

Charles D. Kalil, Charles W. Kalil and Brenda Kalil

v.

Town of Bartlett

Docket No.: 23942-08CU

DECISION

The “Taxpayers” appeal, pursuant to RSA 79-A:9, the “Town’s” May 29, 2008 denial of the Taxpayer’s application for current use (“CU”) assessment on 30.51 acres (“Requested Acreage”) of a parcel with a total acreage of 41.9 acres identified on the Town tax map as Map 6WSTSD/Lot 268L00 (the “Property”). For the reasons stated below, the appeal is denied.

The Taxpayers have the burden of showing, by a preponderance of the evidence, the Town erred in denying their application for CU. See RSA 79-A:9; and Tax 206.05. We find the Taxpayers failed to prove the Town’s denial was in error.

The Taxpayers, represented by Charles W. Kalil, argued the Town erred in denying the CU application because:

- (1) the Property (known as the Old Hill Farm) has had the same ownership for a long time (since 1983), with the only change being the addition of Mr. Kalil’s son, and has been used as a fish and game farm, with the necessary fish and game and agriculture departments approvals;
- (2) a condominium subdivision plan of 12 lots was applied for and was approved by the Bartlett Planning Board on September 19, 2006 with the approved condominium plat recorded at the Carroll County Registry of Deeds on September 21, 2006;

(3) the Taxpayers applied to put the Requested Acreage in CU on April 8, 2008 and were denied by the Town in a letter dated May 29, 2008;

(4) the Property did not receive all the necessary approvals because the Selectmen, rather than the Planning Board, signed the road construction plans (Taxpayer Exhibit No. 5);

(5) the Formula Development Corp. v. Town of Chester, 156 N.H. 177 (2007) (“Formula”) case is not applicable to this appeal because the land use change tax in Formula was due to sale of the property; and

(6) the areas shown on Taxpayer Exhibit No. 4 indicate sufficient non-curtilage land to qualify for CU.

The Town argued its denial of the CU application was proper because:

(1) a department of revenue administration (“DRA”) employee, Mary Pinkham Langer, who is a certified New Hampshire assessor, assisted the Town in reviewing the CU application;

(2) she determined the Requested Acreage did not qualify for CU pursuant to RSA 79-A:7, V(b) and the Town selectmen agreed with this conclusion;

(3) the Taxpayers received a building permit and construction occurred prior to presentation of the subdivision plan approval;

(4) RSA 79-A:7, V(b) and Formula support the Town’s denial of the CU application;

(5) RSA 79-A:7, V(b) does not prescribe that all approvals must be received before land is removed from CU;

(6) road construction work (confirmed by an engineering report dated October 17, 2007 in Municipality Exhibit B) occurred subsequent to the Town’s approval of the subdivision;

(7) the type of animal husbandry activities engaged in by the Taxpayers on the land do not fit the statutory definition in RSA 79-A:2, VI or any of the categories of “Farm Land” activity listed in CUB 304.02, the applicable current use board regulation; and

(8) the selectmen acted in good faith in denying the CU application and the denial complies with the law.

Board's Rulings

For the reasons that follow, the board finds the Taxpayers did not carry their burden of showing the Town erred in denying their 2008 CU application.

Summary of Facts

The parties generally agree to the facts. What few exceptions exist to this general agreement are noted in the following summary of the relevant facts.

The Taxpayers own 41.9 acres of a generally triangular configuration bounded on the west by West Side Road and on the east by the Saco River (see Municipality Exhibit E and Taxpayer Exhibit No. 4.) At the time of the Taxpayers' CU application, the Property was improved with three dwellings owned by family members, the latest of which was built in 2006 and subsequently became encompassed in Unit 1 of the condominium subdivision shown on Taxpayer Exhibit No. 4. The two earlier houses were encompassed by Unit 3 and Unit 6 shown on the condominium plan with various other outbuildings utilized in the Taxpayers' agricultural enterprises also shown on Taxpayer Exhibit No. 4.

