

**Juniper Fells, LLC**

**v.**

**City of Concord**

**Docket Nos.: 23355-07LC/23356-07LC/23357-07LC/23358-07LC**

**DECISION**

The “Taxpayer” appeals, pursuant to RSA 79-A:10, the “City’s” 2007 land use change tax (“LUCT”) of \$10,500.00 each on four lots (the “Properties”):

Map 123/Block 3/Lot 53 – a 1.51 acre lot;

Map 123/Block 3/Lot 55 – a 1.92 acre lot;

Map 123/Block 3/Lot 56 – a 1.42 acre lot; and

Map 123/Block 3/Lot 57 – a 2.26 acre lot.

The LUCT bills were based on a \$105,000.00 full value assessment on each lot and were billed by the City on August 6, 2007 based on an actual date of change in use of September 13, 2006. For the reasons stated below, the appeals for abatement are granted.

An initial issue as to whether the Taxpayer had timely filed abatement applications with the City was subject to a limited hearing held on October 1, 2008 and addressed in the board’s subsequent November 21, 2008 order and the board’s December 19, 2008 order responding to the City’s Motion for Reconsideration. The board found in those orders that the Taxpayer had

timely filed its abatement requests and proceeded to a hearing on the merits of the appeals on March 4, 2009.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the City's LUCT assessments were erroneous or excessive. See Tax 205.06. We find the Taxpayer carried its burden.

The Taxpayer argued the LUCTs were erroneous or excessive because:

- (1) RSA 79-A:7, VI(a) excepts the assessment of a LUCT when "[l]and under current use is taken by eminent domain or any other type of governmental taking" which would result in a disqualification due to physical change or a reduction in acreage under ten (10) acres;
- (2) the City Planning Board's conditional approval of the Phase IV subdivision of Juniper Fells required the Taxpayer to deed the open space land of 14.52 acres to the City and to annex the adjoining Parcel A of 4.91 acres to the undeveloped Phase III of Juniper Fells; these conditions were coerced and equate to a "governmental taking" as provided for by RSA 79-A:7, VI(a); and
- (3) the City's assessed value of \$105,000 is excessive for the lots given their quality and lack of view and appear to be based on comparables utilized by the City that are superior in both features.

The City argued the LUCTs were proper because:

- (1) the conditions the Planning Board placed on the Juniper Fells Phase IV subdivision are not "governmental takings" but are the result of agreements reached with the Taxpayer during the subdivision review and approval process;
- (2) to the extent the Taxpayer believed such conditions were onerous and resulted in a "governmental taking", the Taxpayer is precluded from raising them as a defense in the LUCT appeals by the principle of res judicata/collateral estoppel as the Taxpayer did not challenge and appeal the Planning Board's conditional approval;

- (3) the Taxpayer's deeding of the open space area in August, 2006 (recorded at the Merrimack County Registry of Deeds on September 13, 2006) resulted in there being less than ten (10) contiguous acres in Phase IV, thus triggering the assessment of the LUCTs;
- (4) even if the transfer of the open space land to the City in the fall of 2006 was not an event triggering the LUCTs, under the supreme court's ruling in Formula Dev. Corp. v. Town of Chester, 156 N.H. 177 (2007), the Taxpayer's construction of Swan Circle, the road accessing the five (5) clustered lots of Phase IV in the spring of 2007 would have disqualified all the acreage of Phase IV from current use;
- (5) the phrase "any other type of governmental taking" contained in RSA 79-A:7, VI(a) does not relate to conditions of a subdivision approval such as what occurred for Phase IV of Juniper Fells, but rather relates to land taken by government under the threat of eminent domain but without the condemnor instituting the condemnation process as outlined in RSA ch. 498-A;
- (6) if the Taxpayer believed the conditions of the subdivision approval resulted in a taking, it needed to file a timely appeal of the subdivision approval to challenge such conditions; and
- (7) the Taxpayer failed to present any market value evidence to carry its burden of showing the City's assessment of \$105,000 per lot was excessive.

