

Jonathan and Kathleen Sistare

v.

Town of Dublin

Docket No.: 20586-04DE

DECISION

The “Taxpayers” appeal the “Town’s” denial in tax year 2004 of the Taxpayers’ application for a discretionary preservation easement, as provided in RSA ch. 79-D, on 75 Windmill Road, Map 7, Lot 5A (the “Property”). For the reasons stated below, the appeal is denied.

The Taxpayers have the burden of proof in this appeal. Under the statute, the Town’s “denial shall be deemed discretionary and shall not be set aside by the board of tax and land appeals . . . except for bad faith, discrimination, or the application of criteria other than those set forth” in the statute. RSA 79-D:5, II.

The Taxpayers argued they were entitled to the discretionary preservation easement because:

(1) the Town acted with “bad faith” and “discrimination” in denying their application dated April 14, 2004;

- (2) the Taxpayers were “caught by surprise” at the May 24, 2004 meeting, held by the board of selectmen, where the application was considered, because the Taxpayers did not receive any prior notice the selectmen had asked for and received three letters from Town residents which opposed the application until the letters were read at the meeting;
- (3) the Town selectmen refused the Taxpayers’ request to “continue” the May 24, 2005 hearing, but offered them an opportunity to “rebut” the opposition letters in writing;
- (4) the Town granted two other applications for discretionary preservation easements in the same time period (2003-04);
- (5) the Property was acquired in 1999 when the previous owner went bankrupt and the barn and carriage house have been restored and renovated as a dwelling at considerable expense by the Taxpayers;
- (6) the intent of the statute is to provide a ‘tax break’ to allow owners of historic agricultural structures to maintain them and the Taxpayers’ application for a 50% discretionary preservation easement should have been granted; and
- (7) in the alternative, the Town should now be ordered to negotiate “in good faith” with the Taxpayers to establish a preservation easement “percentage satisfactory to both parties.”

The Town argued the denial of a discretionary preservation easement on the Property was proper because:

- (1) the Taxpayers’ application was more complicated than others because it involved converted structures (a barn and carriage house), moved, updated and incorporated into a modernized dwelling of over 6,000 square feet assessed at well over \$500,000 (\$567,900 in tax year 2004);
- (2) because the selectmen did not feel they had sufficient expertise to decide the issue, they requested written input from three qualified residents, two of whom are the current and former

presidents of the Town's Historical Society, and the other is employed as state curator with the New Hampshire Division of Historical Resources;

(3) all three individuals submitted letters in opposition to the Taxpayers' application which contained detailed reasons for denial and these letters were part of the public file available for inspection by the Taxpayers or any other person at any time after they were submitted;

(4) at the selectmen's meeting on May 24, 2004, the three letters were read out loud by the chairman and no one spoke in favor of the application except for one of the Taxpayers;

(5) prior to the close of that meeting, the selectmen gave the Taxpayers, at their request, additional time to respond to the three letters (until Sunday, June 13, 2004), but the Taxpayers did not submit anything until June 14, 2004;

(6) although the selectmen voted to deny the application on June 7, 2004, they were prepared to "reverse" this decision had they been persuaded to do so by the Taxpayers' June 14, 2004 submittal;

(7) the selectmen considered the Taxpayers' June 14, 2004 submittal, but did not change their minds and therefore signed and sent a June 21, 2004 letter denying the application; and

(8) the Taxpayers failed to meet their burden of proof that the Town acted in bad faith or with discrimination in its denial of their discretionary preservation easement application.

Board's Rulings

Based on the evidence presented, the board finds the Taxpayers failed to sustain their burden of proof and their appeal is therefore denied.

The parties appear to agree the standard of review for this appeal is set forth in the Discretionary Preservation Easements statute, RSA ch. 79-D. The scope is quite limited and specific. As noted above, RSA 79-D:5, II expressly provides that the Town's "denial shall be

deemed discretionary and shall not be set aside . . . except for bad faith, discrimination or the application of criteria other than those set forth” in the statute. The Taxpayers argue the Town’s denial should be set aside on the grounds of “bad faith” and “discrimination” but the board is unable to make such findings here.

