

Robert and Annette Larocque

v.

City of Concord

Docket No.: 23960-08LC

DECISION

The “Taxpayers” appeal, pursuant to RSA 79-A:10, the “City’s” \$15,000 land use change tax (“LUCT”) on 1.12 acres removed from current use (the “Property”). The LUCT was based on a \$150,000 full value assessment. For the reasons stated below, the appeal for abatement is granted.

The Taxpayers have the burden of showing, by a preponderance of the evidence, the City’s LUCT assessment was erroneous or excessive. See Tax 205.06. We find the Taxpayers carried their burden.

The Taxpayers argued the LUCT was erroneous or excessive because:

- (1) the City’s LUCT bill was mailed more than 12 months after the City discovered the change in use and therefore no LUCT is due and payable by the Taxpayers;
- (2) if the LUCT bill is determined to have been timely mailed, the LUCT amount is excessive because the City’s estimate of the area removed from current use is overstated;

- (3) a March 3, 2009 appraisal (Taxpayer Exhibit No. 3) prepared by Russell W. Thibeault of Applied Economic Research, Inc. (the “Thibeault Appraisal”) estimated an April 1, 2007 market value range of \$17,000 to \$19,000 based on one third of an acre removed from current use; and
- (4) the City should reimburse the Taxpayers for their costs and fees incurred to proceed with this appeal.

The City argued the LUCT was proper because:

- (1) the LUCT bill was mailed to the Taxpayers within 12 months of the date the City “actually discovered” a change in use occurred to some of the Taxpayers’ land which had been previously subject to current use assessment;
- (2) it used global positioning system (“GPS”) data to help estimate the amount of land that should be considered ineligible for current use assessment;
- (3) it gave the Taxpayers the benefit of the doubt by only removing 1.53 acres from current use when it was correcting “old errors” in the Taxpayers’ current use information; and
- (4) the LUCT bill should be reduced from \$15,000 to \$9,600 based on a restricted report performed for this appeal in March 2009 by Ms. Kathryn Temchack, the City’s Director of Real Estate Assessments (the “Temchack Report”) which estimated the April 1, 2007 market value to be \$96,000.

On April 6, 2009, subsequent to the hearing, the board visited the Property and viewed the placement of the improvements and the land area shown on Municipality Exhibit B which the City delineated as “land ineligible for current use status.”

Board’s Rulings

Based on the evidence, the board finds the City did not timely mail the LUCT bill “within 12 months of the date the local assessing officials actually discover[ed] that the land use change tax” was due and payable. The appeal is therefore granted for the reasons discussed below.

Similar to many current use appeals, this case raises multiple issues: 1) whether the City’s LUCT bill was timely mailed to the Taxpayers pursuant to RSA 79-A:7, II (c); 2) the date of the change in use; 3) the actual area removed from current use and subject to a LUCT; and 4) the “full and true value” of the land removed as of the date of change. Before addressing these issues, a general chronology of the current use history of the Property is informative.

Chronology

In April 1974, the Taxpayers’ predecessor in title applied for current use assessment on the Property. See Municipality Exhibit E. The breakdown of the land categories on the initial application showed 65 acres in horticultural crops, 120 acres under the forest land category and a one acre building site. The map attached to the application depicted virtually the same information as written on the application with the exception of an area noted as “2 A Build.” This application appears to have been granted in part and denied in part by the City. A June 24, 1974 “Notice to Applicant for Current Use Taxation” informed the applicant of the City’s decision as follows:

<u>Type of Land</u>	<u>No. of Acres</u>	
Homesite (Building)	1	granted
Horticultural Crops	65	granted
* Forest Land	119.3	denied

* The above decision may be reconsidered provided you submit a written statement summarizing past forest accomplishments, present forest conditions and plans for future forest improvements and harvest on the tract of land.

Subsequently, on July 18, 1974 another notice from the City indicated the following:

<u>Type of Land</u>	<u>No. of Acres</u>	
Homesite (Buildings)	1	
Horticultural Crops	65	Granted
Forest Land	119.3	Denied

The paragraph (*) regarding reconsideration was removed from this notice.

A revised application was submitted to the City on April 4, 1975 depicting 65 acres horticultural crops and 119.3 acres forest land (Municipality Exhibit F). By a June 24, 1975 notice, the City granted the application and added a one acre building site to the form.