### **Board's Rulings**

The four lots subject to the LUCTs are part of a five (5) lot cluster subdivision known as Juniper Fells Phase IV. In March, 2006 the Concord Planning Board approved the cluster subdivision with a number of conditions including the condition that 14.52 acres of open space land be conveyed to the City. Another condition required an adjoining 4.91 acre parcel, identified as Parcel A on Municipality Exhibit A, be temporarily annexed to the adjoining lot owned by Juniper Fells, also known as Juniper Fells Phase III, which was involved in litigation with the City at the time of the Phase IV approval. When the Taxpayer conveyed the deed to the

14.52 acre open space parcel to the City, and recorded in October, 2006, the City determined the remaining four (4) lots owned by Juniper Fells were less than ten (10) contiguous acres and, thus, assessed the LUCTs under appeal.

The Taxpayer's primary argument is the conditions contained in the March, 2006 approval of Phase IV result in a "taking" that would except the land from current use assessment pursuant to RSA 79-A:7, VI(a).

RSA 79-A:7, VI. For purposes of this section, land use shall not be considered changed and the land use change tax shall not be assessed when:  
(a) Land under current use is taken by eminent domain or any other type of governmental taking which would cause the use change penalty to be invoked because, by reason of an actual physical change or by reason of size, the site no longer conforms to criteria established by the board under RSA 79-A:4, I.  
(Emphasis added.)

The Taxpayer also argued if the City had not required the open space land to be deeded to the City but rather that it remain as open space land held in common as undivided interests by the five (5) benefited lots, then the LUCTs would not be due until the lots were either sold or built upon. Further, the Taxpayer made the argument that if Parcel A had not been required by the City to be appended to Phase III, so the Phase III parcel would have adequate frontage as a stand-alone lot, then that additional acreage would have been available for Phase IV development and would have delayed the assessment of the LUCTs until the lots were sold or developed.

For the reasons that follow, the board does not agree with the Taxpayer's assertion that the City's Planning Board conditions resulted in a "taking" that would except the four (4) lots from LUCTs.

The pivotal issue in these appeals is what is meant in RSA 79-A:7, VI(a) by the phrase "or any other type of governmental taking". Attorney Waugh, on behalf of the City, argued it

meant land acquired under threat of condemnation while Attorney Sullivan, for the Taxpayer, argued it related to “governmental actions” impacting the property in question.

In construing statutes, the board must 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 (1984); and Appeal of Campton School Dist., 138 N.H. 267, 269 (1994).

The board searched for any New Hampshire case law or prior board decisions that addressed this issue in the context of RSA 79-A:7, VI(a), but found none. However, Black’s Law Dictionary, 5<sup>th</sup> ed. (1979) in part defines “take” or “taking” as:

Property may be deemed “taken” within the meaning of these constitutional provisions when it is totally destroyed or rendered valueless, or when it is damaged by a public use in connection with an actual taking by the exercise of eminent domain, or when there is interference with use of property to owner’s prejudice, with resulting diminution in value thereof. “Taking” of property within Constitution is not restricted to mere change of physical possession but includes permanent or temporary deprivation of use to owner if such deprivation amounts to abridgment or destruction by reason of actions of state of lawful rights of individual to possession, use or enjoyment of his land.

The board also researched New Hampshire case law and found an extensive series of cases relating to when land use ordinances are unconstitutional and result in a “taking” by their application. See e.g., Gonya v. Comm’r, N.H. Ins. Dep’t, 153 N.H. 521 (2006); Bacon v. Town of Enfield, 150 N.H. 468 (2004); Torromeo v. Town of Fremont, 148 N.H. 640 (2002) and the cases cited within; J.E.D. Assoc’s, Inc. v. Town of Atkinson, 121 N.H. 581 (1981). See also Peter J. Loughlin, New Hampshire Practice, Land Use, Planning and Zoning, vol. 15, 26-31 (3<sup>rd</sup> ed.).

Based on this review of the plain and ordinary meaning of the word “taking” and the case law referenced above, the board finds the phrase in RSA 79-A:7, VI(a) “or any other type of governmental taking” could include property taken under threat of condemnation, as argued by

the City, but could also pertain to land “taken” as a result of the application of an unconstitutional provision of a land use ordinance. Applying this meaning of the term “governmental taking”, the board finds the facts in these appeals do not warrant delaying the assessment of the LUCTs as asserted by the Taxpayer.