In Porter v. Town of Sanbornton, 150 N.H. 363 (2003), the supreme court recently considered the issue of bad faith in the context of a municipal tax assessment. In that case, the selectmen were accused of “bad faith” [because they had allegedly imposed a higher (18%) increase in the assessment of certain taxpayers “in retaliation for” a challenge to a prior (14%) proposed increase], but the supreme court held:

We presume that boards act in good faith and in conformity with the requirements of law. . . . Bad faith involves more than mere bad judgment or negligence. . . . Bad faith implies conscious wrongdoing. . . . To carry the heavy burden of proving bad faith in this context, one must demonstrate intent to injure or intent to disregard duties. Cf. Indian Head Nat’l Bank v. Corey, 129 N.H. 83, 87-88 (1986).

Id. at 369 (Other citations omitted).

In this appeal, the board carefully considered the testimony and other evidence presented, including the sequence of events leading to the denial of a discretionary preservation easement by the Town. While the selectmen could have provided the Taxpayers with prior notice of their intention to seek input from historical experts before the May 24, 2004 meeting, they were not required to do so. Applicants who attend a municipal meeting should anticipate and be prepared to respond to opposition, whether in the form of live testimony or written submissions by others who may favor or deny the application. Although the Taxpayers claim to have been ‘caught by

surprise'¹ by the opposition letters, this does not mean the selectmen acted in "bad faith" by considering them.

Similarly, although the selectmen could have waited a week longer to vote on the application, rather than doing so at the June 7, 2004 meeting (and before receiving the Taxpayers' response on June 14, 2004), their vote does not establish bad faith. This is because the meeting to consider and decide whether to grant the application was held on May 24, 2004 and the selectmen could have voted to grant or deny it at that time, rather than taking the issue under submission. The selectmen attending the hearing of this appeal also indicated they were prepared to reconsider the vote if the Taxpayers had presented sufficient reasons for doing so before the selectmen signed and sent the June 21, 2004 denial letter, prepared by the Town's attorney.

The board finds no basis for concluding the denial decision would have changed had the Town waited longer to see if the Taxpayers would submit anything to attempt to rebut the written opinions of the three experts before voting on June 7, 2004. The board notes, in this regard, that the three experts who recommended denial all reside in the Town, expressed familiarity with the history and significance of the Property, as well as other historic structures in the Town, and are knowledgeable in the field of preservation: two are the current and former presidents of the Town's historical society and one is the State Curator with the Division of Historical Resources. The board finds the Town selectmen did not act unreasonably in either seeking or relying upon the written input of these experts. One of the experts noted the Town has 156 buildings listed on the National Register of Historic places and two historic districts. See Taxpayer Exhibit 1, Tab E. This relative abundance of historical structures could have made it less incumbent upon the

¹ The claim of surprise is weakened in this case because one of the Taxpayers (Jonathan Sistare) is an attorney and serves as the administrator for a neighboring town.

selectmen to exercise their discretion to grant a preservation easement on the Property, which, according to this expert, is not eligible for such listing and is not situated within one of the historic districts. Id.

The board finds the procedures followed by the Town's selectmen now being questioned by the Taxpayers do not amount to "conscious wrongdoing" or an "intent to injure or intent to disregard [their] duties," the tests stated in the recent Porter decision quoted above.² The selectmen are also entitled to the contrary presumptions (good faith and conformance with the requirements of law) stated in the same quotation from the Porter decision.

