

Jo Anne C. Brideau

v.

Town of Epping

Docket No.: 19963-03LC

DECISION

The “Taxpayer” appealed, pursuant to RSA 79-A:10, the “Town’s” December 10, 2003 land-use-change tax (“LUCT”) of \$2,000, abated to \$200 by the selectmen in March, 2004, with respect to land disqualified from current use on a 10.56-acre lot designated as Map 27, Lot 45-1 (the “Property”). The initial LUCT was based on a \$20,000 full-value assessment for ten acres “disqualified per this assessment” and the March, 2004 abatement by the Town was based on a \$2,000 full-value assessment for one acre. For the reasons stated below, the appeal for further abatement 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. We find the Taxpayer sustained her burden on this issue.

The Taxpayer argued the LUCT was erroneous because:

- (1) no land was taken out of current use when she purchased the Property or thereafter;

- (2) while the Town reduced the original LUCT in response to her abatement application, and correctly concluded nine acres to be “unproductive” wetland, the Town erred in classifying and assessing one acre as “White Pine” forest land;
- (3) the one acre of white pine lies in an area of the Property surrounded by wetland and is inaccessible; and
- (4) no LUCT should have been assessed and the one acre should be correctly classified as unproductive.

The Town argued the LUCT was proper because:

- (1) a 1992 current use map provided to the board delineates one-half acre out of current use and 13 acres in current use at that time;
- (2) after boundary line adjustment(s), tax map corrections and the removal of additional acreage from current use in 2000, the Property still includes nine acres of wetland and one acre of white pine with no indication that the white pine is inaccessible and therefore deserving of treatment as “unproductive” land; and
- (3) the Taxpayer failed to sustain her burden of proof.

Board’s Rulings

Based on the evidence, the board finds the Taxpayer met her burden of proving the Town erred in assessing the LUCT and that it should be further abated. The Taxpayer’s additional challenge to the Town’s classification of one acre as “White Pine” forest land rather than unproductive land is denied, however, for the reasons discussed below.

It appears the Town assessed the LUCT on one acre of “White Pine” forest land because of a mistaken belief regarding whether forest land can be aggregated with other land in order to qualify for current use. As CUB 304.01(b) (2) makes clear, however, the 10 acre minimum

acreage requirement, where it applies to current use land, can be met by “any combination of farm land, forest land or unproductive land.”¹ A combination of nine acres of wetland and one acre of white pine forest land thus meets the minimum acreage requirements for current use and the one acre should not have been subject to a LUCT.

The board further finds, however, that the Taxpayer failed to prove her additional contention that one acre of white pine on the Property should be classified as unproductive wetland and therefore be subject to a lower assessment (\$15 per acre rather than \$128 per acre for white pine, less a 20% recreational adjustment for each).

The board makes these specific findings while recognizing the record is not free of ambiguity regarding several issues, despite a full hearing attended by the Taxpayer and a Town representative (Administrator Steve Fournier) and careful review of an additional document (a 1992 current use map) submitted by the Town on August 5, 2004 at the board’s request.

First, it is unclear why the Town chose to impose an original LUCT of \$2,000 (in a bill dated December 10, 2003), which it then abated to \$200 in March, 2004 (based on a recommendation from its contract assessor/agent, Scott P. Marsh of Municipal Resources, Inc.). Mr. Marsh did not appear at the hearing to testify on behalf of the Town and neither did any of the selectmen who issued the LUCT or approved the abatement.

One difficulty stems from the fact that the record before the board continues to reflect 10 acres should be in current use, whether it is classified as nine acres of “Unproductive” land and one acre of “White Pine” (as shown on the Town’s assessment-record card) or, as the Taxpayer

¹ In addition, as provided in CUB 304.01(b)(5), there is no minimum acreage requirement for “unimproved wetland” and a tract of “any size” can qualify. The Town appears to have recognized the latter point when it granted the abatement in March, 2004, based on a recommendation to the selectmen dated February 27, 2004 from Scott P. Marsh of Municipal Resources, Inc., the Town’s contract assessor. This document states: “wetlands of any size are allowed to be in current use classification.”

argues, the land should be depicted and assessed as a total of 10 acres of unproductive land (based on her belief the one acre of white pine qualifies as inaccessible because it is allegedly surrounded by wetland.) See RSA 79-A:2, XIII defining “unproductive land” to include land “the location of which renders it inaccessible or impractical to harvest agricultural or forest products . . .”; and CUB 304.04 (“Unproductive Land”).

As noted, a tract of land consisting of diverse types (forest land, unproductive land, farm land) can be combined to meet the 10 acre minimum for current use taxation. See RSA 79-A:4, I and CUB 304.01(b), discussed above. The Town’s position would be tenable only if acreage other than the one acre of white pine had been disqualified from current use, but there is nothing in the LUCT nor the Town’s other records reviewed by the board to indicate this was the basis for assessing the LUCT, either originally or as subsequently abated.

The Taxpayer testified she acquired the Property in September, 2002 and placed her manufactured home on an already existing slab in an area of the Property (0.56 acres) that was not then in current use. The Town presented no documentary or other evidence to rebut this testimony.

It remains unclear to the board just what triggered the LUCT bill issued by the Town, since the bill reflects a total of 10 acres of land (with no reference or explanation regarding the additional 0.56 acres). The assessment-record card shows nine acres as “Unproductive” and one acre as “White Pine,” but also shows a 0.56 acre “Building Site,” presumably where the modular home is located, is subject to ad valorem assessment of \$21,300, which the Taxpayer did not appeal. If in fact the 0.56 acre building site was subject to the LUCT, the amount assessed would have been considerably higher, since it should be based on 10 percent of the “full and true value” of the land removed from current use under RSA 79-A:7, I.