Beginning in February of 2006, and culminating in the Planning Board's approval on September 19, 2006, the Taxpayers sought and received approval for a twelve condominium subdivision of the Property. The subdivision plat, after approval by the Planning Board on September 19, 2006, was recorded at the Carroll County Registry of Deeds on September 21, 2006. As part of the follow-up to the subdivision approval, the Taxpayers signed an engineering review agreement with the Town dated November 14, 2006 (see Municipality Exhibit B). Several site visits by the Town's engineer ensued in 2007 with a report dated October 17, 2007

indicating some additional river gravel had been placed by the owners adjacent to West Side Road and in one internal area of the existing driveways.

At the hearing, the Taxpayers disagreed with the Town that all final approvals had been obtained because they asserted it was not the Selectmen's authority to approve the road plan, citing a recent April 7, 2008 Carroll County Superior Court Order in Red River Property Development, LLC v. Town of Bartlett, Docket No. 06-E-157:163 (Taxpayer Exhibit No. 1). The Town disagreed, arguing the Red River Order was not binding precedent, and therefore did not impact on the propriety of the road plan being approved by the Selectmen.

Board's Findings

The board agrees with the Town's observation that there are no statutory provisions or parameters that explicitly determine the eligibility of the Property for CU assessment given the Property's partially improved state and subdivision as a twelve "unit" condominium subject to the Town of Bartlett's development density requirements. However, by applying the logic of the provisions of RSA 79-A:7, which relate to the disqualification of land and the assessment of a land use change tax, and Formula, the board concludes the Requested Acreage is not eligible for CU.

RSA 79-A:7, V, which relates to the amount of land subject to a land use change tax, states, in part:

[O]nly the number of acres on which an actual physical change has taken place... and land not physically changed shall remain under current use assessment, except as follows:

(a) When a road is constructed or other utilities installed pursuant to a development plan which has received all necessary local, state or federal approvals, all lots or building sites, including roads and utilities, shown on the plan and served by such road or utilities shall be considered changed in use, with the exception of any lot or site, or combination of adjacent lots or sites under the same ownership, large enough to remain qualified for current use assessment under the completed development plan; provided, however, that if any physical changes are made to the land prior to the issuance of any required local, state or federal permit or approval, or if such changes otherwise violate any local, state or

federal law, ordinance or rule, the local assessing officials may delay the assessment of the land use change tax until any and all required permits or approvals have been secured, or illegal actions remedied, and may base the land use change tax assessed under RSA 79-A:7 upon the land's full and true value at that later time.

(b) When land, though not physically changed, is used in the satisfaction of density, setback, or other local, state or federal requirements as part of a contiguous development site, such land shall be considered changed in use at the time the development site is changed in use.

As discussed extensively in Formula, the court noted sub-paragraphs (a) and (b) are separated by a "period" and, thus, stand independently of each other. We find sub-paragraph (b) has bearing in this instance as the Taxpayers have obtained a condominium approval from the Town in which certain areas of the land, while perhaps not physically changed, have been set aside and designated as open space so as to satisfy density requirements of the Town's Zoning Ordinance for the twelve approved condominium units. Through this common scheme of development (condominium subdivision with the twelve lots having shared interest in the designated common land), the Property is now a "contiguous development site" where, at the time any disqualifying construction occurs (see RSA 79-A:7, IV), the entire "contiguous development site" is not eligible for CU assessment. Because the Property contains pre-existing improvements (three dwellings, various outbuildings and various driveways/roads), the very existence of such improvements, now embodied in a condominium subdivision where the unit sizes and open space are predicated upon zoning density requirements, causes the entire Property or "contiguous development site" to be ineligible for CU.

This is consistent, albeit with an inverse perspective, with the conclusion in Formula that the initiation of the construction of such improvements on "undeveloped or unimproved land"¹

¹ Cub 301.09 "Undeveloped land" means any land which is not used for residential, commercial, or industrial purposes, other than the growing of farm and forest products.

Cub 301.10 "Unimproved land" means any land, left in its natural state, which is devoid of structures or other improvements.

that has been subdivided as a condominium (and thus is a “contiguous development site” with the inextricable density relationship of the unit lot sizes and the common open space land) results in a land use change tax being assessed upon the entire tract of land. As noted in Formula, 156 N.H. at 180 “[t]he plain language of the statute provides that where, as here, a portion of the site being developed is reserved as open space to satisfy local land use requirements, then ... the property, constituting the entire development site, comes out of current use all at once. . . .”

