

Magic Toto

v.

Town of Dalton

Docket No.: 19890-03LC

DECISION

The “Taxpayer” appeals, pursuant to RSA 79-A:10, the “Town’s” 2003 land-use-change tax (“LUCT”) of \$540 on a 0.5-acre tract of unimproved land valued at \$5,400 that is part of a 15.08-acre lot identified as Lot 4 of Map 51 (the “Property”). For the reasons stated below, the appeal is granted.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the Town erred in assessing the LUCT. See TAX 205.07. The board finds the Taxpayer carried this burden.

The Taxpayer argued the LUCT was erroneous because:

- (1) he does not operate a campground on the Property and no permits have ever been sought for such an operation;
- (2) two campers on one occasion and five campers on another were the only times the Property was used for camping activity;

- (3) a portable toilet was used for the benefit of the five campers and was on the Property in August, September and October, 2002 because of a water problem with the dug well;
- (4) tree branches and brush were removed for safety and aesthetic reasons and six water spigots were installed on the Property primarily for fire protection and not for camping purposes; and
- (5) the Town improperly removed the 0.5-acre tract of land from current use.

The Town argued the assessment of the LUCT was proper because:

- (1) the Taxpayer advertised on the internet the opportunity to camp on the Property;
- (2) one selectman (Dean Sweeney) drove by the Property several times during the summer of 2002 and saw campers and portable toilets;
- (3) there are numerous water spigots on the Property available for campers; and
- (4) the Taxpayer failed to satisfy his burden of proof.

Board's Rulings

Based on the evidence, the board concludes the Taxpayer carried the burden of showing the Town erred by removing the 0.5-acre tract from current use and assessing the LUCT.

Land which has been classified as open space and assessed according to RSA 79-A:5 shall be subject to a LUCT "when it is changed to a use which does not qualify for current use assessment." RSA 79-A:7, I. In particular, RSA 79-A:7, IV reads in relevant part:

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

"(a) Actual construction begins on the site causing physical changes in the earth, such as building a road to serve existing or planned residential, commercial, industrial or institutional buildings; or installation of sewer, water, electrical or other utilities or services to serve existing or planned residential, commercial, industrial, institutional or commercial buildings; or grading the site for present or future construction of buildings; or any other act consistent with the construction of buildings on the site; except that roads for agricultural, recreational, watershed or forestry purposes are exempt."

The Town based its decision to remove the 0.5-acre area from current use and assess a LUCT on two factors: first, the Taxpayer had cleared the underbrush and lower tree limbs and installed water spigots on a portion of the Property; and second, the Taxpayer advertised on the internet the opportunity for the public to camp on the Property and installed a portable toilet for that purpose. The board will review each of these factors separately.

There was no dispute between the parties that there was an area of the Property where the underbrush had been cleared, the trees had been limbed to a certain height and some water spigots had been installed. There was, however, disagreement between the parties concerning the purpose and effect of these actions. The Town contended the Taxpayer was clearing land and installing water spigots to facilitate and promote the campground activities that were advertised on the internet. The Taxpayer asserted the clearing of the underbrush and the limbs on the trees was merely for safety and esthetic reasons. The Taxpayer stated he commonly walked in the woods for enjoyment, and his enjoyment was enhanced by not having to be concerned with any low hanging tree limbs or the underbrush. Further, the Taxpayer testified these clearing activities produced piles of brush and limbs which he routinely burned. The Taxpayer stated that for safety reasons it is important to have a nearby water source when burning the brush in order to contain the fire as necessary. According to the Taxpayer, the water spigots, of which there are six scattered on the Property, were installed for that purpose and the spigots were placed randomly with no consideration for their accessibility to a possible campsite or campground. While this may be a unique situation, the board finds the clearing on the Property and the presence of the water spigots to be incidental in nature and not probative evidence the Taxpayer changed the land to operate a commercial campground. Also, the

photographs submitted by the Taxpayer (Taxpayer Exhibit 1) indicate little, if any, disturbance to the land that one routinely links with campground usage.

