

Terrance Qualters

v.

Town of Winchester

Docket No.: 18799-01LC

DECISION

The ATaxpayer@ appeals, pursuant to RSA 79-A:10, the ATown=s@ July 11, 2001 land-use-change tax (ALUCT@) of \$3,000 (based on a \$30,000 full-value assessment) on four acres of land located on Map 6, Lot 16 disqualified from current use (the AProperty@). For the reasons stated below, the appeal for abatement is denied.

The Taxpayer has the burden of showing the Town=s LUCT assessment was erroneous or excessive. See TAX 205.07. We find the Taxpayer failed to prove the LUCT was erroneous or excessive.

The Taxpayer argued the LUCT was erroneous or excessive because:

(1) the Property and other land, a total of 89 acres, were placed in current use by the prior owners (Kenneth and Carmencita Perry) in 1977;

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(2) the Taxpayer has conducted gravel operations on the Property and on adjacent lots he has owned for some period of time;

(3) the amount of gravel removed for sale to others from the Property (5,000 cubic yards) was quite limited;

(4) additional material (approximately 20,000 cubic yards) was removed from the Property and used on other lots owned by the Taxpayer;

(5) the physical area of gravel operations was overstated by the Town; and

(6) the Property has no road frontage, further reducing its value.

The Town argued the LUCT was proper because:

(1) by the Taxpayer=s own admission, approximately \$25,000 worth of gravel and fill (valued at \$1.00 per cubic yard) were removed from the Property;

(2) the Taxpayer failed to keep adequate records or notify the Town in writing of his gravel operations, as required by law;

(3) an aerial survey and other information collected by the prior assessor and Mary Pinkham-Langer of the New Hampshire Department of Revenue Administration (ADRA@) supports the Town=s computation of the physical area removed from current use and the LUCT;

(4) the Taxpayer admitted that access to Route 119 was available because of an old right-of-way over other lots; and

(5) the Taxpayer failed to meet his burden of proof.

Board=s Rulings

Based on the findings and rulings that follow, the board concludes the Taxpayer failed to carry the burden of showing the Town=s \$30,000 LUCT was erroneous or excessive.

The Taxpayer raised two arguments relative to the Town=s LUCT: 1) the area subject to the LUCT is less than four acres; and 2) the Town=s full-value assessment of \$30,000 is excessive. After outlining the applicable statutes, the board will address both arguments.

Applicable Statutes

RSA 79-A:7 details the provisions of assessing a LUCT. In particular, RSA 79-A:7, IV in part reads:

For the purposes of this section land use shall be considered changed and the land use change tax shall be payable when: . . .

(b) Topsoil, gravel or minerals are excavated or dug from the site; except:

(1) Removal of topsoil in the process of harvesting a sod farm crop in amounts which will not deplete the topsoil; and

(2) Removal of gravel and other materials for construction and maintenance of roads and lands for agricultural and forestry purposes within the qualifying property of the owner or, with the approval of local authorities, to other qualifying property of the owner.

Sale of excavated materials shall constitute a land use change of the property from which the material was excavated. The site shall be reclaimed when the construction or maintenance project is completed to mitigate environmental and aesthetic effects of the excavation. Both project completion time and acceptability of reclamation shall be determined by local authorities. The owner shall keep local officials informed in writing of plans to remove and use of soil material from qualifying lands for purposes of this subparagraph and to assure conformance with any local ordinances, as well as plans for reclamation of the site. Fully reclaimed land shall be eligible for current use assessment if it meets open space criteria established by the board under RSA 79-A:4, I, whether or not such land was under current use assessment prior to the excavation.

The board finds all the excavation activity that occurred on Map 6, Lot 16 disqualified the underlying land from current use and subjects it to an RSA 79-A:7 LUCT. The board finds none of the material excavated on Lot 16 was used for any of the purposes excepted by statute such as agricultural and forestry uses on Lot 16 or on other current-use land owned by the Taxpayer with approval of the local authorities. While some of the material removed from Lot 16 was used on adjoining lots owned by the Taxpayer, the material was not used on acreage qualifying for current use. The board finds conclusive evidence in the record that the material was removed without the approval of local authorities.

Area Subject to LUCT

The Taxpayer argued the area on which the Town should have based its LUCT is significantly less than four acres. During the hearing, the Taxpayer testified to a plan performed by Graz Engineering (Graz Plan) as the basis for that assertion. The board kept the record open to receive a copy of the Graz Plan which was submitted by the Taxpayer on January 17, 2003.

The Graz Plan dated November 18, 2002 (approximately one year, four months subsequent to the July 2001 LUCT date), depicts the total disturbed area of Lot 16 with notes relative to reclamation status of various disturbed portions. The Graz Plan also contains a note (#12) indicating: The total area of existing excavation (no current reclamation) is approximately 58,500 square feet. This area, however, is significantly smaller than the total area shown on the plan which had been previously disturbed for excavation and on which some reclamation had subsequently occurred.

