

George and Josephine Szirbik

v.

Town of Wakefield

Docket No.: 18819-01LC

DECISION

The “Taxpayers” appeal, pursuant to RSA 79-A:10, an adjusted land-use-change tax (“LUCT”) of \$12,000 assessed by the “Town” on Map 24, Lot 110, a 0.54 acre waterfront lot (the “Property”). 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 carried this burden.

The Taxpayers argued the adjusted LUCT was improper because:

- (1) the Town erroneously concluded the Taxpayers’ abatement application was untimely;
- (2) the correct date for assessment of the LUCT is December 1, 1999, not October 20, 2000; and
- (3) the Town overestimated the market value of the Property, resulting in an excessive LUCT.

The Town argued the LUCT, as adjusted, was proper because:

(1) it issued a formal notice of tax on August 16, 2001 and the Taxpayers failed to “apply in writing” for an abatement within “2 months of the notice of tax date,” as required by the statute (RSA 79-A:10, I);

(2) while the Town did agree to adjust the LUCT (from \$16,000 to \$12,000) based on subsequent meetings and deliberations involving the Taxpayers, the Town’s contract assessor and the Town’s board of assessors (“Board of Assessors”), which culminated in a letter to the Taxpayers dated November 14, 2001, this letter is not a “notice of tax,” and therefore, did not extend the two-month filing time period ;

(3) the Town properly dismissed the Taxpayers’ December 19, 2001 letter and accompanying abatement application as untimely;

(4) the correct date of the LUCT assessment was October 20, 2000, when the Town granted a building permit;

(5) the market value of the Property as of that date was at least \$120,000, making a LUCT of \$12,000 (10% of market value) proper; and

(6) the Taxpayers failed to meet their burden of proof.

Board’s Rulings

As the parties recognize, the threshold procedural issue of timeliness, as well as the substantive issue of the proper LUCT assessment, are both present and must be addressed in this case. If the Taxpayers’ abatement request to the Town was untimely, the appeal should be dismissed under the line of certain authorities quoted infra in Section A. On the other hand, if the request was timely, then the board must proceed to determine if the amount of the LUCT assessment is proper.

The board heard considerable testimony on each issue at the hearing held on August 28, 2002. Based on this testimony and the documents submitted by the parties, the board rules: (i) the Town's timeliness objection is without merit; and (ii) a further abatement of the LUCT to \$7,000 is appropriate. The board's specific findings and reasoning are presented below.

A. The Town's Timeliness Objection

The Town and its contract assessor (Nyberg & Purvis) place great emphasis on the issue of timeliness as it pertains to the Taxpayers' request for abatement of the LUCT. In making this argument, they rely on RSA 79-A:10, I, which provides: "[a]ny person aggrieved by the assessment of a land use change tax may, within 2 months of the notice of tax date and not afterwards, apply in writing to the selectmen or assessors for an abatement of the land use change tax." Regarding the issue of timeliness, the supreme court, in the context of a LUCT appeal, has recently noted:

"[S]tatutory deadlines for requesting a tax abatement . . . have historically been strictly enforced [citation omitted], and failure to timely file an appeal is fatal regardless of accident, mistake or misfortune. Therefore, the board [of tax and land appeals] properly refused to consider requests for tax abatements that were not timely filed with the town. [Citation omitted.]"

Appeal of Estate of Van Lunen, 145 N.H. 82, 86 (2000).

According to the Town, only one tax bill with respect to the LUCT was ever issued and mailed to the Taxpayers – on August 16, 2001. See Municipality Exhibit A and RSA 79-A:10, IV. ("For purposes of this section, 'notice of tax date' means the date the taxing jurisdiction mails the land use change tax bill.") Measured against this August 16th date, the Taxpayers' letter dated December 19, 2001 enclosing an abatement application, apparently received by the Town on December 27, 2001, clearly falls outside the "2 month" period prescribed in RSA 79-

A:10, I for an “application in writing . . . for an abatement of the land use change tax.”