First, no evidence was submitted that the Planning Board’s condition requiring transfer of the 14.52 acre open space parcel to the City was done under any threat of RSA ch. 498-A eminent domain condemnation action.

Second, even if any actions taken by the City’s conditional approval of Phase IV could be claimed to be unconstitutional and thus result in a “taking” of the Property, the Taxpayer is prevented, as the City correctly argues, by the principle of collateral estoppel from raising such a challenge three years later in the litigation of the LUCTs when the Taxpayer did not raise the claim by appealing the Planning Board’s conditional approval of Juniper Fells Phase IV subdivision in March of 2006. Town of Auburn v. McEvoy, 131 N.H. 383 (1988) and Guy v. Town of Temple, 157 N.H. 642, 650 (2008). RSA 677:15 requires “any persons aggrieved by any decision of the planning board concerning a plat or subdivision may present to the superior court a petition” within thirty (30) days of the planning board vote on the application. The Taxpayer did not file any appeal of the Planning Board’s conditional approval and thus is barred from now raising it as a basis for claiming a “taking” had occurred.

Furthermore, the board agrees with the City that even if the transfer of the open space land did not trigger the issuance of the LUCTs, the four (4) lots would have been disqualified from current use six to eight months later in the spring of 2007 when, as the testimony indicated, road construction began on Swan Circle. Because Juniper Fells Phase IV was a cluster type of development and the 14.52 acres of open space land was necessary to meet the density

requirements under the City's subdivision regulations, the supreme court's holdings in Formula Dev. Corp. v. Town of Chester, 156 N.H. 177 (2007) would require all of the land of Phase IV to be disqualified from current use at the time the construction of the road was initiated.<sup>1</sup> Consequently, any conceivable potential delay in the assessment of the LUCTs was minimal and unlikely to significantly affect the valuation of the Properties.

The board finds the minimal testimony and evidence submitted relative to the retail value of the lots by the Taxpayer was so inconclusive that the Taxpayer is unable to carry its burden. Mr. Mullaney, the principal of Juniper Fells, LLC, testified at one point he had no real evidence of value and could not testify about the Properties' market value. Although Mr. Mullaney did make some comparative qualitative comments relative to the four (4) lots under appeal and the comparables that he asserts the City used to derive its assessments, no evidence was presented as to the City's comparables or any definitive evidence as to the quality of the lots under appeal or that of the comparables. Further, the board is unable to give any weight to the testimony of Mr. Mullaney that the fifth lot, which had been transferred to Juniper Fells Builders for \$81,000, was an arm's-length transaction. Mr. Mullaney testified that he held half interest in Juniper Fells Builders along with a contractor and, thus, the transfer of the lot from Juniper Fells, LLC, where Mr. Mullaney has sole interest, to an entity where he has half interest certainly is questionable as an arm's-length transaction. See Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253 (1994) (trial court has discretion to evaluate the evidence surrounding a sale in determining whether such sale should be given weight in determining market value).

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<sup>1</sup> The Taxpayer further argued the open space land could have been held in common as undivided interests by the five (5) lots of Juniper Fells Phase IV and thus would delay the assessment of the LUCT until such lots were either built on or sold. The supreme court was very clear in Formula that current use rules 307.02 and 307.03, which allowed such delayed assessment of lots where the open space was held as undivided common interest, was *ultra vires* because RSA 79-A:7, V(b) is clear and the scheme envisioned by the current use rules was not authorized by statute.

The Taxpayer did include some closing documents with his appeal of some lots in the vicinity that he had some ownership interest at one time. However, again, the testimony and evidence relative to the comparability of those lots and any discount for bulk sale of the lots was inconclusive and did not carry the Taxpayer's burden. In brief, as a real estate broker and developer, Mr. Mullaney should have been able to provide significantly more probative market value evidence than the sparse evidence and comments presented at hearing.

Consequently, the board finds no evidence was submitted to show the City's retail value for the lots of \$105,000, the basis for the LUCTs, was in error.

