

**Debra Matulaitis and Mark McNichol**

**v.**

**Town of Deerfield**

**Docket No.: 24729-10LC**

**DECISION**

The “Taxpayers” appeal, pursuant to RSA 79-A:10, the “Town’s” 2009 land use change tax (“LUCT”) of \$1,780 on a 1.163 acre parcel disqualified from current use when it was acquired by the Taxpayers from an abutter (the “Property”). The LUCT was based on a \$17,800 full market 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 Town’s LUCT assessment was erroneous or excessive. See Tax 205.06. We find the Taxpayers carried this burden.

The Taxpayers argued the LUCT was erroneous or excessive because:

(1) the LUCT bill was not timely sent to the Taxpayers because the Town should have been aware that much of the Property was encumbered with two septic easements and systems built in the late 1990s as evidenced by the earlier easement deeds and the building permits;

- (2) if the LUCT bill is determined to be timely, the assessed value of \$17,800 is excessive because the Property is encumbered by two septic systems, a private road accessing adjoining lake lots and a power distribution line;
- (3) the Taxpayers' purchase price of \$25,000 for the Property is in excess of market value because they had to pay the asking price wanted by the fee owner of the current use land; and
- (4) the Property has a market value of \$7,000 based on the "Pinard" comparable sale (annexation) of 2.2 acres of rear land to an existing 10 acre improved lot to enable current use assessment.

The Town argued the LUCT was proper because:

- (1) neither the building inspector nor the assessing officials had any substantive records or indication of the septic easements or that the construction of the septic systems occurred on current use land; the Town "discovered" the disqualification of the Property only upon the deed of the Property to the Taxpayers in December 2008 and then timely issued the LUCT bill;
- (2) the Town agreed the Taxpayers were unduly motivated purchasers and the \$25,000 purchase price was in excess of market value and thus reduced the value to \$17,800;
- (3) the assessment was also estimated by extracting the differential value between sales that are similar in size of the Taxpayers' lot before annexation (0.46 acre) and the after annexation size of approximately 1.6 acre; and
- (4) the encumbrance of the Property with the neighbor's septic system in addition to the Taxpayers own septic system is not a significant factor affecting value.

## **Board's Rulings**

### Timely Filing of LUCT Bill

The threshold issue in this appeal is whether the Town's May 18, 2009 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."

The board has ruled on this threshold issue in a number of cases and the following paragraphs from Teeter v. Deering, BTLA Docket No.: 22907-07LC (April 22, 2008) decision summarizes the board's general ruling regarding this issue.

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. (Emphasis added.)

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.

For the following reasons, the board finds the Town did not “actually discover” the change in use until the copy of the Taxpayers’ December 4, 2008 deed acquiring the 1.163 acre parcel from “Sidmore” was received by the Town from the Rockingham County Registry of Deeds. As the Taxpayers testified, they annexed the 1.163 acre parcel from Sidmore to their existing .46 acre dwelling on Pleasant Lake to be able to control the land on which their septic system had been previously constructed. Both the Taxpayers’ septic system and the neighbors’ (Rausch) septic system had been constructed on the adjoining Sidmore property as a result of septic easements having been granted by Sidmore for that purpose. The 1.163 acres encompasses both the Taxpayers’ approximately 3,600 square foot septic easement and the Rausch’s 7,000 square foot septic easement.

The board finds the earlier easement deeds (Sidmore to Rausch in October 1972 and Sidmore to Whatmough in December 1987 and April 1990), the construction of the Rausch septic system sometime prior to 1988 and the Taxpayers renovations and installation of a septic system in 1999 did not provide actual notice to the Town that a portion of the Sidmore current use property was being disqualified from current use. First, the earlier easement deeds, which were presumably copied to the Town, were not known to the assessing officials nor had there

been any notation made on the assessment-record cards or the tax maps as to the existence of the easements. Even if they had been known, the mere existence of an easement without any actual physical construction of a septic system would not disqualify property from current use. Second, the subsequent construction of the septic systems by both the Taxpayers and the Rausch's presumably were done as part of construction or renovation of dwellings and plans for such septic systems would have been supplied or available to the Town at that time. However, the Town's assessor, Mr. Gary J. Roberge of Avitar Associates of New England, Inc., testified the building permits and septic plans had not, at that time (circa 1998 - 1999) been provided to the assessing officials but rather had been retained in the Town's planning department.

