

Richard Teeter

v.

Town of Deering

Docket No.: 22907-07LC

DECISION

The “Taxpayer” appeals, pursuant to RSA 79-A:10, the “Town’s” 2007 land use change tax (“LUCT”) of \$7,000.00 on a 2.0 acre building lot (the “Property”). The LUCT was based on a \$70,000 full value assessment. For the reasons stated below, the appeal for abatement is granted but only to an amount based on the Town’s recommended assessment of \$68,000.

The Taxpayer has 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 Taxpayer did not carry his burden, but the LUCT assessment is abated to the amount recommended by the Town.

The Taxpayer argued the LUCT was erroneous or excessive because:

(1) the Town’s assessment was billed on 03/01/07, well past the 12 months provided by statute (from when the Taxpayer notified the Town by obtaining a building permit for constructing a residence in September 2005 or when the building inspector reviewed the construction in November 2005); thus, the tax bill was not timely sent and no tax is due;

- (2) invoices from the contractor indicate construction was occurring during the last quarter of 2005;
- (3) the septic site plan was provided to the Town as the basis for the disturbed area and the Town did not indicate any other map or site plan was needed;
- (4) the Taxpayer saw town officials throughout 2006 including inquiring of the tax collector as to why there had not been an assessment for the partially completed dwelling and why no LUCT had been assessed;
- (5) the actual acreage changed was 1.0 to 1.25, not the 2.0 acres assessed by the Town at \$70,000;
- (6) if a LUCT is due, it should be approximately half the \$70,000 assessed for 2.0 acres or \$35,000 per acre; and
- (7) despite a recommendation for abatement, the Town has not granted the abatement or issued a refund.

The Town, represented by Avitar Associates of New England, Inc. (“Avitar”), argued the full value assessment should be reduced to \$68,000 to account for the disturbed area being only 1.0 acre and argued the revised assessment is proper because:

- (1) the LUCT bill is timely because the construction of the dwelling was not “discovered” by Avitar until the new construction was picked up during a site visit by an Avitar employee, Daniel Langille, in January 2007;
- (2) the assessment-record card was “flagged” that a building permit was issued on September 29, 2005, but a visit to the site in February 2006 indicated no construction had begun;

(3) the Taxpayer did not submit a plan depicting the amount of land disturbed and necessary for the house construction and thus, the minimum zoning acreage of 2.0 acres was the basis for the LUCT; and

(4) sales that occurred in 2005 were the basis for Avitar's recommended revised full value assessment of \$68,000.

This appeal was consolidated for hearing with Thomas A. Bouffard v. Deering, Docket No.: 22600-07LC due to the similarity of issues and assessment. Thus, the board has considered all evidence submitted in both appeals.

Board's Rulings

The threshold issue in this appeal is whether the Town's March 1, 2007 LUCT bill was timely issued pursuant to RSA 79-A:7, II(c) and, thus, whether the Taxpayer is liable for a LUCT.

RSA 79-A:7, II(c) states in part:

“Such bill shall be mailed, at the latest, within 12 months of the date upon which the local assessing officials receive written notice of the change of use from the landowner or his agent, or within 12 months of the date the local assessing officials actually discover that the land use change tax is due and payable.”

RSA 79-A:7, I and the related current use rules (Cub 307.01(c)(2); Cub 308.02(a)(1); and Cub 308.03(c)) are clear that the effective date of a LUCT is the date the land no longer qualifies for open space due to physical disturbance to the land for development purposes. See also Frost v. Town of Candia, 118 NH 923 (1978).

Based on the following factual findings and application of the pertinent law, the board rules the Town's March 1, 2007 LUCT bill is timely from when the Town actually “discovered” the new residential construction in January 2007, and thus, the Taxpayer is subject to a LUCT.

On August 22, 2005 the Taxpayer purchased the 13.02 acre lot which had been subdivided from a larger parcel previously enrolled in current use. On September 29, 2005, he obtained a building permit from the Town to construct a single family dwelling. Notice of the issuance of the building permit was entered into the Town's Avitar computer assisted mass appraisal system to "flag" the parcel for review by Avitar to assess any new construction and a LUCT. Construction began on the parcel in October 2005 with an excavator performing site work for the foundation and septic system and with the foundation being poured in December 2005. The timing of the foundation work is documented by the copy of the Taxpayer's general contractor's "job invoice" of January 5, 2006. The Taxpayer also testified the Town's building inspector inspected the foundation installation during that time period and the Town's road agent reviewed the location of the driveway sometime in the final quarter of 2005. During the construction period, the building permit was posted at the driveway entrance along with the contractor's and the mortgage company's signs.