As the parties noted at the hearing and the board recognizes, there are discrepancies between the areas on the map (2 acres), which apparently was never revised, and the listing of the home site area on the revised application (1 acre). Further, between the time the Property was placed in current use in 1974 and the time the Taxpayers decided to place the Property under a conservation easement in 2001, no surveys of the entire Property had been completed. During the intervening years, portions of the Property had been conveyed to other owners. As a result of a 2001 survey, the total area of the Property was determined to be approximately 155 acres, plus or minus, including the area of the improvements. Subsequent to placing the Property under the conservation easement, the Taxpayers decided to build a new farmhouse and after satisfying all the mandated requirements were issued a building permit on November 4, 2005. One of the conditions of the conservation easement is that only one dwelling may be on the Property. Therefore, on May 23, 2006, after the new house was built, the Taxpayers received a demolition permit for the razing of the old farmhouse. The Taxpayers were issued a certificate of occupancy for the new farmhouse on September 26, 2006. See Taxpayer Exhibit No. 4.

On October 30, 2006 Ms. Temchack wrote the Taxpayers a letter stating “I am in the process of determining assessments to use for land values on land that has been recently removed from current use.” See Municipality Exhibit H. The heading on the letter is “RE: Land Removed from Current Use Parcel 104-2-18”, the City’s identification of the Property on its municipal tax maps. The letter requested the Taxpayers “submit a map by December 30, 2006 indicating where and how much land is both in and out of current use.” The Taxpayers testified they provided the City the requested information on or before November 10, 2006. The City issued the LUCT bill (denoted as a department of revenue administration (“DRA”) Form A-5) on January 28, 2008. This bill states the actual date of change in use occurred on April 1, 2007.

Findings

The threshold issue in this case is whether the City’s January 28, 2008 LUCT bill was timely issued pursuant to RSA 79-A:7, II(c) and, thus, whether the Taxpayers are 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, 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). As stated above and for the following reasons, the board finds the City did not timely mail the LUCT bill within 12 months of the actual discovery that the land no longer qualified for current use assessment and therefore no LUCT shall be imposed.

The exhibits and testimony provided at the hearing revealed the following facts. The Taxpayers responded to the City's October 30, 2006 request for a map and information on or before November 10, 2006. Attached to Municipality Exhibit H is a portion of the survey plan of the Property with handwritten notes which were identified by the parties to have been made by Mr. Larocque, one of the Taxpayers, and Mr. Hathaway, one of the assessors in the City's assessing office. The testimony at hearing was that one of Mr. Hathaway's areas of responsibility in the assessing department included, in some manner, current use related properties. Mr. Larocque wrote the building area was 86,000 square feet and the driveway area was 6,400 square feet based on a 16 foot wide by 400 foot long driveway. Under those notations is Mr. Hathaway's handwriting which adds the two areas together for a total square footage of 92,400 square feet which he equates to 2.12 acres. This area is greater than the one or two acres listed on the earlier application forms/map. The board finds Municipality Exhibit H, in conjunction with the parties' testimony, is compelling evidence the City "actually discovered" or "received written notice" (the two ways the statute provides for the "local assessing officials" to become made aware a change in use has occurred), on or before November 10, 2006, there was a change in use to the Property that caused some land to become ineligible for current use assessment and a LUCT bill should be issued to the Taxpayers. Further, Mr. Hathaway visited the Property on April 18, 2006, as noted on the assessment-record card, to "measure/ new UC."

On Mr. Hathaway's April 18, 2006 visit to the Property, there were two residential dwellings (the old and new farmhouses) in close proximity to one another¹. The board finds the combination of Mr. Hathaway's previously discussed assessing responsibilities involving current use properties and his notation on the assessment-record card that there were ongoing construction activities on the Property to be additional evidence the City actually discovered there was a change in use to some of the Property approximately one year prior to the April 1, 2007 date of change listed on the LUCT bill (the A-5 form).

Because the board finds the City's LUCT bill is untimely, it is unnecessary to address the issues of whether the amount of the land removed is accurate or if the full and true value is appropriate. Those questions are now moot.

