

Town of Charlestown

v.

TransCanada Hydro Northeast, Inc.

Docket No. 26637-12OS

ORDER

The board has reviewed the “Town’s” March 11, 2013 Motion for Reconsideration (“Motion”) of the board’s February 7, 2013 Decision and the “Taxpayer’s” March 18, 2013 “Objection” to the Motion. The suspension Order entered on March 14, 2013 is dissolved and the Motion is denied for the reasons stated below, as well as those presented in the Objection.

I. Issue Presented

As noted in the Objection (p. 1), the issue presented by the Motion is whether the Town has satisfied its burden of proving the board “committed an error o[f] law or fact” by dismissing the Town’s “Petition for Reclassification of Current Use Parcels Pursuant to RSA 79-A:12, II” (the “Petition”) and the Town is required to demonstrate the Decision “is unlawful or unreasonable.” [See RSA 541:3 and 541:4 and Tax 201.37.] The board finds the Motion fails to satisfy this burden of proof.

The Motion asserts the board has misinterpreted the scope of its statutory authority, both its general authority under RSA 71-B:5, I and its “any source” authority under RSA 79-A:12, II, and has no “discretion” whatsoever regarding whether to “hear” the merits of the RSA ch. 79-A

current use issue framed in the Petition; in other words, the Town argues the board has a “duty” to hold a hearing on the merits of the Petition, making dismissal prior to any such substantive hearing “plainly incorrect.” (Motion, pp. 2, 3, 5 and 6.)

The board reviewed the relevant pleadings (the Petition and the “Objection” to the Petition) in some detail before making its rulings. In the Decision (p. 1), the board noted the key facts presented by the Town and the Taxpayer are not in dispute, even if they disagree in their legal conclusions. A hearing to make findings regarding contested facts prior to deciding whether the board should assert jurisdiction under RSA 79-A:12, II was therefore not necessary.

The Petition (pp. 9 and 3) alleges the Town (in May, 2007) acted in error (“improperly”) when it voluntarily approved the Taxpayer’s applications (filed in April, 2007) to place three parcels of land (the “Property”) in current use “as open space land” pursuant to RSA ch. 79-A. According to the Town, the board cannot dismiss the Petition because of the “any source” provision in RSA 79-A:12, II, which gives the board authority to accept jurisdiction when land has allegedly been “fraudulently, improperly or illegally” classified for current use assessment. The Town asks the board to revoke the current use classifications on the Property, not simply prospectively (starting in tax year 2013), but retroactively for every tax year back to 2007. (Id., p. 15.) The Taxpayer denies the claim that the Town acted “fraudulently, improperly or illegally” and argues the Town is not entitled to the remedies it is seeking in the Petition.

The Motion (p. 1) contends the Town has no means to correct its own alleged error without board intervention: the Town states it “would like nothing more than to remedy this situation,” but contends it cannot do so “unilaterally” and is required to proceed with an “any source” appeal under RSA 79-A:12, II as it is the Town’s only remedy. The board does not agree: filing an appeal under this statute is the Town’s only method of addressing the current use

classification of the Property; the board must accept jurisdiction and hold a substantive hearing on the Petition; or with the Town's other arguments for reconsideration of the Decision.

II. The Town's RSA 71-B:5, I Arguments

Although not mentioned at all in the Petition (see "Jurisdiction," p. 9), the Motion emphasizes RSA 71-B:5, I as a jurisdictional basis for the maintenance of this appeal. This statute states the board "shall have power and authority" to "hear and determine all matters involving questions of taxation properly brought before it . . . at the pleasure of the taxpayer or as otherwise provided by law." As evident by its name, the board has an appellate role regarding "questions of taxation properly brought before it" and its "power and authority" are "entirely" defined by statute.¹ The board's jurisdiction commonly arises when a taxpayer files an appeal of a decision by the taxing authority (the municipality or the State). As noteworthy examples, taxpayers have the statutory right to appeal to the board: municipal ad valorem assessment decisions (RSA 76:16-a); municipal refusals to grant tax exemptions, deferrals or credits (RSA 72:34-a); and municipal current use classification and taxation decisions (RSA 79-A:9 and RSA 79-A:7). In other words, the statutory framework established by the Legislature contemplates a municipal decision prior to a taxpayer's appeal for relief from the board (or the superior court, based on concurrent jurisdiction in most instances). No corresponding express grant of statutory authority exists for a municipality to file an appeal of its own decision to assess property either for ad valorem or current use taxation (either with the board or the superior court).