(Emphasis added.) In addition to the existing improvements disqualifying the Requested Acreage from CU, the furtherance of the development plan, as noted in the October 17, 2007 engineering plan by the placement of gravel in conformity with the general internal road scheme of the improved condominium plan, also disqualifies the Requested Acreage from CU.

The board disagrees with the Taxpayers’ interpretation of Formula and their assertion that Cub 307.03² is applicable in this instance. The court’s holding in Formula of applying a land use change tax to the entire parcel did not hinge upon the sale of the parcel but rather the fact that it was a condominium development that contained open space necessary to satisfy the density requirements of the local zoning ordinance and thus constituted a “contiguous development site”. As the court noted in Formula, the provisions of Cub 307.03 are not controlling because they are not consistent with the straightforward reading of RSA 79-A:7, V and, thus, it was *ultra vires* or “beyond the powers” of the current use board to enact such a rule. In addition, the board finds

² Cub 307.03 Condominium Developments.

(a) In the case of a condominium development, land physically changed to accommodate the construction of a building(s), curtilage and infrastructure shall be removed from current use along with the amount of open space land needed to support that building(s) until such time there is no longer 10 qualifying acres.

(b) The amount of open space land needed to support the building(s) in (a) above, shall be the percentage interest that the building(s) represents in the entire project.

(c) The percentage of ownership interest in the condominium declaration language shall be used to calculate the amount of open space land in (b) above.

the Taxpayers' reliance on the Red River Order to be misplaced because RSA 79-A:7, V(a) is not applicable to this ruling.

In brief, it would be inconsistent with the legal logic set forth in Formula to grant CU on the Requested Acreage when it is part of a "contiguous development site" subject to condominium approval which is predicated on certain open space land necessary to meet density requirements of such approval and when such "contiguous development site" contains disqualifying construction. Consequently, the board upholds the Town's denial of the Taxpayers' 2008 CU application and denies the Taxpayers' appeal.

The "Requests" received from the Taxpayers and 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, "nether 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 overly broad or narrow so 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.

TAXPAYERS' FINDING OF THE FACTS

Prior to sub-division approval dated Sept. 19, 2006

1. A test pit was done on our property of 41.9 acre farm land to apply for NH State Septic Approval for a 5 bedroom house on West Side Road, Bartlett, NH, Map 6WSTRD, parcel 268L00, and the test pit was inspected by the Bartlett health officer on June 25, 2004.

Neither granted nor denied.

2. The Kalil's received construction approval for a 5 bedroom septic system from the State

of NH DES #CA2006079078 dated March 3, 2006.

Granted.

3. The Kalil's applied for a building permit from the Town of Bartlett to build a 5 bedroom house on the 41.9 acres dated March 30, 2006.

Granted.

4. The Town of Bartlett Selectmen told the Kalil's they would have to get a notary's letter stating they would not sell the house until they receive sub-division approval.

Granted.

5. The Kalil's sent to the Selectmen the notary letter on April 10, 2006.

Granted.

6. The Kalil's received their building permit #4737 to build a 5 bedroom house on their 41.9 acre lot on West Side Road, Bartlett, NH. Permit was signed by Selectman Gene Chandler on May 8, 2006, prior to sub-division approval.

Granted.

7. Four months eleven days later we received our sub-division approval for a 12 unit condo lot on the 41.9 acres signed by the Bartlett Planning Board and recorded on September 19, 2006 in the Carroll County Registry of Deeds.

Neither granted nor denied.

8. The Bartlett Planning Board did not approve of our road plan which is called Kalil's Way. We were told we would have to get approval for the road plan from the Selectmen.

Neither granted nor denied.

9. The Bartlett Selectmen, finally three months later, all three Selectmen approved and signed the plan on December 22, 2006.

Neither granted nor denied.

10. On April 7, 2008 the NH Superior Court [issued]

Red River Property Development LLC
V
Town of Bartlett and Board of Selectmen
Docket No. 06-E-157:163
ORDER

The Bartlett Selectmen had no authority to approve or sign subdivisions for streets or roads. Only the Bartlett Planning Board has the authority. Therefore, Kalil's road plan signed on December 22, 2006 by the three selectmen is not legal to date, it was never signed by the Bartlett Planning Board to this date. As of December 2008 there is no need for a road plan as the lot was resub-divided into six lots and no new street is needed.