Daniel Langille of Avitar visited the lot sometime in February 2006, did not see any construction and noted on the assessment-record card; "02/06 no start on building; ck 07."

Construction continued on the dwelling through 2006 with it being an enclosed shell on April 1, 2006 based on the Taxpayer's recollection and testimony. The building inspector inspected the building at several stages of its construction in 2006. The Taxpayer at some point in the later half of 2006 inquired of the tax collector as to why no LUCT bill or ad valorem bill for a partially completed dwelling had been issued. He was told the assessments were running behind.

In January 2007, Avitar revisited the property, noticed the dwelling and lacking any site plan submitted by the Taxpayer, based the LUCT assessment of \$70,000 on the minimum lot

size of 2.0 acres. The ensuing LUCT bill was dated March 1, 2007 with a “date of release” being noted as January 1, 2006.

RSA 79-A:7, II(c) provides for two events of equal weight from which the LUCT bill must be mailed within 12 months “at the latest.” The bill must be mailed 12 months either from when “the local assessing officials receive written notice of the change in use” or 12 months from “the date the local assessing officials actually discover that the land use change tax is due and payable.” In construing statutes, the board should first examine the language and, where possible, “ascribe the plain and ordinary meanings to the words used” unless the statute itself suggests otherwise. Appeal of Astro Spectacular, 138 N.H. 298, 300 (1994); Appeal of Campton School Dist., 138 N.H. 267, 269 (1994). Here, the plain reading of the statute places equal weight on either event (“notice” or “actual discovery”) due to the use of the conjunction “or” without any qualification or priority of events. Further, the inclusion of the adverb “actually” before “discover” emphasizes the assessing officials must have actual knowledge that an event has occurred that disqualifies the land from current use, not simply that they should have known or should have discovered a LUCT was due.

This statutory deference to municipalities as to either event triggering the 12 month timeline is supported by the public policy purpose the issuance of a LUCT is intended to fulfill. (The board must read the language at issue in the context of the entire statute and the statutory scheme. Barksdale v. Town of Epsom, 136 N.H. 511, 514 (1992); Great Lakes Aircraft Co. v. City of Claremont, 135 N.H. 270, 277 (1992).) Land that qualifies for current use is assessed at rates substantially lower, in most instances, than market value. When land is developed and no longer qualifies for current use, the 10% tax of its market value is intended to provide municipalities with some recovery of the lower tax revenue received while the land was in

current use. As the supreme court noted in Woodview Development Corp. v. Town of Pelham 152 NH 114, 116 (2005), “[t]he 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.’ Opinion of the Justices, 137 N.H. 270, 275, 627 A.2d 92 (1993).” Thus, allowing these two alternate events to trigger the 12 month billing timeline is intended to allow municipalities to be able to collect LUCTs for the equitable benefit of all the other taxpayers in the taxing jurisdiction.

Moreover, because the actual date of the change in use can be any day of the year (see RSA 79-A:7, I) assessing officials must have actual knowledge of it to be able to assess and bill it within 12 months, similar to the 12 month limitation of RSA 76:14 to correct omissions in the annual assessment of *ad valorem*.¹

In most instances, the notice date and actual discovery date are the same or close. Here, however, the Taxpayer’s written notice was the assessing official’s receipt of the September 29, 2005 issuance of the building permit which was entered onto the assessment-record card and

¹ While not fatal for the assessing of the LUCT because of the later (January 2007) “discovery date”, the lack of noticing the new construction by Mr. Langille on his February 2006 visit resulted in the Town not billing for a 2006 ad valorem assessment on the site not in current use and on the framed shell as of April 1, 2006. The Taxpayer received a 2006 bill only for current use assessment on the 13.02 acres. While the process for alerting (flagging) the contract assessors of new construction appears reasonable, there may be a need for Avitar and the Town officials to communicate better and cross reference building and driveway permits to ensure such lapsing of assessed property does not occur.

given to Avitar employees to follow up on.² Why Mr. Langille did not observe the construction on the site during his February 2006 visit is inexplicable. The Taxpayer submitted clear documentation that, at the very least, the foundation was poured and the septic system was stumped out. The contractor's and mortgage holder's sign along with the building permit were at the entrance to the driveway. Chairman Franklin viewed from Old County Road the Taxpayer's property and other "Mighty Oak" subdivision lots on May 22, 2007 as comparables in two appeals on Old County Road (Maine v. Deering, BTLA Docket # 21111-04PT and Nelson v. Deering, BTLA Docket # 21259-04PT). The residential sites that had been or were in the process of being developed were clearly visible from Old County Road. Consequently, the building permit notice and site visit should have caused Avitar to assess the LUCT at that time. However, the fact it was not does not foreclose on it being assessed and billed within 12 months of the January 2007 date when Mr. Langille revisited the lot and "actually discovered" the disqualifying construction.