However, the board must comment on the City's procedures and practices regarding how it manages land in current use assessment. The City should consider and implement a more timely review of properties in current use which receive permits for various construction activities which may trigger the issuance of a LUCT bill. The various City departments which issue permits relative to real property (building permits, demolition permits, certificates of occupancy, construction code compliance, etc.) and the City's assessing department need to communicate on a regular basis to avoid a repeat of the facts in this case. The City's current system for monitoring parcels of land which are assessed in current use is modeled after its ad valorem tax procedures. As opposed to ad valorem taxation, which has April 1 of each year as the fixed date of valuation (see RSA 75:1), the current use statute governing the LUCT (see RSA 79-A:7, II (c)), which each taxpayer is liable for if a non qualifying event occurs on the current use land, makes it clear the 12 month time period begins when the assessing officials

¹ Mr. Larocque testified the farmhouses were approximately 3 feet apart at their closest point. When the Taxpayers moved from the old house to the new, during a heavy rainstorm on Mother's day weekend in May 2006, they actually could pass some items through the window of one house into the other.

receive written notice or actually discover the land has changed in use. To delay in timely assessing the LUCT, as is the case in this appeal, puts the City at risk of missing a singular opportunity to receive a significant amount of revenue. The board is aware the City has a substantial number of properties subject to current use assessment (500+/-). The board finds this fact to be another reason why a more timely and ongoing review procedure should be instituted.

Further, based on the board's view of the Property subsequent to the hearing, the board finds some of the area the City has considered ineligible for current use assessment should remain in current use. Specifically, the board finds the area on the west and northwesterly side of the Property nearest the irrigation pond, described as a stump dump/rock pile along with the road leading to it as well as the triangular section on the northwesterly side of the access road from the area of the buildings to the stump dump are eligible for current use assessment. These areas are little more than unmanaged land that serve as intermittent storage areas for various materials used in the agricultural activities. The board orders the City and the Taxpayers to review and refine the area not qualified for current use and for the parties to update the appropriate City information. This information will serve as a benchmark and reference point for the future. The City shall administratively correct the records at the Merrimack County Registry of Deeds to more accurately describe the area of the Property not in current use and the area remaining in current use. In this case, the City testified the Taxpayers had not provided the City with a survey of the Property delineating the land not qualified for current use and the City used GPS data in an attempt to define that area. However, Municipality Exhibit H contains, in addition to Ms. Temchack's letter to the Taxpayers, a copy of a portion of a survey of the Property on which the Taxpayers outlined the area (not including the driveway) they determined

was not eligible for current use assessment. The board reminds the City the current use criteria booklet published by the current use board through the DRA clearly states in the section titled “Landowner’s Responsibilities” the landowner must submit “[a] map of each parcel of property going into current use. The map need not be a survey map...” The map must, however, contain certain information as outlined in the current use booklet. While a survey, if available, may provide more exact and detailed information, it is not required and the lack of one should not be a ground for denying a current use application. Further, while GPS data may be a valuable tool to help accurately depict a property’s configuration or to assist in locating areas being removed from current use, it should not be used to retrospectively calculate acreages previously missed by the assessing officials.

During the Taxpayers’ closing statement, a request for costs and fees was made which the board denies for the following reasons. The board’s authority to assess costs is contained in two statutes: (1) RSA 76:17-b, which states, “(w)henever, after taxes have been paid, the board of tax and land appeals grants an abatement of taxes because of an incorrect tax assessment due to a clerical error, or a plain and clear error of fact, and not of interpretation, as determined by the board of tax and land appeals, the person receiving the abatement shall be reimbursed by the city or town treasurer for the filing fee paid under RSA 76:16-a, I.”; and (2) RSA 71-B:9, in part, which states, “(c)osts and attorney’s fees may be taxed as in the superior court.” Further, Tax 201.39 provides for the board to order costs if “the matter was frivolously brought, maintained or defended....” The board does not find there was a clerical error, an error of fact or the City frivolously defended the appeal or acted in bad faith. Thus, the board concludes the criteria for awarding costs and reimbursing the filing fee have not been met.

For the previously discussed reasons, the board finds the City's LUCT bill is untimely and the Taxpayers do not have a land use change tax bill obligation. There was testimony at the hearing that the Taxpayers had paid a portion of the LUCT bill. If any payments have been made, the amount paid shall be refunded to the Taxpayers with the appropriate interest calculated from the date of payment to the date of refund.

The "Requests" received from the City 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 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.

