“Dover”) filed an appeal of the City of Somersworth’s (“Somersworth”) assessment of a payment in lieu of tax on three undeveloped parcels owned by Dover located on Willand Pond in Somersworth pursuant to RSA 72:11. This statute provides: “any city or town aggrieved by the payment in lieu of taxes on such property shall have the same right of appeal that a taxpayer may have.” The three parcels are identified as follows: Map 40, Lot 40, 3.6 acres, assessed value, \$13,000; Map 40, Lot 61, 15 acres, assessed value, \$22,000; and Map 41, Lot 9, 6.5 acres, assessed value, \$17,900 (collectively the “Property”).¹

Dover argued:

¹ The map, lot and acreage numbers are from the appeal document filed by Dover and appear to be the extent to which Dover was assessed by Somersworth. However, the board notes, based on Somersworth Exhibits B and G, that a fourth parcel identified as Map 40, Lot 52 may also have been owned by Dover in Somersworth. However, no testimony or evidence was submitted that Lot 52 was independently assessed for payment in lieu of tax.

- (1) the Property was not “held for the purpose of a water supply . . .” and hence is not assessable by Somersworth under RSA 72:11, but is instead exempt under RSA 72:23, I;
- (2) Dover ceased all water pumping from Willand Pond in the 1950s because the outflow from pumping exceeded the inflow, and in the 1970s removed a pumping station on one of the parcels; and
- (3) the Smith and Cummings Wells that are used by Dover are hydrologically separate from Willand Pond and its aquifer.

Somersworth argued:

- (1) even if Dover is not presently using Willand Pond for its water supply, it does have the potential to use the Property for this purpose;
- (2) in 1997, Dover represented to the state (Dover Exhibit 4) that the “Willand Pond Aquifer” was a water supply source for the Smith and Cummings Wells; and
- (3) Dover had a posted sign on the Property (Somersworth Exhibit F), in existence at least until February, 2001, showing it treated Willand Pond as a “Public Water Supply.”

Board’s Rulings

The sole issue raised in this appeal is whether the Property is “held by [Dover] . . . for the purpose of a water supply or flood control . . .” and thus, subject to a payment in lieu of taxes in accordance with RSA 72:11, or whether the Property is not so held, and thus, is exempt from taxation as municipal-owned land pursuant to RSA 72:23, I.

Based on the evidence the board finds the Property, as of April 1, 1999, was not held for

water supply or flood control purposes and, thus, the 1999 payment in lieu of tax should be abated and returned with interest as provided in RSA 76:17-a.

There is no question the Property was initially purchased in 1941 for water supply purposes and at least one of the parcels was actively used until the 1950s to supply public water. It was discontinued at that time because the pumping outstripped the pond's recharge capabilities, and later, in the 1970s, the pumping station and pump were removed. According to the testimony of Pierre Lavoie, Dover's Community Services Director, the Property continued to be held after the pumping station removal under the assumption that it provided water supply protection and recharge capabilities for two wells (Smith and Cummings) located on another nearby parcel in Dover.

From this point on in the chronology, however, there is conflicting evidence as to the use of the Property, and, consequently, the parties dispute whether, as of April 1, 1999, the Property was still held by Dover for water supply purposes. Dover submitted several documents to support its claim the Property was not held for such purposes. First, two reports of an engineering firm, BCI Geonetics, Inc., in 1987 and in 1991 (Dover Exhibits 2 and 1 respectively), conclude that a "groundwater divide likely exists between the Willand Pond drainage to the north and the remainder of the aquifer tapped by the Smith and Cummings Wells to the south." (Dover's Exhibit 2, page 7.) Second, in a letter dated September 12, 1994 (Dover Exhibit 6), the Dover City Manager stated to the director of the New Hampshire Department of Resources and Economic Development ("DRED"), Division of Parks and Recreation, that "the City of Dover has no intention of utilizing Willand Pond as a drinking water supply in the future,

which would discourage recreational use of the pond.” This letter was submitted in conjunction with Dover’s application to DRED for federal funds to assist in developing a park providing public access to Willand Pond and undeveloped land to the north of the pond, land owned by Dover within its city bounds and in Somersworth on Map 41, Lot 9. (See plans, Somersworth Exhibit B.)

Somersworth, on the other hand, claimed that Dover was still holding the Property for water supply purposes. It argued Dover maintained a regulatory sign (Somersworth Exhibit F) at this park location prohibiting motor-fueled power boats and swimming on Willand Pond due to it being a public water supply. The testimony was that the sign was in place at least until 2001. Also, Dover Exhibit 4 is a list from a report revised in 1997 and submitted to the state identifying “emergency planning for part of our water supply” within the City of Dover. This list references the “Willand Pond Aquifer” as being a supply source for the Smith and Cummings Wells, which are still being utilized by Dover.

