

Julian and Marisa Devlin

v.

Town of Hanover

Docket No.: 25432-10CU

DECISION

The “Taxpayers” appeal, pursuant to RSA 79-A:10, the “Town’s” June 9, 2010 denial of the Taxpayers’ application for current use on 5.13 acres, a part of their land on Map10/Lot 15, a 10.4 acre lot assessed at \$559,700 (land \$193,400; building \$366,300) (the “Property”). For the reasons stated below, the appeal is granted.

The Taxpayers have the burden of showing, by a preponderance of the evidence, the Town erred in denying their application for current use. See RSA 79-A:9; Tax 206.05. The Taxpayers carried this burden.

The Taxpayers argued the Town erred in denying their current use application because: (1) as delineated and explained in Taxpayer Exhibit No. 1, the Property consists of 5.13 acres of wetland and 5.25 acres of upland, and this fact is confirmed by the photographs, maps and other documents in Taxpayer Exhibit Nos. 2 and 3 and, most importantly, by the testimony of the Taxpayers’ expert, Jonathan A. Sisson, III, a certified soils and wetlands scientist;

- (2) Mr. Sisson inspected the Property several times, beginning in 2008, and determined that 5.13 acres of the Property met every definition and criterion for wetlands;
- (3) according to this expert, the 5.13 acres are “poorly drained wetland” making it very unlikely the State of New Hampshire Wetlands Bureau would grant a permit to access that area and harvest any trees on it because it would be difficult to do so without impacting the wetlands;
- (4) as stated in CUB 304.01(b)(5), there is no minimum size requirement for wetlands;
- (5) the 5.13 acres meets the intent of the current use law pertaining to the conservation and reduced assessment of wetlands; and
- (6) the appeal should be granted.

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

- (1) based on the statutory and regulatory (Current Use Board) definitions of “unproductive land” and “wetlands” discussed in Municipality Exhibit A (the Town’s “Current Use Report”), the Town concluded the 5.13 acres do not qualify as wetlands because it is not unproductive and is capable of growing forest products;
- (2) before the Property was developed (as a house lot), it was “completely forested,” as shown in the aerial photographs in the Town’s presentation;
- (3) the Taxpayers’ expert is not a certified forester;
- (4) the Town’s Director of Assessing met with the Taxpayers and inspected the Property before concluding the 5.13 acres did not qualify as wetlands;
- (5) as shown on the photograph of the moose (Taxpayer Exhibit No. 4), the land on the Property behind the moose is “treed”; and
- (6) the acreage in question is capable of producing forest products, is not unproductive and, therefore, does not qualify for current use as wetlands and the appeal should be denied.

Board's Rulings

The board finds the Taxpayers carried their burden of showing the Town erred in denying their application for current use on the 5.13 acre portion of the Property as wetlands. Their appeal is therefore granted.

The Taxpayers presented substantial evidence and a detailed presentation to support their claim the 5.13 acres qualified as wetlands. In addition, they called an expert witness, Mr. Jonathan A. Sisson, III, a certified soils and wetlands scientist, who testified he had personally inspected the Property on several occasions. He was initially contacted by the Taxpayers when they purchased the Property to determine whether or not wetlands were present on the Property and, if so, to delineate their boundaries on a map. In conjunction with this current use appeal, the Taxpayers contacted Mr. Sisson and requested he determine, based on his experience, training and expertise, the amount of acreage which, in his opinion, qualified as wetlands. Mr. Sisson testified he inspected the Property and took photographs, soil samples and made observations of the entire area in question. During his inspection, he completed the Wetland Function-Value Evaluation Form created by the U.S. Army Corps of Engineers (the "Corps") and applied the criteria determined by the Corps to the Property. It was Mr. Sisson's opinion that there was no question the 5.13 acre area of the Property under appeal qualified as wetlands of which approximately 30% is forested wetlands with the remainder being unproductive wetlands.

The board finds Mr. Sisson's expert testimony to be compelling evidence the 5.13 acres qualifies for current use assessment as wetlands. The Town's determination that no portion of the Property qualified as wetlands for current use purposes based on the fact there were trees on part of it is unsupported and misconstrues the current use statutes and regulations.

The Legislature did not make “wetlands” a separate category of open space land. Instead, the statutory and regulatory framework recognizes only three land categories (farm, forest and unproductive) and wetlands can exist in each of these categories. Compare RSA 79-A:2, VI (“Farm Land”), VII (“Forest Land”) and XIII (“Unproductive Land”) with RSA 79-A, XIV (“Wetlands); the latter statutory provision begins by recognizing “Wetlands” can be found in “areas of farm, forest and unproductive land” provided they are sufficiently inundated or saturated by surface water or groundwater.

In applying a statute, the board must “first look to the plain and ordinary meaning of the words used.” Pennelli v. Town of Pelham, 148 N.H. 365, 366 (2002); and Town of Acworth v. Fall Mountain, 151 N.H. 399 (2004). The board finds the plain and ordinary meaning of the statute is not difficult to understand and apply to the facts of this case once it is recognized, as the Legislature clearly did, that wetlands can exist in any of the three current use categories of land. The Town’s assertion that the trees depicted on Taxpayer Exhibit No. 4 (the “moose” photograph) indicate the Property is not “unproductive” land is misplaced for the reasons previously discussed. Even if the 5.13 acres contains an indeterminate mix of forest and unproductive land, this fact does not, in and of itself, preclude this area of the Property from qualifying for current use assessment as wetlands.

The Town did not produce a wetlands expert of its own but instead relied on the testimony of its assessor, who questioned Mr. Sisson’s expertise since he is not a “certified forester.” The board does not agree that the question presented in this appeal is beyond the scope of Mr. Sisson’s expertise as a certified soils and wetlands scientist.

For all of these reasons, the board finds the 5.13 acres qualifies as wetlands in the forest and unproductive land categories. Therefore, the board grants the Taxpayers’ appeal and the

Town shall treat the 5.13 acres as wetlands, place them in current use and make the appropriate adjustments to the Property's assessment.

If the taxes have been paid, the amount paid on the value in excess of the proper assessment with 5.13 acres determined to be wetlands entitled to current use valuation shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

Until the Town undergoes a general reassessment or in good faith reappraises the property pursuant to RSA 75:8, the Town shall use the revised assessment for subsequent years.

RSA 76:17-c, I and II.

Any party seeking a rehearing, reconsideration or clarification of this Decision must file a motion (collectively "rehearing motion") 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 with a copy provided to the board in accordance with Supreme Court Rule 10(7).

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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: Julian and Marisa Devlin, 120 Three Mile Road, Hanover, NH 03755, Taxpayers; Chairman, Board of Selectmen, Town of Hanover, PO Box 483, Hanover, NH 03755; and Current Use Board, c/o Department of Revenue Administration, 109 Pleasant Street, Concord, NH 03301, Interested Party.

Date: 6/29/11

Anne M. Stelmach, Clerk