Edward H. and Marcia J. Wagner

v.

Town of Dunbarton

Docket No.: 19953-03LC

DECISION

The "Taxpayers" appeal, pursuant to RSA 79-A:10, the "Town's" land-use-change tax ("LUCT") of $7,000 (reduced from $9,000 initially) for certain land taken out of current use from a parcel of land designated as Lot 4-8 of Map H3 (the "Property"). The LUCT, as abated, was based on a $70,000 full-value assessment. For the reasons stated below, the appeal for further abatement is granted.

The Taxpayers have the burden of showing, by a preponderance of the evidence, 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 time of removal from current use was actually September 2002, when site work began, one month earlier than the Town ultimately agreed (October 2002);

(2) the amount of acreage removed from current use was 1.83 acres based on a drawing and calculations made by the Taxpayers and submitted to the Town, not 2.28 acres;

(3) land values in the Town were appreciating at a very high rate (approximately 8% per month, as reflected in Table 2 of Taxpayer Exhibit 1);

(4) the Property required construction of a long driveway (approximately 1,000 feet) to access the building site; and

(5) the value of the land taken out of current use for purposes of assessing the LUCT should be no more than $45,000 to $50,000, not $70,000.

The Town argued the LUCT was proper because:

(1) buyers purchase property based on the value of buildable home lots and place far less value on any excess acreage acquired;

(2) upon consideration of the Taxpayers' application to the board of assessors, the Town pushed back the date of change in use from June 17, 2003 to October 29, 2002, resulting in a reduction of the LUCT from $9,000 to $7,000;

(3) the Taxpayers informed the Town they paid $90,000 for the land acquired;

(4) the Town concluded 20 acres would remain undisturbed in current use, leaving a remainder of approximately 2.28 acres as the amount of land taken out of current use; and

(5) the Taxpayers failed to sustain their burden of proof.

Board's Rulings

Based on the evidence, the board finds the LUCT should be abated to $6,640.

The Taxpayers based their appeal on three issues: the time of assessment of the LUCT; the acreage removed from current use; and the value of the acreage removed for assessment of the LUCT. The board will discuss each of these issues below.

With regard to the time issue, the Town's LUCT bill issued on August 27, 2003 was for $9,000, based on a "change in use" date of June 17, 2003. (This amount is 10% of a $90,000

value determination.) After several meetings with the Taxpayers, the Town's board of assessors, by letter dated October 21, 2003, agreed to reduce the LUCT to $7,000, based on a change to "the time frame the lot was disqualified (10/29/02)." They denied the Taxpayers' application for a further abatement, resulting in this appeal.

The Taxpayers indicated that a building permit was issued on October 17, 2002, but argued the actual change of use for the purpose of the LUCT occurred in September 2002 when construction of the driveway and clearing of the building site began. RSA 79-A:7, IV(a) clarifies the operative date for assessment of the LUCT is when "[a]ctual construction begins on the site causing physical changes in the earth, such as building a road to serve existing or planned residential, . . . buildings; . . . or grading the site for present or future construction of buildings . . . ." See also CUB 308.01(a)(1) ("Assessing Full and True Value," which references "[t]he date the actual physical change was begun").

At the hearing, the Town did not dispute the Taxpayers' testimony that these changes began in September 2002. The board finds, pursuant to RSA 79-A:7, IV (a), the LUCT was triggered with the driveway and site work in September 2002. While this effective assessment date is a month earlier, the board finds the Taxpayers failed to prove that changing the date by one additional calendar month (from October 2002 to September 2002) would materially affect the estimated "full and true value" of the Property taken out of current use pursuant to RSA 79-A:7, I.

Turning to the second issue, the acreage removed from current use, the board finds the preponderance of the evidence supports the Taxpayers' position that the actual acreage removed was 1.83 acres, as shown on the sketch and computations supplied to the Town by the Taxpayers and designated as "Exhibit B" to their abatement application. This document was examined and

discussed at some length at the hearing and appears to meet the requirements of a "development plan" as defined in CUB 301.06(b). It was prepared and forwarded to the Town by the Taxpayers, in place of an earlier survey which had showed only one acre would be removed from current use.[1] According to the Taxpayers, the Town expressed dissatisfaction with this document, indicating it was too confining and not likely reflective of actual area being disqualified; this caused the Taxpayers to prepare and submit the revised sketch with an acreage calculation.

The Town's position that 2.28 acres was removed from current use is not supported by any survey, sketch or calculation. The Town's LUCT bill showing this acreage amount is also somewhat at odds with its own assessment records (designated as "Exhibit H" to the Taxpayers' abatement application) which shows a total of 22.38 acres, with 20 acres in current use ("CU") and 2.38 acres not in current use ("NICU").

In light of these facts, and the ongoing need for the Town to maintain a reasonably accurate record of what land has been taken out of current use, the board finds the Taxpayers' revised sketch and acreage calculation provide the best evidence that the amount taken out of

[1] Cf. CUB 302.01(d)(1), which requires taxpayers seeking a current use classification to submit with their (Form A-10) application to the Town a "map or drawing" of the entire parcel that shows "[b]oth current use and non-current use land, adequately identified and oriented to establish its location, and sufficiently accurate to permit computation of acreage." While there appears to be no similar requirement in the current use statute or regulations when land is taken out of current use, considering all the provisions of current use statutes and rules, it would be illogical to conclude a "development plan" could be less accurate than the initial application map.

current use was 1.83 acres. The Town should modify its assessment and other records accordingly to reflect this acreage.[2]

The final issue is the proper basis of valuing the 1.83 acres taken out of current use. The current use statute requires the LUCT be computed "at the rate of 10 percent of the full and true value" of the land removed from current use. RSA 79-A:7. The applicable measure is "the highest and best use of the land" being disqualified from current use. CUB 308.01(b).

