

**Deacon Family Limited Partnership and
Arthur F. Howard & Virginia L. Howard Trust**

v.

Town of New London

Docket No.: 26627-12CU

DECISION

The “Taxpayers” appeal, pursuant to RSA 79-A:9, the “Town’s” denial of their application for current use on the “Property,” consisting of two contiguous lots:

A portion (approximately 1.7 acres) of Map 068/Lot002/000 (“Lot 2”), a 3.2 acre improved waterfront lot; and

All of Map 069/Lot 005/000 (“Lot 5”), a 14.46 acre unimproved “back lot.”

For the reasons stated below, the appeal on Lot 5 is granted and the appeal on Lot 2 is denied.

The Taxpayers have the burden of showing, by a preponderance of the evidence, the Town erred in denying their application for current use on the Property. See RSA 79-A:9; Tax 206.05. The Taxpayers carried this burden as to Lot 5 and not as to Lot 2.

The Taxpayers argued the Town erred in denying their current use application because: (1) both lots were in common ownership prior to the time of the current use application and the Town, although originally questioning this fact, has now accepted it (see Municipality Exhibit B);

- (2) for approximately 35 years, the land on both lots has been devoted to watershed protection, biological diversity and management and recreation, with some “firewood salvage,” and Lot 2 (the front lot) has ledge and a very steep slope to the waterfront;
- (3) Taxpayer Exhibit No. 3 is a “revised” map for Lot 2 submitted to the Town which depicts the location of the unimproved 1.7 acres (including two foot paths to the waterfront area leading to the docks and boat house -- approximately 54% of Lot 2) and the remaining improved areas (the existing house, garage, well, septic tank, leach field, driveway and tennis court);
- (4) Taxpayer Exhibit No. 4 shows the back lot (Lot 5) which is undeveloped except for footpaths through the forest;
- (5) both lots are “not posted” and are open to public access; and
- (6) the Town should have approved current use classification for both Lot 2 and Lot 5 and the appeal should be granted.

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

- (1) Lot 2 is a “residential waterfront property” and does not fulfill the intent of the current use statute as reflected in RSA 79-A:1 (Declaration of Public Interest) because of the existing improvements;
- (2) Lot 2 is essentially a developed, single-purpose, improved waterfront house lot “for the private enjoyment of the taxpayers both for recreation and ascetic purposes”;
- (3) the Town has no objection to placing Lot 5 in current use (and in fact this lot was enrolled in current use but removed only because the Taxpayers failed to submit a corrected application for the Town to record, as indicated on the assessment-record card for Lot 5);
- (4) Municipality Exhibit B contains a chronology and details of the “McLaughlin” case, which shares similar characteristics of the Property, and Municipality Exhibit C contains photographs and other information about the McLaughlin property;

(5) the board's earlier decisions (including "McDowell" and "Wiggin," as well as McLaughlin) support the Town's denial of the current use application; and

(6) the appeal should be denied.

After the April 11, 2013 hearing on the merits, the board took a view of the Property on June 24, 2013 primarily to obtain a better understanding of the land areas the Taxpayers claim qualify for current use on Lot 2. The board also viewed Lot 5 on that visit.

The view was attended by representatives of the Taxpayers (including Andrew F. Howard, Ph.D., who also attended the hearing), the Town's assessors (Norm Bernaiche and Kristen McAllister) and Jasen A. Stock, Executive Director of NHTOA (the New Hampshire Timberland Owners Association). The board did not take any testimony on the view.

Board's Rulings

Based on the evidence presented, including its view of the Property, the board¹ finds the Taxpayers did not meet their burden of proving the Town erred in denying the current use application with respect to Lot 2. As to Lot 5, the board finds it does qualify for current use. Pursuant to RSA 79-A:9,² the appeal is therefore denied in part (as to Lot 2) and granted in part (as to Lot 5) for the reasons discussed below.