The board gives more weight to the collective documentation of Dover Exhibits 1, 2 and 6 to find that, as of April 1, 1999, the Property was no longer considered as either a potential water supply property or as a secondary recharge/protection area for the Smith and Cummings Wells. The board gives no weight to Dover Exhibit 4 because, as Mr. Lavoie stated, the inclusion of the Willand Pond Aquifer as a supply source to the Smith and Cummings Wells in the 1997 emergency planning document to the state was an “error.” He testified the report was an update of an earlier report and inadvertently continued the Willand Pond Aquifer supply source notation when it should have been deleted. Also, the board does not find Dover’s signage

prohibiting motorized boating and swimming conclusive evidence of the purpose for which the Property was being held. Dover was unable to supply any information as to when the dual signs were erected or the basis of its authority to post signs prohibiting motor fuel powered boats and swimming on Willand Pond. A review of the statutes by the board, however, indicates RSA 270:112 prohibits “any vehicle or boat equipped with an internal combustion engine on the ice or open waters of Willand Pond.” RSA 270:112 does not provide, however, any indication of the purpose of the boating limitation. Certainly the sign “No Swimming Public Water Supply” is contradictory to Dover’s position on the issue. On balance, however, we find the other evidence submitted is more conclusive of Dover’s purpose for the Property in 1999.

The board has also considered the actions of Dover and Somersworth subsequent to 1999 and find them to be consistent with the finding that, as of April 1, 1999, Dover no longer considered the Property necessary for any public water supply purposes. For example, another engineering study (Dover Exhibit 5) dated February 2, 2000, indicated that the groundwater flows in the Willand Pond area “generally in an easterly direction . . . and not towards the Smith and Cummings Wells located to the south.” Also, Dover’s quitclaim deeds recorded March 23, 2001 (Somersworth Exhibit G²) intending to clarify Dover’s use of the Property, along with

² This exhibit is a quitclaim deed from Dover to itself referencing one of the three parcels. This quitclaim deed was recorded at book 2286, pages 232 and 233 and appears to describe a parcel of land of 4.45 acres that Dover had acquired from an Oliver J. and Amy L. Mercier on November 8, 1941, and corresponds to Map 40, Lot 52 (based on Somersworth Exhibit B). A review of the “copies” submitted of Exhibit G indicates they are actually a different quitclaim deed recorded at book 2286, pages 228 and 229 for another property acquired by Dover from Strafford Savings Bank in 1941 which appears to be Map 40, Lot 61. Based on these two deeds and the two pages missing between the recording notations, the board concludes that it is quite possible that Dover issued multiple quitclaim deeds for the various parcels it owns

Dover and Somersworth cooperating in seeking grants for, and developing walking trails on, parcels owned by Dover on the south and east side of Willand Pond in 2001, support Dover's contention that, as of April 1, 1999, the Property was no longer being held for public water supply purposes but rather for passive recreational purposes.

The authorities cited by Somersworth do not address the "purpose" issue raised in this appeal, but rather dwell on proper valuation under RSA 72:11. For example, in City of Manchester v. Town of Auburn, 125 N.H. 147, 150 (1984), the city conceded that it owned thousands of acres on or near the shore of Lake Massabesic and "had utilized the lake as a source of water for more than one hundred years," restricting its use by the public to "fishing and boating, allowing no swimming, water skiing or similar activities," but contested the town's method of valuing this property for the payment in lieu of taxes. See also Manchester v. Auburn, 102 N.H. 325 (1959). Similarly, the constitutionality of RSA 72:11 is not being questioned. Keene v. Roxbury, 81 N.H. 332 (1924).

Last, the board places no evidentiary weight on the Somersworth's assessor's testimony recounting a Foster Daily Democrat article stating: "that Dover's quitclaim deed could be 'undone' at some time in the future if the properties are needed for public water supply." She admitted having no personal knowledge regarding the truth of this allegation.

In summary, the board finds Dover sustained its burden of proving the Property is not

around Willand Pond to clarify its intended use of Willand Pond.

assessable by Somersworth under RSA 72:11. While the Property may have previously been held by Dover for “the purpose of a water supply,” this reason for holding the Property terminated well before the relevant assessment date of April 1, 1999.

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(a). 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(f). 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.

Dover’s Requests for Findings of Fact and Rulings of Law

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.

1. Granted.

2. Granted.

3. Granted.

4. Granted.

5. Neither granted nor denied.

6. Neither granted nor denied.

7. Granted.

8. Granted.

9. Granted.

10. Granted.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify that a copy of the foregoing order has been mailed this date, postage prepaid, to: Board of Assessors, City of Dover; Walter L. Mitchell, Esq., counsel for the City of Dover; Board of Assessors, City of Somersworth; and Brain R. Barrington, Esq., counsel for the City of Somersworth.

Date: December 7, 2001

Lisa M. Moquin, Clerk