Linda and Gary Jacobson

v.

Town of Brookline

Docket No.: 20578-04LC

DECISION

The "Taxpayers" appeal, pursuant to RSA 79-A:10, the "Town's" May 25, 2004 land-use-change tax ("LUCT") of $8,360 on a vacant two-acre lot (the "Property"). The LUCT was based on a $83,600 full-value assessment. For the reasons stated below, the appeal for abatement is denied.

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 failed to meet their burden.

The Taxpayers argued the LUCT was erroneous or excessive because:

(1) the low and moderate income tax relief statute establishes income standards for determining ability to pay and their annual income was below the maximum prescribed in the statute;

(2) they qualified and pay for a mortgage with a subsidy under the federal "Section 8" program which also has income eligibility standards that they meet;

(3) any "person aggrieved" may apply for abatement of the LUCT under RSA 79-A:10; and

(4) they should be granted a complete abatement of the LUCT because of inability to pay.

The Town argued the LUCT was proper because:

(1) the Taxpayers purchased the Property from a family trust and constructed a home on it;

(2) the Property was in current use for a number of years and received the benefit of lower taxation during that time;

(3) the value assigned ($83,600) at the time of the change in use is well supported by the comparables supplied and the rate of appreciation on vacant land is substantial, as also reflected in these comparables;

(4) the Taxpayer received a mortgage for approximately $230,000; and

(5) no basis exists for abating the LUCT due to inability to pay.

Board's Rulings

Based on the evidence, the board denies the Taxpayers' request for an abatement of the LUCT as the Taxpayers failed to show any legal basis for such an abatement.

The Taxpayers' sole argument for requesting an abatement was inability to pay due to low income. The Taxpayers acquired the Property from a related trust (Dunton Family Trust) which had been set up to provide family members the ability to each withdraw a lot from a larger tract on which to build. The two-acre parcel was subdivided from the Dunton Family tract with the Taxpayers being required to cover the survey and subdivision costs but with no payment to the trust for the parcel. The Taxpayers subsequently obtained a Section 8 subsidized mortgage in the total amount of $231,000 which included funds for the LUCT and house construction. The Taxpayers stated the appraisal done by the bank for the subsidized loan estimated the market value of the Property was 160% of the mortgage value.

In requesting an abatement from the Town, the Taxpayers utilized a form (DP-8) designed by the department of revenue administration for receiving low and moderate income homeowners property tax relief applications under RSA 198:57. The Taxpayers argued the information on this form was pertinent to their LUCT appeal inasmuch as it tied the amount of relief to a level of income. We disagree. The board rules the provisions of RSA 198:57 have no bearing on an RSA 79-A:10 LUCT abatement request. RSA 198:57 provides for a refund from the state for qualifying low and moderate income individuals of a portion or all of their RSA 76:3 state education property tax. A LUCT has no state property tax component to it, and thus, the provisions of 198:57 are not applicable in any fashion to an abatement request for LUCT.

The Taxpayers further argued that because RSA 79-A:10 states "[a]ny person aggrieved by the assessment of a land use change tax may . . . apply in writing to the selectmen or assessors for an abatement of the land use change tax," the Taxpayers should be granted an abatement because they were aggrieved due to their inability to pay the tax.

The board notes the similarity in wording between RSA 79-A:10 and the abatement statute for the annual property tax, RSA 76:16, which also uses the phrase "[a]ny person aggrieved by the assessment of a tax . . . ." RSA 76:16 further states the general basis for abatement of an annual property tax to be for "good cause shown." While RSA 76:16 does not explicitly define what constitutes "good cause shown," the supreme court has, to date, established only two bases, disproportionality and poverty/inability to pay, for abating an annual property tax. Barksdale v. Town of Epsom, 136 N.H. 511 (1992); Ansara v. City of Nashua, 118 N.H. 879 (1978); Briggs' Petition, 29 N.H. 547 (1854).