There are, however, multiple factual, logical and legal problems with the Town’s conclusion that the appeal in this case should be time-barred. The board will now discuss these facts, the logic and the relevant law.

First, it is clear the Taxpayers notified the Town promptly of their concerns and met with Town officials on several occasions in order to correct errors in the LUCT and abate the August 16, 2001 tax bill. Taxpayer George Szirbik (“Mr. Szirbik”) attended the Board of Assessors meeting on August 24, 2001, as did the Town’s “Contracted Assessor, Brett Purvis.” See Municipality Exhibit A (containing minutes of August 24, 2001 meeting). This meeting occurred just eight days after the tax bill was issued.

According to the Town’s own documents (including minutes of both the August 24 and August 31, 2001 Board of Assessor meetings), Mr. Purvis “apolog[ized]” for errors that may have been made in computing the August 16, 2001 tax bill and visited the Property, for the first time, on August 27, 2001. Id. The minutes of August 24, 2001 meeting noted Mr. Szirbik would submit “something in writing to explain and identify site preparation work” (emphasis added), apparently at the Town’s request. Mr. Szirbik did in fact do so in a handwritten note by the time of the August 27, 2001 Board of Assessors meeting. Id.

There is no indication in the record before the board that the Town ever requested more from the Taxpayers: e.g., an additional, or more formal, written application for abatement. To the contrary, the Town acted at all times prior to its November 14, 2001 letter, quoted below, in a manner consistent with the Taxpayers’ understanding, to which Mr. Szirbik testified under oath,

that an abatement request was being processed and would be acted upon by the Town's Board of Assessors. Indeed, this is precisely what occurred.

Following the meetings noted above, the Board of Assessors voted on November 9, 2001, to reduce the land value from \$160,000 to \$120,000, which resulted in a reduction of the LUCT from \$16,000 to \$12,000. See RSA 79-A:7 (LUCT is assessed at 10 percent of "full and true value"). The Board of Assessors directed the assessing clerk to prepare, and then themselves reviewed, a letter to the Taxpayers dated November 14, 2001.

This letter reads as follows:

"Thank you for attending the Board of Assessors meeting on November 9, 2001. After much discussion with the contracted town assessor, the Board of Assessors voted to decrease the full and true value of the land at the time of the change in use from \$160,000 to \$120,000 decreasing the land use change tax due to \$12,000.00. This is the final notification. You will not receive a second bill; the Board will issue an abatement for the difference in amount due on the original bill issued in August of 2001." (Emphasis added.)

At the hearing on this appeal, one of the members of the Board of Assessors testified regarding the meaning of this letter. Significantly, he conceded that the November 14, 2001 letter could be considered "the same thing" as a tax bill. The letter unambiguously states the Town would not be issuing a subsequent, revised bill showing the substantial (25%) reduction in the LUCT. When the Taxpayers received the November 14, 2001 letter, they knew, for the first time, the definite amount of LUCT liability they were facing, causing them to send the December 27, 2001 letter requesting abatement. Measured against November 14th letter, the Taxpayers' request, is, of course, well within the 2-month period specified in RSA 79-A:10, I.

The procedural issue for the board is, therefore, whether the Town's unilateral decision not to issue a corrected (or "second") tax bill should result in the loss of the Taxpayers' appeal

rights (because of the Town's insistence that the relevant tax bill date is August 16th). The board believes not.

No particular form of writing is specified by the statute for requesting an abatement of the LUCT. While the Town emphasizes the need for a "writing," the handwritten note supplied by the Taxpayers to the Town within the 2-month period following August 16, 2001 can meet this requirement as a matter of law.¹ The note was submitted by Mr. Szirbik to persuade the

¹ The board believes the extensive body of law pertaining to the Statute of Frauds is instructive, even if not directly applicable to a municipal notification. Cf. RSA 382-A:2-201 (Formal Requirements; Statute of Frauds) and Official Comment 1:

"The required writing need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad. . . ."