As the supreme court has further noted, the test of whether a municipality has acted in bad faith is an "objective" rather than a "subjective" one. Cf. Treisman v. Town of Bedford, 135 N.H. 573, 575 (1992) (reversing trial court finding of bad faith and award of attorney's fees). When there is a "reasonable basis" for the municipality's decision, a finding of bad faith is unwarranted. Id. Here, the selectmen had a reasonable basis for the specific findings made in their June 21, 2004 letter denying the application for a discretionary preservation easement.³

The Taxpayers also attempted to use the granting of discretionary preservation easements on two other properties in the Town to establish a claim of "discrimination." The board finds the evidence fails to prove this claim. As testified to by the Town selectmen, the preservation easements granted to the "King" barn, forge and woodshed and the "Hammond" barn (described in the documents included in Taxpayer Exhibit 1, Tab I) involved different issues which were

² The Taxpayers' submitted definitions of "bad faith" from several Internet sources, see Taxpayer Exhibit 1, Tab D, have been reviewed and also fail to sustain their position; in brief, the board finds no basis for concluding "[i]ntentional deception, dishonesty, or failure to meet an obligation or duty" or that "dishonesty or fraud" occurred on the part of the Town. Cf. No. 12 of the Town's Request for Findings of Fact and Rulings of Law, infra.

³ The Taxpayers' reliance on Funtown v. Town of Conway, 127 N.H. 312 (1985), is misplaced. In Funtown, the master's finding of "bad faith" was supported by evidence of "delaying tactics" and municipal officials acting in 'dual capacities' to deprive the plaintiff of a building permit. Id. at 315-17. No comparable facts exist here.

more clear-cut and less complicated than those pertaining to the Property.⁴ No opposition to the granting of those easements appears to have been presented, either by qualified experts or by others in the Town. Those applications also dealt with barns that were being preserved for use as barns rather than former barn structures being renovated into residential living space. (See RSA 79-D:2, III.) Thus, the board cannot find the Town applied differing standards amounting to “discrimination” in granting them and denying the Taxpayers’ application.

The board further notes the preservation easement is, on its face, “discretionary” in nature rather than a mandatory right any taxpayer is entitled to receive. The statute creating the easement was first enacted in 2002 and directs the municipality to “weigh the public benefit to be obtained versus the tax revenue to be lost if such an easement is to be granted.” RSA 79-D:5, I. The statute further describes the criteria to be applied to determine public benefit, see RSA 79-D:3, II, and the Taxpayers do not claim the Town ignored the relevant criteria. Even were it inclined to do so, the board does not have the statutory authority to substitute its own judgment for the “discretion” entrusted to the Town to determine whether to grant a preservation easement under RSA ch. 79-D. While the Taxpayers and the Town obviously disagree about the merits of the application, including the application and weight to be given the statutory criteria, such disagreement is not a sufficient ground for granting the appeal or, as requested in the alternative by the Taxpayers, remanding the issue to the Town for further consideration.⁵

⁴ Even if the Town, contrary to the evidence, could somehow be shown to have erred in granting the King and Hammond applications, however, such errors would not necessarily establish the Property should also have been granted a discretionary preservation easement. In a related property tax context, it is well established that the underassessment of others (by mistake or otherwise) does not justify an abatement. Cf. Appeal of Cannata, 129 N.H. 399, 401 (1987).

⁵ As alternative relief, the Taxpayers request the board to order the Town “to negotiate in GOOD FAITH [an easement] percentage that is satisfactory to both parties.” See Taxpayer Exhibit 1, Tab K.

In summary, the Taxpayers failed to prove either bad faith or discrimination in the Town's denial of a discretionary preservation easement for the Property. The appeal is therefore denied, as well as the Taxpayers' request for costs. Cf. TAX 201.39(a). The board has ruled on the Town's Requests for Findings of Fact and Rulings of Law below.

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.

Findings of Fact and Rulings of Law

The "Requests" received from the Town are replicated below, in the form submitted and without any typographical corrections or other changes. The board's responses are in bold face. With respect to the Requests, "neither granted nor denied" generally means one of the following:

- a. the Request contained multiple requests for which a consistent response could not be given;
- b. the Request contained words, especially adjectives or adverbs, that made the request so broad or specific that the request could not be granted or denied;
- c. the Request contained matters not in evidence or not sufficiently supported to grant or deny;

- d. the Request was irrelevant; or
- e. the Request is specifically addressed in the Decision.