The Town's approach of adjusting the $90,000 original assessment to $70,000 simply to reflect assumed appreciation between October 2002 and June 2003 is not satisfactory for several reasons. First, the Taxpayers represented to the Town the entire parcel of 22.83 acres was purchased for $90,000. That was the price agreed upon at the time the purchase and sale agreement was entered into in September 2002, not June 2003 (the date shown on the Town's LUCT bill). While the Taxpayers presented some evidence that prices were rising in the Town in the period from the fall of 2002 until June 2003, they made no claim that the price was overly high (did not reflect market value) when they entered into the agreement to purchase it in September 2002. When a sale is at arm's-length, the sale price "is one of the best indicators of that property's value." Appeal of Lakeshore Estates, 130 N.H. 504, 508-09 (1988) (purchase and sale agreement used to establish fair market value), quoting from Poorvu v. City of Nashua, 118 N.H. 632, 633 (1978).

Second, the LUCT should be imposed only upon the portion of the 22.38 acre parcel that was taken out of current use, not the value of the entire parcel, as is implied by the Town's initial

[2] The board is not persuaded by the Town's assertion at the hearing that the Taxpayers' calculated acreage should be increased somewhat because the actual width of the strip of land where the long driveway is located on the Property is 40 feet. The area cleared for the driveway by the Taxpayers is only 25 feet in width, the measurement used by the Taxpayer in making the 1.83 acre calculations. The board finds the remaining width (while it may generally represent a size recommended for firefighting access purposes) was not actually disturbed by the construction of the Taxpayers' driveway and therefore can reasonably be excluded.

determination and subsequent abatement actions. The Town is correct in assuming buyers place more value on acquiring a buildable home lot, especially where substantial development restrictions are applicable (5-acre minimum lot size and 300-feet minimum frontage), than on the number of additional (excess) acres acquired. Nonetheless, the board finds the latter factor should not be ignored in estimating land values. Thus, while much of the value no doubt is in the land and curtilage taken out of current use for the home (estimated at 1.83 acres, as noted above), some apportionment of the $90,000 purchase price is necessary.

On the other hand, the board cannot agree with the Taxpayers' primary method of estimating the value of the land taken out of current use. That method consists of calculating (as shown in "Exhibit D" to their abatement application) the "Average cost per acre" from seven land sales (varying in size from 0.95 to 12.8 acres and varying in location in the Town and perhaps other attributes) between September 2002 and November 2002 to estimate the "Fair Value of a 5 acre lot" (the Town's minimum lot size) and then making adjustment for three acres not removed from current use ($6,000) to derive an estimated value of approximately $45,000. Averaging sales is a very imperfect way of estimating market value since it ignores the unique characteristics of each property in the sample.

Nor does the board find the Taxpayers' assumption that land was appreciating at the rate of approximately 8% per month (from the limited data in Taxpayer Exhibit 1) realistic or useful. For one thing, the board knows of no municipality in the State, including those with waterfront properties, where appreciation rates of 96% per year (8% x 12) have been experienced. For another, no appreciation adjustment is needed in this appeal since the board finds, as noted above, that the purchase price was established at around the same time (September 2002, in the purchase and sale agreement) as the land was removed from current use.

Instead, the board finds better evidence for estimating value is the sales information for the adjacent Labreque parcel on Tenney Hill Road, which sold in the same time frame and for the same purpose of constructing a single-family home. In effect, the Taxpayers purchased for $90,000 a lot consisting of 22.38 acres (1.83 acres for their home lot and 20.55 acres of excess land). The Labreque parcel on Tenney Hill Road was purchased for $70,000 and consists of five acres.[3] Applying the $20,000 difference in the prices of these two lots to the 17.38 difference in acreage (22.38 – 5 acres) yields approximately $1,150 per excess acre. The market value of the Taxpayers' 20.55 acres left in current use (22.38 – 1.83 = 20.55) is determined to be $23,600 (rounded)($1,150 x 20.55 = $23,632.50).

Employing this approach, the board finds the value of the 1.83 acres taken out of current use to be $66,400 ($90,000 minus $23,600). The Taxpayers are therefore entitled to a further abatement of the LUCT to $6,640. If the LUCT has been paid, the amount paid on the value in excess of $6,640 shall be refunded with interest at six percent per annum from date paid to refund date. The Town is further directed to modify its records accordingly including the lien release form. See RSA 79-A:7, II and CUB 308.03.

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

[3] While there are some differences between these lots, the board finds them to be offsetting in nature. For example, the extra cost of accessing the Property (with a long driveway) is offset by the additional privacy offered by this parcel, the majority of which is situated a good distance from the road.

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

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Paul B. Franklin, Chairman

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Douglas S. Ricard, Member

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Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Edward H. and Marcia J. Wagner, 81 Tenney Hill Road, Dunbarton, New Hampshire 03046, Taxpayers; and Chairman, Board of Selectmen, Town of Dunbarton, 1011 School Street, Dunbarton, New Hampshire 03046.

Date: August 25, 2004

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Anne M. Stelmach, Deputy Clerk