In other words, in situations where a "writing" is required by law to make a contract enforceable, courts have applied a very liberal and lenient approach and have found even the most minimal type of writing can satisfy this element. This could include, for example, a handwritten note, such as the one submitted to the Town by the Taxpayers shortly after the

Town to reduce the LUCT by providing relevant details regarding site work, which was directly relevant to determining both the assessment date and amount of the LUCT.

August 24, 2001 Board of Assessors meeting apparently in response to a request by the Town.
See Municipality Exhibit A.

There can be no question the Town proceeded, after the August 16, 2001 notice of tax, to act in a manner consistent with the recognition that the Taxpayers were requesting an abatement.

This is evident from the minutes of the Board of Assessors' meetings noted above and the meetings held by the Town's contract assessor with the Taxpayers, as well as Mr. Purvis' apparent acknowledgment that errors had been made with respect to the original LUCT. These errors resulted in the "final notification" given in the Town's November 14, 2001 letter that the LUCT was being reduced substantially.²

Upon review of these facts, the board must question whether a municipality can control the timeliness of an appeal by unilaterally deciding whether or not a subsequent tax bill should be issued once it decides for itself (after communications with the taxpayers) the original bill contained errors requiring correction. Clearly, the November 14, 2001 letter reflects a recognition by the Town that the original bill was in error and directs the Taxpayers to pay a reduced amount as the LUCT. The board, like the member of the Town's own Board of Assessors who testified at the hearing, can see no substantive difference between this letter and a revised notice of tax.

This case is distinguishable, of course, from Van Lunen, supra. In that case the

² If no actual abatement application had been requested by the taxpayers, the Town would presumptively have lacked jurisdiction or authority to abate the LUCT. Cf. Tyler Road Development Corp. v. Town of Londonderry, 145 N.H. 615, 619 (2000) (there is "no jurisdiction to abate taxes absent a prior request for an abatement filed with the town's assessors").

municipality issued LUCT bills without further reductions or adjustments and the taxpayer did not file timely abatement requests for certain of the lots with the municipality. Here, in contrast, the Town had full notice that the Taxpayers disputed the amount of the original LUCT and fully participated in attempts, which soon proved successful, to reduce the tax amount.

The board finds the Taxpayers should not be barred from questioning the reduced amount (\$12,000) simply because the Town chose to wait until November 14, 2001 (almost two months after the first tax bill) to notify them of the correction to the LUCT. The record is clear the Town was actively deliberating a reduction in the LUCT, with the participation of the Taxpayers, for most of the two-month period after August 16, 2001. As Mr. Szirbik stated at the hearing, it would have been impractical to decide whether to seek a further abatement until he knew the amount of LUCT the Town was going to impose.³

From a tax administration and policy standpoint, this case is clearly different from situations where a taxpayer waits passively for two or more months before filing a request for an abatement of a LUCT (unchanged during the interim period of delay): the board believes this is the situation the legislature addressed in RSA 79-A:10, I, not the instant appeal where the Town appears to concede the Taxpayers took many relevant actions during the two-month statutory period to correct the LUCT, with the Town's full knowledge and active participation. No unfair

³ In this regard, see Van Lunen, supra, 145 N.H. at 85-86. In that case, an abatement request filed *before* issuance of the LUCT under appeal was held to be "premature" and therefore "not timely filed."

prejudice or surprise can be claimed by the Town in these special circumstances, notwithstanding its objection based upon a very mechanical reading of the statute.

It must also be noted that the Town's position is logically inconsistent. If the operative notice of tax date is August 16, 2001, then the two-month statutory period prescribed in RSA 79-A:10, I, would have expired in mid-October, well before the Town's November 14, 2001 letter abating the original LUCT. See footnote 2, supra.