1. Jonathan and Kathleen Sistare filed a Discretionary Preservation Easement application with the Town of Dublin Selectmen's office on 15 April, 2004. The application recites that the subject structure is located at 75 Windmill Hill Road in Dublin.

Granted.

2. The subject structure is a remodeled combination of two buildings, one of which was dismantled and moved from Francestown to the Sistare property in Dublin where it was reconstructed, modernized and connected to another structure.

Granted.

3. Prior to the public hearing the Board of Selectmen contacted several Dublin residents who were thought to have special knowledge or expertise relative to historic structures including Paul Tuller, President of the Dublin Historical Society, and Philip Bastedo State Curator, NH Division of Historical Resources.

Granted.

4. The Board of Selectmen through its Town Administrator also contacted the law firm of Orr & Reno and the New Hampshire Division of Historical Resources soliciting information and advice regarding the discretionary easement statute and how the same applies to structures that have been renovated for a different use.

Granted.

5. The Board of Selectmen held a public hearing, pursuant to RSA 79-D on 24 May, 2004 at 7:30 p.m at which time Sistare and others gave testimony.

Granted.

6. At the conclusion of the Public hearing, the Board of Selectmen informed Sistare that he could submit additional memoranda and/or expert opinion documents in support of his application at any time prior to June 13, 2004.

Granted.

7. On June 7, 2004, the Board of Selectmen, voted to deny the Sistare believing that it was their last opportunity to act within the 60 day time limit imposed by RSA 79-D: 5 (I),

Neither granted nor denied.

8. Sistare submitted a letter in support of his application on June 14, 2004.

Granted.

9. By letter of June 21, 2004, the Board of Selectmen informed Sistare that his application for Discretionary Easement was denied by unanimous vote of the Board of Selectmen

Granted.

10. RSA 79-D:5, II provides in part, as follows:

The local governing body's decision may be appealed by using the procedures of either RSA 79-A:9 or 79-A:11 provided, however, that such denial shall be deemed discretionary and shall not be set aside by the board of tax and land appeals or the superior court except for bad faith, discrimination, or the application of criteria other than those set forth in RSA 79-D:3 and paragraph I of this section.

Granted.

11. The sole basis of the Sistare Appeal is that the Board of Selectmen acted in bad faith by soliciting comment and opinion from Dublin residents who have a varying degree of knowledge and expertise with respect to historic structures and RSA 79 D, and that he (Sistare) was caught "off guard."

Denied.

12. “Bad faith” is defined in Blacks Law Dictionary as “...generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive...It contemplates a state of mind affirmatively operating with a furtive design or some motive of interest of ill will.”

Neither granted nor denied.

13. The Board of Selectmen’s purpose in soliciting comment from Dublin residents thought to have expertise with respect to historic structures and the application of RSA 79D was simply to inform themselves with respect to both of these subjects.

Granted.

14. The Board of Selectmen acted in good faith at all times in connection with the Sistare Discretionary Easement Application.

Neither granted nor denied.

15. Sistare had the right and the opportunity to produce expert witnesses or other witnesses on his own behalf in support of his application. He chose not to do so.

Granted.

16. The Board of Selectmen gave Sistare until 13 June, 2004, to submit memoranda or expert opinion in support of his application. Sistare chose not to do so, submitting only his own written rebuttal on 14 June, 2004.

Granted.

17. This Board finds, based upon the testimony of the parties and all of the evidence submitted, that the Board of Selectmen did not act in bad faith, and that the decision of the Board of Selectmen is therefore affirmed.

Granted.

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: Jonathan and Kathleen Sistare, 75 Windmill Hill Road, Dublin, New Hampshire 03444, Taxpayers; Chairman, Board of Selectmen, Town of Dublin, Post Office Box 277, Dublin, New Hampshire 03444; and David Tower, Esq., Tower, Crocker & Mullins, Post Office Box 510, 47 Main Street, Jaffrey, New Hampshire 03452, counsel for the Town.

Date: May 27, 2005

Anne M. Stelmach, Clerk