The board notes additional confusion engendered by an earlier LUCT bill issued by the Town on May 19, 2000.² The 2000 LUCT bill removed 2.5 acres from 13 acres initially in current use, leaving 10.5 acres (which is roughly the present size of the Property). According to the prior owner (Dick Fisher), the Town's 2000 LUCT bill of \$4,150 was paid, although he believed it to be in error. In his letter dated December 30, 2003 to the selectmen, Mr. Fisher also indicates that the "footprint" for Taxpayer's house "should be out of current use because it was never put in current use." This record provides some evidence that the 0.56 acre building site referred to on the assessment-record card was not in current use at the time the Taxpayer acquired the Property.

Turning to the classification issue, the board finds the Taxpayer failed to prove her contention that the Town should reclassify the one acre of white pine as unproductive. Such a reclassification, if proper, would reduce her current use assessment by only a very minor amount (\$102 eliminated "white pine" assessment offset by \$12 increased "unproductive" land assessment = \$90) and her resulting tax burden by much less.

Based upon the limited evidence presented, however, and the Taxpayer's burden on this issue, the board finds no basis for ordering a reclassification, assuming it would have jurisdiction to do so in this RSA 79-A:10 appeal. Cf. RSA 79-A:9 and RSA 79-A:12. The board has reviewed the 1992 current use map filed by the Town at the board's request on August 5, 2004. This map shows various areas and an "island" which was included in the nine acres designated as "Area #3" classified as wetland ("swamp – flooded land"). The board was advised by the Town that boundary line adjustment(s) or tax map corrections occurred after this map was filed, but the

² Both the 2000 and 2003 LUCT bills apparently refer to the Property, which is now listed as Map 27, Lot 45-1 but, according to a letter to the Town from Dick Fisher, a prior owner, dated December 30, 2003, was previously listed as Map 10, Lot 172.

significant point is that “Area #4” of one and one-half acres is situated well to the east of the island on the map and is described as having “some upland pine growth.” While this area may be subject to some wet conditions also, the map does not support the Taxpayer’s testimony that the one acre of white pine is situated on the “island” surrounded by wetland and therefore is inaccessible. (Because of the board’s finding that the one acre of white pine is not situated on the “island,” it need not address the Taxpayer’s further argument that it should be excluded because of the 100 foot buffer provision contained in CUB 304.04(b).)

Finally, at the close of the hearing the Taxpayer made an oral request for costs, but has not submitted a written request or itemization within the time specified. The board will not award costs in this appeal. See also RSA 71-B:9 (Supp. 2003); and TAX 201.39.

For all of these reasons, the Town is ordered to abate the LUCT of \$200 on the one acre of white pine forest land and remove any liens resulting from imposition of the original or the abated LUCT by the Town. If the LUCT has been paid, the amount paid shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

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

Michele E. LeBrun, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Jo Anne C. Brideau, 36 Hickory Hill Road, Epping, New Hampshire 03042, Taxpayer; Chairman, Board of Selectmen, Town of Epping, 157 Main Street, Epping, New Hampshire 03042; and Current Use Board, c/o Department of Revenue Administration, Post Office Box 457, Concord, New Hampshire 03302.

Date: August 18, 2004

Anne M. Stelmach, Deputy Clerk

Jo Anne C. Brideau

v.

Town of Epping

Docket No.: 19963-03LC

MODIFIED DECISION

The board has reviewed the timely rehearing/reconsideration motion (“Motion”) filed by the “Taxpayer.” The Motion contains additional facts, photographs and a statement that these documents were also served on the “Town.” The Town did not respond to the Motion, which requests reconsideration of the “Decision” dated August 18, 2004 in several respects: namely, reclassification of one acre of current use land on the “Property” and an award of costs. For the reasons stated below, the Motion is granted in part and denied in part without rehearing, pursuant to TAX 201.37(g).

Upon consideration of the additional evidence presented by the Taxpayer, the board finds she has met her burden of establishing that the current use classification of the one acre previously designated as “white pine” by the Town (see Decision at pp. 5-6) should more properly be designated as unproductive wetland. The board finds, based on the Taxpayer’s additional statement and photographs, that the land designated “Area #4,” “upland pine growth”

on the 1992 initial current use application map now meets the current use definition of wetlands due to a change in drainage during the intervening years. The board is mindful that the net effect of this change on the assessment for the year under appeal is quite modest reducing the assessment from \$66,210 to \$66,120 (\$90 for tax year 2003 -- “\$102 eliminated ‘white pine’ assessment offset by \$12 increased ‘unproductive’ land assessment,” id. at p. 5). A more accurate classification of the current use land will, however, also be beneficial in improving the accuracy of the Town’s records. The board finds, on balance and as provided in RSA 541:3 and TAX 201.37(d), “good reason” exists to modify the Decision in this limited respect.

On the other hand, the board does not find the Taxpayer is entitled to any award of costs on this appeal, including her claim for the \$65 filing fee. See TAX 201.39 and Decision, p. 6.

If the 2003 taxes have been paid, the amount paid on the value in excess of \$66,120 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

Any appeal must be by petition to the supreme court filed within thirty (30) days of the date shown below, pursuant to RSA 541:6.

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 a copy of the foregoing Modified Decision has this date been mailed, postage prepaid, to: JoAnne C. Brideau, 36 Hickory Hill Road, Epping, New Hampshire 03042, Taxpayer; Chairman, Board of Selectmen, Town of Epping, 157 Main Street, Epping, New Hampshire 03042; and Current Use Board, c/o Department of Revenue Administration, Post Office Box 457, Concord, New Hampshire 03302.

Date: October 11, 2004

Anne M. Stelmach, Deputy Clerk