According to the Graz Plan, the total area disturbed is approximately a rectangle; consequently, the board was able to accurately scale the width and length of the total disturbed area. This calculation indicates the total area subject to LUCT approximates the Town=s estimate of four acres.

Further, the board has reviewed the aerial photo (Municipality Exhibit C) and the several on-site photographs (Municipality Exhibit B) and finds those photographs support the Graz Plan depiction of the total area disturbed as approximately four acres. The board finds the Taxpayer=s argument that the disturbed area is 58,500 square-feet to be incorrect and all the evidence supports the Town=s estimate of four acres.

Valuation of Four Acres

TAX 205.07 establishes that the burden of proof in any LUCT appeal lies with the Taxpayer.

Tax 205.07 Burden of Proof.

In LUCT Appeals, the taxpayer shall have the burden to prove the municipality erred in assessing the tax or in assessing the tax amount. Such challenges may include challenges to the change-in-use date used by the municipality and/or the property's full value as determined by the municipality.

The Taxpayer submitted no evidence of the Property=s market value but only argued why he believed the Town=s assessment of \$30,000 was excessive.

The Town, for its part, did not submit any basis or description as to how the \$30,000 assessment was determined. At the time of the LUCT bill, the assessment was estimated by the

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Town=s then assessing contractor, Avitar Associates of New England, Inc., specifically, Mr. James Rice. However, subsequent to that time, the Town changed its assessing contractor and, at the time of the hearing, was utilizing the firm of Nyberg Purvis & Associates. The Town was unable to locate any notes or source documents describing how the \$30,000 assessment was estimated.

Consequently, the board is faced with deciding the reasonableness of the \$30,000 assessment with neither the Town=s original calculation nor any market evidence submitted by the Taxpayer. The board=s analysis could be very short, by simply finding the Taxpayer failed to submit any market evidence to refute the LUCT. However, given that the Town did not submit the initial basis for its estimate, the board has decided to review the reasonableness of such an estimate.

The lot does not have direct road frontage but is accessed over other lots owned by the Taxpayer via rights-of-way from both Route 119 and Forest Lake Road. (See Town tax map (Taxpayer Exhibit 1) and Graz Plan, specifically note #7). The Taxpayer testified the adjoining lots owned by him had for many years been utilized for gravel excavation and that he was in the ongoing process of smoothing and filling former excavated areas on those lots for potential commercial/industrial development. The Taxpayer further testified he had excavated approximately 25,000 cubic yards of low-quality material from Lot 16, sold approximately 5,000 yards (mixed with better-quality material from the adjoining lot) and used the balance of approximately 20,000 yards in his reclamation process on the adjoining lots.

The board finds the Town=s assessed value of \$30,000 for the four acres on Lot 16 is not an unreasonable estimate of value for the real estate rights those four acres embody, including the right to excavate material. RSA 79-A:7 simply says the LUCT shall be based upon A10 percent of the full and true value@ of the area disturbed. RSA 79-A:7 contains no exclusion of the consideration of gravel or mineral rights from such valuation as does RSA 72:13. The board concludes that RSA 79-A:7 Afull and true value@ must be based on all real estate rights (see RSA 21:21) embodied in the disqualified area, including gravel, if the presence of such material would likely be a factor in estimating the market value of the disqualified area.

In this case, where Lot 16 was utilized as a source of fill material for sale and for filling adjoining lots to improve their market potential and value, the board concludes the value of the fill material can be considered in determining the basis of the Afull and true value@ for a LUCT. The Taxpayer testified the material from Lot 16 was inferior to those deposits on the adjoining lot and that he had used it primarily for filling low areas of the adjoining lot in the reclamation process and to some extent had sold it by mixing it with better-quality aggregate in the stockpiling process on the adjoining lot. The Taxpayer=s estimate of \$1.00 per cubic yard (in the ground) is reasonable and comports with the board=s understanding of the general market for such lower-quality fill material.

While the board does not find this estimate alone establishes the basis for the \$30,000 assessment, it is certainly a major factor to be considered as to its reasonableness. Consequently, given the lack of any other market data or other convincing argument from the Taxpayer, the

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board finds the Taxpayer failed to prove the Town=s assessment was excessive or erroneous.

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

Albert F. Shamash, Esq., Member

Certification

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to: John J. Ratigan, Esq., Donahue, Tucker & Ciandella, 225 Water Street, Exeter, New Hampshire, 03833, counsel for the Taxpayer; Loren Martin, Nyberg, Purvis & Associates, 679 Black Brook Road, Goffstown, NH 03045, representative for the Town of Winchester; and Chairman, Board of Selectmen, Town of Winchester, 1 Richmond Road, Winchester, New Hampshire, 03470.

Date: April 22, 2003

Anne M. Bourque, Deputy Clerk