As to the amount of the LUCT assessment, the Taxpayer argued if a 2.0 acre house lot was worth \$70,000, then a 1.0 acre house lot was worth only half that or \$35,000. The board finds the Taxpayer's argument is neither supported by any market data nor supported by basic assessment or appraisal methodology. The only market evidence submitted was the six sales Avitar referenced in its abatement recommendation to the Town which both support the Town's

² The building permit certainly provided notice to the Town of impending development and is one of several documents in Cub 301.05 that can provide such notice to assessing officials.

"Cub 301.05 'Development plan' means:

- (a) Any subdivision plat, site plan, or building permit application supporting documents or similar documents required by state law or municipal ordinance and filed with the appropriate officials; or
- (b) A document prepared by the landowner describing his/her intent to build a road, construct buildings, create subdivisions, excavate gravel or otherwise develop land which is classified under current use."

contention of a basic lot or site value of \$70,000 and a minimal value for acreage in excess of what is necessary for building a dwelling. To value the land using a straight line relationship, as argued by the Taxpayer, is not in keeping with market principles and would result in a disproportionate assessment. While acreage (for land) and square footage (for buildings) are often the units of measure and comparison for valuing property, in reality it is the bundle of tangible and intangible rights embodied in the real estate that must be identified and valued. RSA 21:21³ defines real estate as including all tangible and intangible rights associated with real property. Here, the rights to site and build a dwelling are what need to be assessed. Those rights are nearly equally embodied in either a 1.0 acre site or a 2.0 acre site. Thus, the board finds Avitar's recommended full value assessment of \$68,000 for the disturbed area of 1.0 acre is a reasonable estimate of its market value.

The Town shall file a revised A-5 form with the register of deeds reflecting the acreage disqualified by the LUCT is 1.0 acres rather than the 2.0 acres indicated on the LUCT bill sent to the Taxpayer.

Last, while not critical to the resolution of this appeal, because the parties essentially agree now as to the disqualified area, the board observes there is no overt statutory or rule requirement that a taxpayer, when developing a lot as here, must provide a site map to the assessing officials detailing the disturbed area. (We note that accompanying an initial application for current use the applicant must provide a detailed map showing land not in current use and categories of current use land. Cub 302.01(b)(1) and 309.01(b)(1)). While that may be desirable, lacking such a plan, assessing officials must determine, hopefully in cooperation and coordination with the taxpayer, the disturbed area so as to properly assess it rather than

³ RSA 21:21 Land; Real Estate states: "I. The words 'land,' 'lands' or 'real estate' shall include lands, tenements, and hereditaments and all rights thereto and interests therein."

defaulting to the minimum zoning lot size. See Cub 303.02(b). This lack of any stated requirement in the statutes or rules of the process of maintaining or creating these subsequent curtilage carve-outs may result in unclear and insufficient current use records as time progresses. (The board is aware that subdivision plans and non-residential site plans may provide, in many instances, adequate records of the qualifying status of current use land. It is more the situation as here when large re-subdivided current use lots are developed on an individual basis.)

If the LUCT has been paid, the amount paid on the value in excess of \$6,800 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

Dissenting Opinion

I respectfully dissent from the majority's decision regarding the timely issuance of the LUCT bill and would have ruled the Taxpayer was not liable for and the Town was not entitled to any LUCT.

The timing and sequence of the relevant events are not in dispute. The Taxpayer purchased the Property during the summer of 2005. The Property was one of a four lot subdivision and contained approximately 13 acres. The Taxpayer obtained a building permit from the Town in September 2005. After the issuance of the building permit, the Town's assessing office entered the appropriate notation on the Property's assessment-record card and gave it to the Town's contract assessor so a follow up inspection would be performed. In October/November 2005 the Taxpayer performed site work on the Property and poured a concrete foundation for his house. In that same timeframe, the Town's building inspector observed the foundation work for compliance with the Town's building code and had the Town's road agent inspect the driveway access onto Old County Road. After the Town inspected and approved the foundation and driveway, the Taxpayer began construction of the house. In February 2006, Avitar, the Town's contract assessor, sent one of its assessors, Mr. Daniel Langille, to review the status of the Property. Mr. Langille, however, failed to see any

construction taking place on the Property during his visit and wrote “02/06 no start on building; ck 07” on the assessment-record card (Municipality Exhibit No. A).