**CITY OF CONCORD'S REQUESTS FOR
FINDINGS OF FACT AND RULINGS OF LAW**

1. **Fact:** The Larocques' predecessor-in-title Sunnycrest Farm, through its treasurer John L. Connor, applied for current use assessment on April 5, 1974 for this property at 73 Carter Hill Rd., which was at that time estimated at very roughly 185 acres in total. The 1974 application form shows that 65 acres was requested for classification as "Horticultural Crops." Under "Forest Land," the figure 120 appears crossed out, and "119.3" is stated as the acreage. The typed word "wetland" is crossed off, and replaced by the words "BLDG SITE" with the number of acres marked as "1." However a sketch map (not a survey) – accompanying the application in the City's records – shows "120A Forest," and "65A Orchard," with the notation "2A Bldg" shown on the house site in the midst of the orchard.

Granted.

2. **Fact:** Neither the Taxpayers nor the City has any actual knowledge of how the disparity between the 1-acre and 2-acre figures for the building site (or the disparity in the acreage of the forest land) occurred. There is no evidence before the Board that the City's Assessor altered the application after Mr. Connor left, or that Sunnycrest Farm disagreed in any way with the 1-acre notation.

Neither granted nor denied.

3. **Fact:** The "Notice To Applicant For Current Use Taxation" form dated June 24, 1974, and which the City's records show was sent to Sunnycrest Farm shows the "Homesite (Building)" as being 1 acre, the "Horticultural Crops" as being 65 acres, and the "Forest Land" as being 119.3 acres. The 1975 and 1978 application forms also show the building site as being 1 acre. It is therefore evident that Sunnycrest Farm consented to the 1-acre size of the building lot.

Neither granted nor denied.

4. **Fact:** Between the time the City granted the Current Use treatment of the forest land in 1975, and the Land Use Change Tax bill was sent on 1/28/2008, the Taxpayers and their predecessors paid full value taxation *only* on a *one-acre* building site. The remainder of their land was taxed as current use land during that entire period.

Neither granted nor denied.

5. **Fact:** No accurate survey of the entire property existed in 1974. No survey was done by the Taxpayers or their predecessors-in-title until a 2001 survey, performed in conjunction with the conveyance of a conservation easement. By the time of that survey, some portion of the original 1974 tract had been previously conveyed. In the 2001 survey, the total tract was stated as being 154.715 acres, inclusive of building envelope. Is it impossible to draw any correspondence between the acreage of the 2001 survey, and the acreages in the earlier Current Use applications. Therefore it is not possible to calculate *by subtraction* the size of the building site not qualified for Current Use in 1974.

Neither granted nor denied.

6. **Fact:** On October 30, 2006, the City's Assessor Kathryn Temchack – having been informed of a building permit being issued for the property, wrote to the Larocques, requesting maps and other information about where the 1-acre non-current-use building site was located, so that she could determine whether the new building was located within that site.

Granted.

7. **Fact:** In the spring of 2007 Ms. Temchack received from the Taxpayers a copy of a portion of the 2001 survey, with handwritten notations, estimating that the total area which no longer qualified for current use was 2.12 acres. That communication was the basis for the LUCT tax bill mailed by the City on January 28, 2008.

Denied.

8. **Fact:** Subsequently, after further discussions about the size of the non-current-use area, Mr. Larocque, while refusing to have the building area surveyed, did invite Ms. Temchack to visit the property. On or about September 16, 2008 Mr. Larocque, Ms. Temchack and Mr. Seth Pingree, a GIS specialist for the City, walked the boundaries of the non-current-use area, with Mr. Pingree taking GPS readings. During this visit Mr. Larocque did not dispute the locations of the edge of the non-current-use areas.

Denied.

9. **Fact:** On the basis of the GPS readings taken during the visit with Mr. Larocque's concurrence, and also upon aerial photographs taken of the property in 2000, 2005 and 2008, Mr. Pingree determined, using GIS computer calculation techniques, that the total area not qualified for current use today is 3.53 acres.

Granted.

10. **Fact:** The appraisal which Ms. Temchack has submitted to the Board is based upon that 3.53 acre figure. It gives the Taxpayers the benefit of the doubt that the Taxpayer in 1974 intended to exclude 2 acres from current use, even though actual taxation since that time was based on only 1 acre being excluded. Thus the appraisal for LUCT purposes is based on a figure of 1.53 acres, with an market value of \$96,000.

Neither granted nor denied.

11. **Fact:** There is no evidence that the Taxpayers or their predecessors-in-title ever questioned or contested the notations designating the building site as being one acre in size, or the tax bills which treated their non-Current-Use building site as being only one acre in size, prior to receipt of the October 30, 2006 letter from Ms. Temchack.