However, the board concludes the \$105,000 retail value, without some adjustment for the lack of "betterments" (road and utilities) is not the correct market value for assessing the LUCT as of the date of change (that being either when the Taxpayer conveyed the open space parcel to the City in the fall of 2006 or the spring of 2007 when the construction of Swan Circle began).

RSA 79-A:7, I states that the LUCT shall be "10% of the full and true value..." of the property at the time the land is disqualified from current use. At the time of disqualification (either the fall of 2006 or the spring of 2007) Swan Circle and the associated utilities had not been constructed and thus the lots were not at their retail marketing state. The challenge in properly assessing the LUCTs is to attempt to estimate the value of the lots without access and utilities being provided to the lots. Such improvements are defined as "betterments" at Cub 301.01. "Betterment" means the installation or construction of improvements which influence the value of land such as (a) Roads; (b) Water lines; (c) Sewage lines; (d) Utility lines; or (e) Other physical improvements." Further, Cub 308.02(b) states "[t]he full and true value of the land being disqualified pursuant to RSA 79-A:7, shall be based upon the highest and best use of the land, including the value of all betterments to the land." See also Woodview Dev. Corp. v. Town of Pelham, 152 N.H. 114 (2005) and Appeal of Town of Hollis, 126 N.H. 230 (1985).

Because the highest and best use of the Properties (new lots available for residential construction) had not yet been realized due to the further investment necessary of installing the road and utilities to make them ready for marketing, the City's LUCTs exceed their "full and true value" at the time of change. See 590 Realty Co., Ltd. v. City of Keene, 122 N.H. 284, 287 (1982); and Public Service Co. v. New Hampton, 101 N.H. 142, 148 (1957). (In determining taxable value whether for assessment of an annual property tax or for a LUCT, the transmissible value, as of the assessment date, is material in determination of the assessment).

Despite there being no evidence or arguments submitted on this issue, the board has broad authority to correct assessments that are not done in accordance with the statutes, Court rules and case law cited above so as to be proportional to market value. See RSA 71-B:1; RSA 71-B:16; and Appeal of Wood Flour, Inc., 121 N.H. 991 (1981) Further, as a specialized tribunal created by the legislature to resolve appeals involving valuation issues (property tax and eminent domain), the board has de novo authority (RSA 71-B:11) to review all the evidence submitted and to perform its own investigation in resolving the matters brought before it. In doing so, the board must employ its statutorily countenanced ability to utilize its "experience, technical competence and specialized knowledge in evaluating the evidence before it." RSA 541-A:33, VI. In fact, what the board does in the following paragraph is nothing more than what the City should have done when initially assessing the LUCTs to ensure they were compliant with the law and proportional.

To determine the appropriate adjustment to the retail lot value utilized by the City, the board began by viewing, on its own, Swan Circle. Based on this view and the plans submitted (Municipality Exhibit A), the board determined the "betterments" were comprised of a paved cul-de-sac road approximately 450 to 500 feet long with granite curbing, catch basins and underground storm drainage and underground electric and telephone utilities. The board

reviewed Marshall Valuation Service, a recognized source of replacement cost estimates, and estimated the cost of such improvements to be in the \$225 to \$275 per lineal foot range. See Marshall Valuation, section C, “subdivision costs”. Applying these costs to Swan Circle results in an approximate reduction of the retail value by 25% or an estimated value of the lots at the time of date of change of approximately \$80,000 (rounded).

Based on this analysis, the board orders an abatement of the LUCTs to \$8,000 for each of the four (4) lots.

If the taxes have been paid, the amount paid in excess of the value ordered above 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

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Paul B. Franklin, Chairman

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Michele E. LeBrun, Member

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Douglas S. Ricard, Member

**Certification**

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Eugene F. Sullivan, III, Esq., 11 South Street, Concord, NH 03301, counsel for the Taxpayer; Chairman, Board of Assessors, City of Concord, 41 Green Street, Concord, NH 03301; H. Bernard Waugh, Jr., Esq., Gardner, Fulton & Waugh, PLLC, 78 Bank Street, Lebanon, NH 03766, counsel for the City; and Current Use Board, c/o Department of Revenue Administration, 109 Pleasant Street, Concord, New Hampshire 03301, Interested Party.

Date: April 15, 2009

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Anne M. Stelmach, Clerk