The board believes the November 14, 2001 letter can most logically and equitably be construed as a new notice of tax for purposes of the two-month statutory time line. This is because it gave the Taxpayers the information necessary to determine the amount of tax due (based on a reduced assessed value and tax computation). By its terms, the Town's letter states it is "the final notification" of the LUCT liability and informs the Taxpayers they will "not receive a second bill." Nothing in the law would have precluded the Town from issuing a formal second tax bill on November 14 and, therefore, the Taxpayers should not be faulted or penalized for the Town's election not to do so.⁴

The outcome urged by the Town, dismissal of the appeal because of the "2 month" statutory deadline, is based on a strained and overly technical reading of the relevant statutes. Cf. Van Lunen, supra at 86: "when examining statutory language, we construe all parts of a statute together to effectuate its overall purpose and to avoid an absurd or unjust result. See

⁴ Clearly, this was not a case where, in correspondence with the Taxpayers, the Town was merely explaining or amplifying upon information contained in the original tax bill rather than revising the substance of the bill, including the amount of the tax itself by a substantial amount (\$16,000 reduced to \$12,000). If that were the case, the Town's position may have more merit.

Daggett v. Town of North Hampton, 138 N.H. 744, 746 (1994).” The board believes it would certainly be an unjust result if the Town was able to shield itself from the scrutiny of an appeal simply by opting not to issue a second tax bill.

The board is, of course, familiar with the four-part test for applying estoppel formulated in City of Concord v. Tomkins, 124 N.H. 463 (1984). See also TAX 203.04 (c). More recently, however, the supreme court has noted:

“Although the term ‘estoppel’ embraces a number of loosely defined theories, estoppel may generally be defined as a bar which precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth . . . by his own deed, acts, or representations, either express or implied.” 28 Am.Jur.2d Estoppel and Waiver §1 at 600 (1966). The application of ‘[e]stoppel rests largely on the facts and circumstances of the particular case. (Citation omitted.) . . . ‘its existence is a question of fact to be resolved by the trier of fact . . .’ Olszak v. Peerless Ins. Co., 119 N.H. 686 (1979).”

Great Lakes Aircraft Co. v. City of Claremont, 135 N.H. 270, 289 (1992). The board finds the special facts of this case presented by the Taxpayers to be compelling in these respects.

For all of these reasons, the board finds the Town’s timeliness objection to be without merit and will, therefore, proceed to the substance of the appeal.

B. Further Abatement of the LUCT

Turning to the substance of this appeal, i.e., the proper amount of the LUCT, the board finds further abatement of the LUCT is warranted, based both upon errors in: (i) the date of the assessment; and (ii) the estimated value of the Property. The board will also note in this section of the decision an additional issue the Town should address pertaining to the Taxpayer’s other land remaining in current use (Lot 113), a total of approximately 67.9 acres according to the

Town's records. (See Municipality Exhibit A, Form A-5 "lien release" recorded December 10, 2001.)

1. Proper Assessment Date

The parties sharply disagree as to the correct date of assessment for the LUCT. The Town argues the date should be October 20, 2000, when the Town issued a building permit. The Taxpayers argue the correct date should be December, 1999, when they performed site work and dug a well on the Property. See Taxpayer Exhibit 2.⁵

The statute requires imposition of the LUCT "at the time of the change in use." See RSA 79-A:7, II and IV(a). The latter provision clarifies that the tax should be assessed when "[a]ctual construction begins on the site causing physical changes in the earth, such as . . . installation of . . . water . . . services to serve existing or planned residential . . . buildings; or excavating or grading the site for present or future construction of buildings; or any other act consistent with the construction of buildings on the site." Id.

The board finds the Taxpayers site work and well digging in December, 1999 establish the relevant assessment date for the LUCT. See also Appeal of Town of Peterborough, 120 N.H.325, 327 (1980), citing Frost v. Town of Candia, 118 N.H. 923, 924 (1978).

⁵ According to the Taxpayer's December 19, 2001 letter to the Town, "the actual change of use took place on December 1, 1999 when I had part of the lot stumped and moved a hill to drill my well."