To the extent this paragraph is intended to be a request, the board responds: Neither granted nor denied.

11. On March 21, 2008, Kalil's recorded the Declaration in Carroll County Registry of Deeds in Book 2699, Page 986.

Granted.

12. On April 8, 2008, Kalil's applied to the Town of Bartlett to put part of their farmland in current use.

Granted.

13. On May 29, 2008 Kalil received a letter from the Town of Bartlett Selectmen denying us from putting part of our land in current use.

Granted.

FACTS

14. The fact is back in April 7, 2008 the Bartlett Selectmen knew that all sub-division road or street plans they approved and signed are not legal. That includes the Kalil's road plan which was only signed by the selectmen. Yet, they brushed it off and refused to put Kalil's property in current use as stated in their letter dated May 29, 2008.

Neither granted nor denied.

15. The fact is that on September 20, 2007 the Bartlett selectmen knew of the NH Supreme Court Case, Rockingham No. 2006-515, Clinton Reality Trust (V) Town of Chester, page (3), that the Kalil's did not have all of their legal approvals from the Town of Bartlett. Kalil's road plan is still not approved or signed by the Bartlett Planning Board, yet they brushed it off and refused to put our property in current use, which, we the Kail's were legally entitled to. See page 5 V (a) - must receive all necessary and legal State and Federal approvals. Kalil did not receive all approvals and we are still the same owners of the farm to this date January 2009.

Neither granted nor denied.

16. The above appears to be an intentional act by the Bartlett Selectmen to prevent the Kalil's from putting part of their farm in current use under farm land.

Neither granted nor denied.

17. To the best of my knowledge all of the above is correct.

Neither granted nor denied.

DEFENDANT'S REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW

1. That on May 1, 2006, the Town's Planning Board commenced the public hearing on the application of Brenda Kalil, Charles D. Kalil and Charles W. Kalil (the "Plaintiffs") for a 12-unit (one 6 bedroom unit, eleven 3-4 bedroom units) cluster subdivision on a 41.9 acre parcel (the "development site"), located in the Town's Town Residential District B ("TRDB") and shown as TML 6WSTRD-3/268L00.

Granted.

2. That this was "subdivision by condominium" under Section III, D of the Town Subdivision Regulations.

Granted.

3. That this was also a "subdivision" as that term is defined by NH RSA 672:14 by virtue of the proposal to divide the lot by condominium conveyance.

Granted.

4. That the plan was subject to Bartlett zoning ordinance's 15% open space rule (Article VI. Minimum Land Area Required)

Granted.

5. That the Plaintiffs provided 15.1% common open space (6.3 acres CA / 41.9 acres = 15.1%) per the Town's land use regulations

Granted.

6. That the plan approved by Planning Board on September 19, 2006 and it was recorded at the Carroll County Registry of Deeds Book 215 Page 92 on September 21, 2006.

Granted.

7. That the subject property is a "condominium" pursuant to the Declaration of Condominium (the "Declaration"), prepared in accordance with RSA 479-A, and approved by the Town's Planning Board.

Granted.

8. That Plaintiff Charles Kalil executed an Engineering Review Agreement and Authorization to Proceed with the Town on 11/15/08, which was signed by Selectman Gene Chandler on 11/17/08.

Granted.

9. That in furtherance of that Engineering Review Agreement, Civil Solutions, LLC made a number of construction observation reports on January 3rd and 4th, 2007; May 7th and 14th 2007; and, October 17, 2007. By the October 17, 2007 report, roadwork had commenced per the plan (placement of Aggregate Base gravel).

Granted.

10. That on April 8, 2008, the Plaintiffs submitted an application for current use to the Town's Board of Selectmen proposing to place approximately 21.42 acres (the "subject property") of the Plaintiff's 41.9 acre development site in current use as farmland.

Neither granted nor denied.

11. On May 29, 2008, the Town's Board of Selectmen denied the Plaintiffs' application.

Granted.

12. The Plaintiff's have not demonstrated that the subject property satisfies the statutory definition of "Farm land" per RSA 79-A:2, VI.