The Property consists of two contiguous lots which are part of a larger "compound" of parcels on Lake Sunapee owned by related parties "since the 1890's." Each lot has historically been assessed for ad valorem taxation. This appeal essentially concerns the Town's denial of the Taxpayers' application to place in current use "a portion of the improved waterfront" on Lot 2.

(See Municipality Exhibit B.)

¹ Due to a medical issue, Member Theresa M. Walker did not participate in the view, the final deliberations and the deciding of this appeal. See RSA 71-B:6, I.

² This statute gives the board the authority to "investigate the matter," hold a hearing and "make such order thereon as justice requires." RSA 79-A:9, II. "Either party aggrieved" by the board's decision may appeal to the supreme court, but any such appeal "shall be limited to questions of law." RSA 79-A:9, VI.

Lot 5 is an undeveloped larger parcel located between Route 103A and Pilothouse Road which is not on the waterfront. The board concurs with the Town's conclusion that this lot qualifies for current use. (See Taxpayer Exhibit No. 4.) According to the evidence presented, Lot 5 can be subdivided and developed into multiple residential lots; however, the Taxpayers are not inclined to place Lot 5 in current use unless parts of Lot 2 also qualify.

Lot 2 is a developed smaller waterfront parcel with expansive views across Lake Sunapee to the Mount Sunapee ski area and other mountain vistas. (See the photographs in Municipality Exhibit A.) As noted above, Lot 2 is already improved with a large seasonal home, various driveways, a tennis court, a garage, a boathouse and dock and other outbuildings depicted on Taxpayer Exhibit No. 3. The board cannot envision further development occurring on this lot. Consequently, the board finds the present use of Lot 2 as a developed, waterfront, single family residential lot is its highest and best use.

On the view, the board specifically noted the areas of Lot 2 the Taxpayers contend qualify for current use. One of the Taxpayers' representatives (Mr. Howard) is a certified forester with a Ph.D. in forest management. He pointed out the natural "red pine" trees on Lot 2, along with some white pine, shrubs and other foliage, and how this natural growth has been managed and maintained. The board also observed the ledge along the shoreline and how the boat house and dock were constructed.

The board finds the Taxpayers' arguments that the waterfront should qualify for current use because the boat house and dock are not attached to the shoreline to be without merit. These structures were erected on the water (on "rock cribs") and are connected to the land only with a wooden ramp. The board heard similar arguments in at least one prior appeal: McDowell v.

Town of Alton, BTLA Docket No. 6336-89 (March 22, 1993).³ As in McDowell, the boat house and dock are structures connected to the land even if they are physically “over state property” because the right to construct these structures runs with the land. No other property owner could have built these structures. Further, as in MacDowell, the “areas adjacent to the structures” on the waterfront (between the two pathways depicted on Taxpayer Exhibit No. 3), as well as the pathways themselves, are “no different than the yards and grounds around a camp or house area that would not qualify for current use assessment. Rev 1204.02.” The board further notes that the boat house and dock are very substantial structures with a value in excess of \$160,000 (based on the information on the Town’s assessment-record card). Further, the Town indicated “[m]ost, if not all the land is required for setbacks under both local and state shoreline rules. Even though the Taxpayer claims the remaining land is ‘in its natural state and undisturbed’, the fact remains

³ In McDowell (pp. 3-4), the board noted:

The current use statutes are clear in that to be eligible for unmanaged forest land there should be no structures present regardless of size. The dock is a structure related to the land in question regardless of the fact that it is located over state property because the right to construct that dock runs with the property on which the Taxpayers are requesting current use assessment See Dana Patterson, Inc. v. Town of Merrimack, 130 N.H. 353 (1988).

[] Because of the substantial alteration by the Taxpayers and their recreational use, the area adjacent to the structures and the camp road is no different than the yards and grounds around a camp or house area that would not qualify for current use assessment. Rev 1204.02.