Consequently, the board concludes the "local assessing officials [had not] receive[d] written notice of the change of use from the land owner..." because such documents were not in hand for the local assessing officials in the late 1990's to assess a land use change tax for the septic systems installation. Mr. Roberge acknowledged that the Town, as has been the practice of many municipalities, has improved its internal processing of such documents so that assessing officials receive copies for their purposes in addition to planning and land use regulation functions.

Consequently, the board finds that the Town acted timely in sending the May 18, 2009 LUCT bill which is well within 12 months of the recorded transfer date of the 1.163 acres of December 4, 2008.

#### Proper LUCT Valuation

Both parties agreed that the Taxpayers' purchase price of \$25,000 exceeded market value of the 1.163 parcel because the Taxpayers, as abutters and owners of a septic system easement, were unduly motivated to purchase the land.

The Taxpayers asserted, if the board determined the LUCT bill was timely sent, the value of the 1.163 acres was approximately \$7,000 based on a comparable sale and annexation of 2.2 acres for \$17,600 (approximately \$8,000 per acre) in March 2006 (Frambach to Pinard) to increase the Pinard lot size to be over 10 acres so that they could receive current use assessment on the land supplemental to their house site. The Town argued its assessed value of \$17,800 reflected the incremental value that the Taxpayers' estate was benefited by the annexation of the 1.163 acre parcel annexed to its existing .46 acre house site. While the Pinard sale, on its face, would appear to be a comparable sale, there are significant differences in the motivation of the purchasers and the utility of the land being acquired by the Taxpayers and Pinard. The Pinard's annexation was physically quite distant from the water front and developed house site and thus does not have the ability to support the residential development and enjoyment as the Taxpayers acquisition does. The utility of the Pinard's 2.2 acres is thus inferior to the Taxpayers' ability to maintain their septic system and have additional buffer land to provide protection from development by abutters.

Thus, the board places less weight on the value indication of the Pinard sale than it does on the Town's methodology, as testified to by Mr. Roberge, of estimating the incremental increase in value to the Taxpayers' real estate resulting from the annexation of the 1.163 acre parcel. However, Mr. Roberge noted that the \$17,800 market value estimate did not specifically recognize the 1.163 acre parcel included not only the Taxpayers' septic system but also the Rausch's septic system. The board finds this is a factor that the market would likely recognize and needs to be accounted for in arriving at a proper market value estimate on which to assess a LUCT. Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1975) (In arriving at a proper assessment, municipalities must consider all relevant factors). While no specific evidence was

presented as to the proper adjustment for the presence of the neighbors septic system, the board, utilizing its specialized knowledge and experience (see RSA 541-A:33, VI), has applied a minus 20% adjustment to the Town's assessed value ( $\$17,800 \times .80 = \$14,300$  (rounded)). The board concludes this revised assessed value is a reasonable estimate of the supplemental land value of the 1.163 acre parcel encumbered with the neighbor's septic system and results in a LUCT of \$1,430.

Therefore, if the taxes have been paid, the amount paid on the LUCT in excess of \$1,430 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 with a copy provided to the board in accordance with Supreme Court Rule 10(7).

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Michele E. LeBrun, Member

**Certification**

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Debra Matulaitis and Mark McNichol, 11 Sunset Lane, Deerfield, NH 03037 Taxpayers; Chairman, Board of Selectmen, Town of Deerfield, PO Box 159, Deerfield, NH 03037; Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258, Contracted Assessing Firm; and Current Use Board, c/o Department of Revenue Administration, 109 Pleasant Street, Concord, New Hampshire 03301, Interested Party.

Date: April 9, 2010

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Anne M. Stelmach, Clerk