2. Market Value

In addition, the board finds the Town's estimate of market value⁶ (\$120,000) is excessive. The Town submitted a "Sales Comparison" grid as part of Municipality Exhibit A. The board has reviewed this and other evidence and finds that Lot 97, which sold in July, 1998 and Lot 99, which sold in September, 1997, should be given the most weight in estimating the market value of the Property (Lot 110) as of December, 1999. These lots are physically closer to Lot 110 than the Town's other comparables (several of which are on Veazey Point, whereas Lot 110 and Lots 97 and 99 are beyond Veazey Point and Veazey Cove). Focusing on the actual sales prices of Lots 97 and 99 (\$55,000 and \$56,000, respectively) and applying a time adjustment, the board finds a value of \$70,000 is reasonable for the Property as of December 1, 1999.⁷

3. Further Corrections in Town's Current-Use Records

Finally, the evidence at the hearing indicated a need for the Town to review further its current-use records and modify them appropriately. In developing the Property as a buildable lot, the Taxpayers presented a map to the Town indicating clearly that additional land ("8300 sq ft") on a larger parcel they still own (Lot 113) would have "to come out of current use" to accommodate "sewage disposal" (a septic field) for the house they proceeded to construct on the Property. See Taxpayer Exhibit 1. Lot 113 consists of over 60 acres and is situated across

⁶ The statute requires imposition of the tax at a rate of 10 percent of the "full and true value" of the Property. See RSA 79-A:7, I.

⁷ The Taxpayers appear to agree the Property was worth substantially more after they completed the site work and other improvements. According to the Taxpayers' December 19, 2001 letter to the Town, the value of the Property in 2001 reflects "\$30,000 worth of improvements, not the actual value in December 1999."

Veazey Cove Road, which is apparently a privately maintained road that may also have been included as current-use land as part of Lot 113.

These facts elicited at the hearing reflect a need for the Town to review carefully exactly how much land remains in current use as part of Lot 113 and how much has been removed and should be given a nominal ad valorem value (because a portion consists of roadway or is encumbered as septic field areas to serve the Property and perhaps other lots).⁸ After completing this review, the Town should revise its maps and modify its records accordingly to indicate more accurately the acreage remaining in current use. See Current Use Administrative Rules (“CUB”) 308.03(c), obligating the Town’s assessing officials to “complete Form A-5,” authorized by RSA 79-A:7, II(a), to provide the following information: the number of acres originally classified under current use, previously released from current use, changed by the assessment and remaining in current use. CUB 308.03 (c) (4). Although the Town did complete and record a Form A-5 with the Register of Deeds on December 10, 2001, the board questions whether a correction should be made to this recorded document and other Town records in light of the facts

⁸ In this regard, see the board’s recent Final Decision in O’Donnell v. Town of Nottingham, Docket No. 17999-99CU (April 9, 2002). In that case, the board found that 2.3 acres of land no longer qualified for current use because they were consumed by four roads used to access residential property, pursuant to RSA 79-A:7, IV(a), and that these roads, when removed from current use, had only nominal value, since they benefitted the residential lots and their value was inherent in the assessment of those lots.

developed at the hearing pertaining to the road and the septic field and how they may impact the amount of land remaining in current use in Lot 113.

The board notes the Town is scheduled for certification by the DRA in 2003 under RSA 21-J:11-a (Supp. 2002). The board is, therefore, providing the DRA a copy of the Decision. The Town shall make the appropriate administrative and assessment corrections noted above prior to the DRA's certification review in 2003 so that they be considered by the DRA as part of its review of the adequacy of the Town's overall assessment practices, including land in current use.

In summary, the board finds the LUCT should have been assessed as of December, 1999 when the Property had an estimated value of \$70,000, resulting in a LUCT of \$7,000.

If the taxes have been paid, the amount paid for the LUCT in excess of \$7,000 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. A motion for re
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

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: George and Josephine Szirbik, Taxpayers; Chairman, Selectmen of Wakefield; and Director Robert M. Boley, Community Services Division, Department of Revenue Administration.

Date: November 22, 2002

Anne M. Bourque, Deputy Clerk