The Taxpayer submitted copies of two bills from his general contractor dated January 5, 2006 and January 20, 2006 which show work being performed on the Property beginning December 8, 2005. The January 5th bill was for work performed on ten days in December 2005 and totaled \$5,300. It is clear from the testimony and evidence, significant construction activities had taken place before Avitar’s February 2006 review. The Taxpayer testified there are no mailboxes or lot numbers along this portion of Old County Road. In 2005, however, he posted his building permit, his contractor’s sign and a sign from his lending institution at the entrance of his driveway. Further, the Property was the first and only lot of this four lot subdivision to have any construction taking place on it in February 2006. While the four lots are all greater than 10 acres, they are long and narrow with minimal road frontage. Mr. Langille testified he only had a general area map. Even if he was inadvertently looking at one of the abutting lots and did not see any construction, he should have seen the Taxpayer’s construction taking place next door. The trees are barren in February and visibility is much better than would have been the case in July, for instance. The only logical conclusion that can be drawn is Mr. Langille was in the wrong area and did not inspect the correct building lot for some inexplicable reason. Testimony from the Avitar officials at the hearing was the Town was having “staffing issues” during this timeframe. It appears the Town has an adequate process for tracking building permits and issuing land use change taxes when appropriate. As my colleagues note in footnote #2 of the majority’s decision “[t]he building permit certainly provided notice to the Town of impending development and is one of several documents in Cub 301.05 that can provide such notice to assessing officials.” In the instant appeal, I believe this “notice” was the triggering

event to start the 12 month clock ticking for the Town to issue the LUCT bill. I concur fully with my colleagues as to the purpose of the LUCT and recognize this is the only opportunity the Town has to recover some of the tax revenue it would have received if the Property had not been placed in the current use program. I believe, however, each municipality has an obligation to assess and levy each of its taxes correctly. In this case, the Taxpayer, on several occasions in 2006, visited the Town's offices and inquired about the LUCT and subsequent tax bills and was told they "were running behind." I do not believe there is anything more the Taxpayer could or should have done in this case to alert the Town.

In my opinion, the lack of communication and interfacing between some of the Town's departments may have caused part of the problem. Any conversation between the assessors and the building code enforcement and/or highway department personnel would have certainly revealed there was construction taking place on the Property prior to February 2006, the date of Mr. Langille's first visit. Apparently these conversations did not occur.

I would have ruled the Town is not entitled to collect any LUCT because it missed the 12 month statutory time period. I do not believe, as the majority has apparently held, the meaning of the word "or" in the statute [RSA 79-A:7, II(c)] was intended to allow the Town, which acknowledged it received "written notice" from the Taxpayer but erroneously did not go to the correct property for whatever reason, the option to wait until it eventually discovered the ongoing construction more than 12 months later and to then send the LUCT bill. In my opinion, when a municipality receives written notice of imminent construction on a property previously classified in current use, but through lack of due diligence, no matter how unintentional, does not adequately review that property after construction has actually begun, the municipality is precluded from extending the 12 month deadline for issuing the LUCT or starting the 12 month

period some time in the future after the construction is finally discovered. In my opinion, the plain and ordinary meaning of the statute's words indicates that when a municipality receives written notice or actually discovers a property has changed in use, the 12 month timeframe for issuing the LUCT bill begins to run from whichever of the alternative events occurred first.

RSA 79-A:7, II(c) does not include the word "either" which might imply some discretion on the municipality's part to pick the event that would start the 12 month time period. This would conflict with the statute's phrase "at the latest".

Respectfully dissenting;

Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Richard Teeter, 290 Old County Road, Deering, NH 03244, Taxpayer; Chairman, Board of Selectmen, Town of Deering, 762 Deering Center Road, Deering, NH 03244; Christina Murdough, Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258, Representative for the Municipality; and Current Use Board, c/o Department of Revenue Administration, Post Office Box 457, Concord, New Hampshire 03302, Interested Party.

Date: April 22, 2008

Anne M. Stelmach, Clerk