Denied. See RSA 21:34-a – Definition of Farm, Agriculture, Farming.

13. That per RSA 79-A:7, V(b), the Plaintiffs used the entirety of the subject property in the satisfaction of density, setback, or other local, state, or federal requirements as part of a contiguous development site, and such land became disqualified from consideration for current use when the construction of the road began on or about October 17, 2007.

Granted.

14. Per RSA 79-A:7, V(b), the Plaintiffs changed the use of the subject property as that term is used in this provision of the statute as of October 17, 2007.

Granted.

15. That as of April 15, 2008, on the facts presented, RSA 79-A does not permit the Plaintiffs to now classify the subject property so as to permit the enrollment of the subject property into current use.

Granted.

16. The Town properly denied the Plaintiffs' application for current use and the Board should affirm the Town's decision.

Granted.

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(g). 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

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: Charles D. Kalil, Charles W. Kalil and Brenda Kalil, PO Box 188, North Conway, NH 03860, Taxpayers; Chairman, Board of Selectmen, Town of Bartlett, RFD 1, Box 49, Intervale, NH 03845; John J. Ratigan, Esq., Donahue, Tucker & Ciandella, 225 Water Street, Exeter, NH 03833, counsel for the Town; and Current Use Board, c/o Department of Revenue Administration, 109 Pleasant Street, Concord, NH 03301, Interested Party.

Date: February 10, 2009

Anne M. Stelmach, Clerk

Charles D. Kalil, Charles W. Kalil and Brenda Kalil

v.

Town of Bartlett

Docket No.: 23942-08CU

ORDER

The board has reviewed the March 10, 2009 Motion for Reconsideration (“Motion”) filed by the “Taxpayers” with respect to the February 10, 2009 Decision denying their appeal. The March 20, 2009 suspension order is hereby dissolved and the board denies the Motion for the following reasons.

RSA 541:3 and Tax 201.37(e) place the burden on the moving party to demonstrate “good reason” for granting a rehearing motion by showing the board overlooked or misapprehended the facts or the law and that such error affected the Decision. The board finds the Taxpayers have not met this burden.

Tax 201.37(g) requires parties to submit all evidence and present all arguments at the hearing, because rehearing motions will not be granted to consider evidence previously available to the moving party but not presented at the hearing or to consider new arguments that could have been presented at the hearing. The Motion contains nine numbered points, which include both repetitive and additional factual allegations regarding the “Property” going back to the time

it was purchased in 1983. None of these allegations nor the arguments pertaining to them in the Motion are matters that could not have been presented at the hearing.

In fact, the board devoted considerable attention at the hearing and in the Decision to the central issue of whether the Taxpayers met their burden of proving the “Town” erred when it denied their application for current use (“CU”) on 30.51 acres (the “Requested Acreage”) of the Property. The board concluded that a fair reading of the statute and the case law supports the Town’s conclusion that the Requested Acreage was not eligible for CU. In brief, the board found the Requested Acreage was part of one “contiguous development site” which no longer could qualify for CU because of the approved subdivision plan and the improvements that were already in place on this land at the time of the CU application.

The board further notes, in response to paragraph 2 of the Motion, that the Taxpayers appear to confuse the board with the entirely separate current use board (“CUB”) established under RSA 79-A:3. It may be that the CUB is “in the process of rewriting their rules,” but that is irrelevant to the Decision issued by the board in this appeal.

For all of these reasons, the Motion is denied. Any appeal of the Decision must be by petition to the supreme court filed within thirty (30) days of the date shown below. RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Order has this date been mailed, postage prepaid, to: Charles D. Kalil, Charles W. Kalil and Brenda Kalil, PO Box 188, North Conway, NH 03860, Taxpayers; Chairman, Board of Selectmen, Town of Bartlett, RFD 1, Box 49, Intervale, NH 03845; John J. Ratigan, Esq., Donahue, Tucker & Ciandella, 225 Water Street, Exeter, NH 03833, counsel for the Town; and Current Use Board, c/o Department of Revenue Administration, 109 Pleasant Street, Concord, NH 03301, Interested Party.

Date: April 20, 2009

Anne M. Stelmach, Clerk