The Town provided pages from an internet site (Municipality Exhibit A) as evidence the Taxpayer was attempting to start a campground business. Selectmen Sweeney testified that on several occasions he had driven by the Property and noticed campers and the presence of a portable toilet. The combination of the observed campers, the portable toilet and the internet advertising, the Town testified, was sufficient information to necessitate the removal of that portion of the Property being used for camping from current use and the assessment of the LUCT. In rebuttal, the Taxpayer stated, the Town incorrectly assumed that what it had observed was the beginning of a campground business.

Addressing the issue of the camping, the Taxpayer stated he was intending to commemorate the September 11, 2001 tragic events by holding a memorial on the weekend of September 14, 2002, approximately one year later. The Taxpayer considered this social activity to be a singular event rather than an attempt to operate a commercial campground. There were five people who camped on the Property during that weekend and used a portable toilet and some of the water spigots. The five campers contributed \$20.00 each to defray the costs of food, beverages and the portable toilet. The Taxpayer asserted this was the only occasion he received any compensation for such activity. The Taxpayer further testified that on only one other occasion, when two people stayed overnight, were there any campers on the Property. These campers were not charged a fee for their overnight stay. In support of his claim that there never was a campground on the Property, the Taxpayer stated the Town's assessor visited the Property on three occasions during an eighteen-month period, the latest being September 4, 2002, and the Property was in the same condition at each visit and no evidence of a campground was found.

The Taxpayer also submitted a petition signed by his neighbors (Taxpayer Exhibit 3) stating they did not see any camping activities on the Property. The board finds the extent of the underbrush and tree limb cutting, the lack of a cleared parking area for any potential campers and the fact there was no on-site signage to indicate the presence of a campground, makes the two occasions when camping occurred so incidental as to not warrant the removal of the one-half acre area from current use and the assessment of the LUCT.

Regarding the second issue, Selectman Sweeney testified the portable toilet was there for an extended period of time. The Taxpayer responded by stating the Property is currently served by a dug well that went dry during the months of August, September and October 2002, resulting in no water being available to support the bathroom facilities in the dwelling. For this reason, the Taxpayer had a portable toilet placed on the Property. The Property has an artesian well, however, for financial reasons, it does not have any pumping system and is not hooked up to the dwelling.

With regard to the last issue, the board acknowledges the motivation for the internet posting is not completely clear. The Taxpayer admitted posting the notices, but, asserted it was only for a brief period of time in the spring and summer of 2002. In support of his assertion the Taxpayer submitted a letter (Taxpayer Exhibit 2) from a Mr. Ed Sanders¹ addressed to the TCCAP Fuel Assistance Program. The letter indicated the Taxpayer's postings were an experiment, not extensive and for a relatively short period of time at no expense to the Taxpayer. The Taxpayer further testified his only other posting was on a website for Outdoors New England. This site offered free advertising but was not available to any businesses. This, the

¹ Mr. Sanders has a web site, www.allroutes.to, that presumably contains information on camping opportunities.

Taxpayer testified, was some evidence the Property was not part of a business venture or a commercial campground.

For the reasons stated, the board finds the Town erroneously removed the one-half acre from current use and assessed the LUCT. Consequently for tax year 2003, the land portion of the Property shall be assessed with 14 acres in current use and 1.08 acres not in current use. To the extent these changes would result in a Taxpayer overpayment of 2003 annual property taxes the overpayment shall be refunded with six percent interest from date paid to refund date. If the LUCT has been paid, it shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. The Town shall also abate and refund, if paid, with six percent interest any register of deeds recording fees (RSA 79-A:7, II(c)) or any late payment interest charges (RSA 79-A:7, II(d)). The Town shall also correct any filings at the registry of deeds to accurately reflect the area of the Property classified in current use in accordance with this decision. Additionally, the Town shall correct the assessment-record card by returning the one half acre to current-use status, removing it from the ad valorem section of the assessment-record card and recalculating the assessment accordingly.

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(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.

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 a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Magic Toto, Post Office Box 55, Lancaster, New Hampshire 03584, Taxpayer; and Chairman, Board of Selectmen, Town of Dalton, 741 Dalton Road, Dalton, New Hampshire 03598.

Date: April 13, 2004

Anne M. Stelmach, Deputy Clerk