[] Lastly, the board looks at the general intent of the current use statute, in arriving at this conclusion. In Michael H. Foster v. Town of Henniker, 132 N.H. 75, 82 (1989), the court reinforced the concept that rules do not modify a statute, but only serve to effectuate its purpose. The board does not believe it was the legislature's intent that intensely used land, for example in this case the road and cleared area adjacent to the two structures, should qualify as open space land under the current use statutes. The recreational improvements and uses of this land are intensive and single purposed as opposed to the compl[e]mentary passive uses the drafters envisioned for roadways to support agricultural, recreational, watershed and forestry uses of current use land, as suggested in RSA 79-A:7, IV(a).

[] Therefore the Taxpayers' land, which is used intensely for accessing and using the waterfront in the area of the shed and the dock, does not qualify for unmanaged forest land as it has been improved and disturbed so as to interfere with its natural ecological process.

it could not be developed anyways because of the local and state regulations.” See Municipality Exhibit B. (Emphasis in original.)

The board also reviewed the McLaughlin v. Town of Newbury, BTLA Docket No. 15961-96 (April 2, 1997) decision emphasized by the Town, including the photographs of this property and its site maps (in Municipality Exhibit C). In McLaughlin, the board affirmed the Town’s denial of a current use application “to add an additional 0.2 acres and 287 feet of Lake Sunapee water frontage.” The board concluded “this land properly should be considered a part of the curtilage (CUB 301.04).”⁴

⁴ Further, as in McLaughlin (p. 2):

[G]rooming to improve the visibility of the shore and the Applied Parcel's proximity to the dwelling and associated footpaths leads the board to conclude that its use is directly related to the dwelling's homesite and the enjoyment of the shore from the homesite. Certainly the value and enjoyment of the homesite would not be as great if the vegetation had been allowed to grow up and obstruct the view of the lake. Further, even if the board were to find this land should qualify for current use and not be part of the curtilage, the board agrees with the Town that the site value around the dwelling and the garage would not necessarily change because the Town's site value reflects the view and enjoyment of the Applied Parcel from the site. Lastly, on a practical note, such chopping up of lots in an attempt to minimize tax liability does not appear to fully comport with the purpose of current use as described in 79-A:1. The Applied Parcel, while not built on or developed due to its steep slope, is skirted by a footpath and a footbridge that runs from the house to the boathouse and affords the Taxpayer views of the lake.

Second, the board notes that a portion of the Applied Area is likely within the setback requirements contained in RSA chapter 483-B of the New Hampshire Comprehensive Shoreline Protection Act. Specifically, RSA 483-B:9 requires primary structures be placed 50 feet back from the highwater mark, in this case, of Lake Sunapee. While certainly the dwelling predates that enactment of RSA 483-B, portions of the Applied area would be needed to satisfy the setback requirements. While not controlling in deciding this case, the board notes that RSA 79-A:7,V(b) provides for land to be considered changed if the area is within certain setback requirements[:]

RSA 79-A:7,V(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.

Finally, the Town testified, and the board noted on the view, the existence of the power lines on Lot 2 which are not depicted on the map presented to the Town by the Taxpayers. (See Taxpayer Exhibit No. 3.) The land under these power lines does not qualify for current use.

There is no doubt the Property is well maintained and has been developed historically to preserve much of the pristine natural beauty of the land and the environment. The evidence presented, however, and the prior case law, requires the board to conclude the Town did not err in denying the current use application on Lot 2. The appeal is therefore denied as to Lot 2 and granted as to Lot 5.

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). See also RSA 79-A:9, VI, discussed above.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Michele E. LeBrun, Chair

Albert F. Shamash, Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Deacon Family Limited Partnership, c/o John Deacon, PO Box 1468, New London, NH 03257 and Arthur F. Howard & Virginia L. Howard Trust, c/o Andrew Howard, PO Box 1468, New London, NH 03257, Taxpayers; Chairman, Board of Selectmen, Town of New London, 375 Main Street, New London, NH 03257; and Current Use Board, c/o Department of Revenue Administration, 109 Pleasant Street, Concord, NH 03301, Interested Party.

Date: 8/5/13

Anne M. Stelmach, Clerk