Neither granted nor denied.

12. **Fact:** The *only* evidence Taxpayers have presented, tending to show that in 1974 the non-Current-Use building site exceeded the 1-acre size reflected in the City's records, is the notation of "2A Bldg" shown on the map sketch accompanying the 1974 application. The Taxpayers have presented *no* evidence *at all* that the non-current-use qualified area in 1974 exceeded 2 acres.

Neither granted nor denied.

13. **Law:** In this proceeding the Taxpayers have the burden of proof on all points, *see* Tax 205.07. This burden encompasses *all* relevant facts, including the amount of land excluded from Current Use in 1974, as well as the dates and scopes of all relevant changes in use between that time and today.

Neither granted nor denied.

14 **Law:** In addition, the burden is on a Taxpayer – at the time the taxpayer applies for Current Use – to produce a map of the entire parcel showing “current use and non-current use land, clearly identified, oriented to establish its location, and sufficiently accurate to permit computation of acreage.” Cub 309.01(b)(1)(a). The Taxpayers and their predecessors-in-interest failed to meet that burden in this case.

Denied.

15. **Law:** The Larocques are legally bound by all the actions of their predecessors-in-title at the time the property was placed in Current Use. [By analogy, the N.H. Supreme Court has held in *Appeal of Shane Brady*, 145 N.H. 308 (2000) that a land purchaser was bound by the seller’s failure to file the inventory form under RSA 74:7-a.]

Neither granted nor denied.

16. **Law and Fact:** The Taxpayers have failed to produce any evidence contrary to the City’s justified assumption that the differences between the non-current-use area reflected in 1974 application and the non-current-use area today – as measured by Mr. Pingree using site inspections, aerial photographs and GIS calculations – is all the result of changes in use which have occurred between 1974 and today.

Neither granted nor denied.

17. **Law:** The obligation to pay the land use change tax arises under RSA 79-A:7, II “at the time of the change in use.” Under RSA 79-A:7, II(c), the recorded contingent lien is to be released *only* “upon receipt of payment.” The law does *not* contain any provision for release of the contingent lien solely because municipal officials have failed to discover a change of use.

Neither granted nor denied.

18. **Law:** RSA 79-A:7, II(c) states: “[The land use change tax] bill shall be mailed, at the latest, within 12 months of the date upon which the 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.” The statute does not contain any maximum time limit between the change of use and the discovery, and hence there is no “safe harbor” limitations period on the assessment of the LUCT.

Neither granted nor denied.

19. **Fact and Law:** In this case the City’s assessing officials at no time between 1974 and 2008 received any “written notice of the change in use” from the Taxpayers for purposes of the above statute.

Neither granted nor denied.

20. **Law:** The phrase “actually discover” in RSA 79-A:7, II means that the assessing officials obtain actual knowledge that the change has occurred, and does *not* include constructive knowledge or the occurrence of events or existence of circumstances that “should have” notified the assessing officials – for example the receipt of documents by other officials in the municipality. See *Robinson v. Town of Lyme*, BTLA Docket No. 19983-03LC (5/5/05).

Neither granted nor denied.

21. **Law and Fact:** In this case the City’s Assessor did not “actually discover” that a change in use had occurred subsequent to 1974, until she received information from the Taxpayers in the spring of 2008 estimating the non-current-use area as 2.12 acres.

Denied.

22. **Law and Fact:** The Taxpayers’ submitted appraisal, performed by Russell Thibeault of Applied Economic Research, has no credibility because it is based on an assumed parcel size of 1/3 acre, yet contains no explanation or information about how that 1/3 acre figure was arrived at.

Neither granted nor denied.

23. **Law and Fact:** The City’s use of the figure 1.53 acres for the area changed in use – being the difference between the 2-acre size assumed for 1974, and the 3.53 acres measured by Mr. Pingree – is reasonable and justified.

Neither granted nor denied.

24. **Law and Fact:** The City’s appraisal value of \$96,000 for the area changed in use is reasonable and justified, and the Taxpayers are ordered to pay a land use change tax of \$9,600.00, plus interest at 18% accruing as of February 27, 2008 (30 days after date of bill).

Denied.

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

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Charles Thompson, Temporary Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Donald H. Sienkiewicz, Esq., 110 Isaac Frye Highway, Wilton, NH 03086, counsel for the Taxpayers; 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: July 16, 2009

Melanie J. Ekstrom, Deputy Clerk