There are no specific statutory criteria or case law that explicitly set out the bases for abating a LUCT. However, inherent in the scheme of assessing a LUCT are two frequent "causes" for abating a LUCT: 1) the value assessed pursuant to RSA 79-A:7 exceeds the property's market value; or 2) the municipality was incorrect in determining that the land was disqualified from current use. An inability to pay has to date never been raised as a basis for a LUCT abatement. Because a LUCT is, in most instances, the result of some active development of a property, most taxpayers have adequate resources to pay for the development including a LUCT. Further, as the supreme court has noted, inherent in the payment of a LUCT is a *quid pro quo* for the reduced taxes paid while the property was in current use. "The LUCT is intended to permit a town to 'recapture some of the taxes it would have received had the land not been in the lower open space tax category.'" Woodview Development Corporation v. Town of Pelham, ___ N.H. ___, No. 2004-607, Slip op. (February 9, 2005) citing Opinion of the Justices, 137 N.H. 270, 275 (1993).

However, even if for argument purposes, inability to pay might be a basis for an abatement of a LUCT, the board finds the Taxpayers have not made a showing under the standards outlined in Ansara of inability to pay the LUCT. In Ansara, the court held an abatement because of poverty/inability to pay can only be granted upon a showing by taxpayers with equity in the property that it would not be "reasonable for them to relocate, refinance, or otherwise obtain additional public assistance." Ansara, 118 N.H. at 881. Here, where the Taxpayers have substantial equity in their Property (due to the gifting of the lot from a related family trust) and where the actual payment of the LUCT was incorporated into a subsidized mortgage, the board finds the Taxpayers fall short of the inability to pay standard enunciated in Ansara.

Last, the Taxpayers presented no evidence that the market value estimate of $83,600 was not a reasonable estimate of the Property's "full and true value." RSA 79-A:7, I. The Town submitted sales which indicated that lots were quickly appreciating in the 2003 to 2004 time period and these sales adequately bracketed the $83,600 assessment.

In summary, the Taxpayers failed to establish any basis that the LUCT should be abated, and thus, the board denies the appeal.

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, <u>not the date this decision is received</u>. 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

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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: Linda and Gary Jacobson, 85 Averill Road, Brookline, New Hampshire 03033, Taxpayers; Chairman, Board of Selectmen, Town of Brookline, Post Office Box 360, Brookline, New Hampshire 03033; Loren J. Martin, Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, New Hampshire 03258, representative for the Town; and Current Use Board, c/o Department of Revenue Administration, Post Office Box 457, Concord, New Hampshire 03302, Interested Party.

Date: May 2, 2005

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Anne M. Stelmach, Clerk

Linda and Gary Jacobson

v.

Town of Brookline

Docket No.: 20578-04LC

ORDER

The board has reviewed the Motion for Rehearing ("Motion") filed by the "Taxpayers" with respect to the May 2, 2005 "Decision." The Motion is denied.

The Taxpayers base their claim for abatement of the land-use-change tax ("LUCT") of $8,360 assessed by the "Town" on "poverty/inability to pay." To the extent the Motion attempts to present additional evidence on this issue, the board's rules require parties to "submit all evidence and present all arguments at the hearing"; in particular, parties "shall not submit new evidence with rehearing motions" without leave of the board.[1] The Taxpayers failed to request leave to present the additional facts and documentary evidence contained in their Motion.

[1] See TAX 201.37(f):

> "[R]ehearing motions shall not be granted to consider evidence previously available to the moving Party but not presented at the original hearing or to consider new arguments that could have been raised at the hearing. Except by Leave of the Board, parties shall not submit new evidence with rehearing motions. Leave shall only be granted when the offering Party has shown the evidence was newly discovered and could not have been discovered with due diligence in time for the hearing and when the new evidence will assist the Board."

Even if this additional evidence is considered, however, the board finds no "good reason" to grant the Motion pursuant to RSA 541:3 and TAX 201.37(d). Several points raised in the Motion will be briefly addressed below.

The Taxpayers appear to recognize the possible applicability of Ansara v. City of Nashua, 118 N.H. 879 (1978) to their poverty/inability to pay arguments. In balancing the equities between a municipality's need to collect tax revenues to fund services and an individual's economic circumstances, Ansara establishes a fairly stringent test: to obtain an abatement when taxpayers "have some equity in their homes, [they] must show that it is not reasonable for them to relocate, refinance, or otherwise obtain additional public assistance." Id. at 881.

As noted in the Decision, the Taxpayers have substantial equity in the "Property." The house was constructed with a mortgage for $231,000, which included payment of the LUCT assessment and covered the home construction costs, but not the value of the land, which was given to them at no cost by a family trust. The Taxpayers admitted the Property was appraised for 160% of the mortgage value, indicating the Property, with the home they constructed on it, has a market value of at least $368,000 and an equity cushion (surplus of value over indebtedness) of $137,000. While there may be financial disincentives to selling the Property and/or limitations on further borrowing against this equity (because of the special, subsidized financing already obtained by the Taxpayers), this does not mean the equity should not be considered when evaluating the Taxpayers' poverty/inability to pay arguments.

The board has also considered the Taxpayers' claim that, "due to the high cost of housing," obtaining comparable housing would be difficult. While this may be true, the poverty/inability to pay grounds for tax abatement is not intended to guarantee a certain style or

level of housing. Neither is the fact the Taxpayers qualify and receive other forms of assistance (including food stamps, free school lunch, electric and fuel assistance, Medicaid and additional health insurance coverage) a sufficient ground for abatement. In Ansara, for example, the claimant was an immigrant with two children receiving federal "AFDC" assistance and these modest welfare payments ($308 per month) were her sole source of income. Id. at 880.

The Taxpayers also claim that having to move would have adverse 'emotional effects' on the children. It is not clear, however, that moving is a necessary outcome from denial of the appeal. As noted above, the LUCT was a tax assessment and has already been paid as part of the mortgage they obtained. (It is conceivable that a LUCT abatement granted at this time might lower their monthly payment obligations slightly, if the Taxpayers used the funds obtained to pay down the mortgage rather than some other purpose. The LUCT, however, represents less than 4% of the total mortgage principal ($8,360/$231,000) and the impact on their mortgage obligations would not be material.)

The board further notes other forms of tax relief may be available to the Taxpayers. They can, if they wish, request from the Town an abatement of their annual property taxes under RSA 76:16 for "for good cause shown." The legislature has also provided for various exemptions and tax deferral provisions in RSA ch. 72 to help homeowners facing various forms of hardship. None of them, however, justify an abatement of the LUCT in the circumstances of this appeal.

Finally, the legislature has not overruled, expressly or by implication, the test for poverty/inability to pay set forth in Ansara; in the Decision, the board applied this test to deny the appeal. As noted in the Decision at page 3, the legislature did prescribe certain income criteria for application of the low and moderate tax relief program under RSA 198:57 with

respect to the RSA 76:3 state education property tax. There is no indication the legislature intended to impose the same criteria on municipalities for granting an abatement under RSA 79-A:12 (the LUCT) or RSA 76:16 (the annual property tax).

Any appeal of the Decision must be by petition to the supreme court filed within thirty days of the date of this Order shown below. See RSA 541:6.

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 Order has this date been mailed, postage prepaid, to: Linda and Gary Jacobson, 85 Averill Road, Brookline, New Hampshire 03033, Taxpayers; Chairman, Board of Selectmen, Town of Brookline, Post Office Box 360, Brookline, New Hampshire 03033; Loren J. Martin, Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, New Hampshire 03258, representative for the Town; and Current Use Board, c/o Department of Revenue Administration, Post Office Box 457, Concord, New Hampshire 03302, Interested Party.

Date: June 17, 2005

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Anne M. Stelmach, Clerk