¹ Appeal of Land Acquisition, 145 N.H. 492, 494 (2000):

"The powers of the board and the rights of taxpayers appearing before the board are entirely statutory and are limited by the terms of the statute." Appeal of Gillin, 132 N.H. 311 (1989) (quotation omitted). The board's subject matter jurisdiction is similarly statutorily defined." See Appeal of Town of Sunapee, 126 N.H. 214 (1985).

While emphasizing the first sentence of RSA 71-B:5, I (quoted above) and the preamble which mentions a “duty” (Motion, pp. 6-7), the Town does not discuss the third sentence of this statute. This sentence specifically states “the board may. . . hold hearings, or take such other action as it shall deem necessary” (emphasis added), disposing of any argument that a hearing is required in every tax appeal filed with the board.

A dismissal inherently involves a finding that an appeal was not “properly brought” (in the language of RSA 71-B:5, I) and the board so ruled with respect to the Petition. [Cf. Motion, p. 7, ¶21.] If, as the Town argues, a hearing is required in every tax appeal, then the board would have no authority whatsoever to ever grant any motion to dismiss, a notion contrary to established law. See, e.g., Appeal of City of Concord, 161 N.H. 169, 170-71 (2010) (error for the board not to grant municipality’s motion to dismiss an RSA ch. 79-A tax appeal).

III. The Town’s RSA 79-A:12, II Arguments

As noted above, the Petition does not mention RSA 71-B:5, I and focuses instead on the “any source” paragraph (II) in RSA 79-A:12.² On the record presented, the board concluded in the Decision (pp. 1-3) a substantive hearing was not necessary to decide the threshold question of whether to exercise its discretionary jurisdictional authority under RSA 79-A:12, II.

The legal authorities and arguments in the Objection are supportive of the board’s discretion regarding whether to accept jurisdiction of an appeal to ‘reclassify’ or ‘deny a classification’ of current use property. The textual arguments in the Motion regarding what is “permissive” and what is “mandatory” under RSA 79-A:12, II (as well as under RSA 71-B:5, I) is at odds with the authorities presented by the Taxpayer that govern statutory interpretation and

² The Decision (p. 3) notes another statute, contained in RSA ch. 71, has a similarly worded “any source” provision. See RSA 71-B:16, II (miscited as “RSA 71-B:16, III” in the Petition, p. 9).

the plain meaning of the words of “may” and “shall.”³ See, generally, Appeal of Rowan, 142 N.H. 67, 71 (1997), quoted in the Objection (p. 3).

RSA 79-A:12 (“Reclassification by Board of Tax and Land Appeals”) confers discretionary authority to the board to “order a reclassification” or a “denial of a classification” in four specifically enumerated paragraphs that cover discrete circumstances when such appellate action “may” be necessary. The first paragraph (I) of RSA 79-A:12 applies only to a third party “land owner,” one who believes land “not owned by him . . . has been fraudulently, improperly or illegally so classified.” Such a third party has a prescribed time (“within 90 days of [the land] being listed [in current use] as provided in RSA 79-A:5, IV”) to file a “specific written complaint” regarding that classification and loses the right to do so if he (or she) does not act in a timely manner.

The board notes the Legislature could have enacted a similar paragraph, with or without a time limitation, granting the same right to file an appeal with the board to either the municipality who made the current use classification (the Town) or the owner of the land so classified (the Taxpayer), but chose not do so. The fact the Legislature imposed a 90-day time limitation on another landowner to file an appeal with the board (under RSA 79-A:12, I) indicates some degree of repose was intended for a taxpayer who applies for and receives a current use classification in good faith (without concealment of any material facts from the municipality; see Decision, p. 4, fn. 2). To allow either the municipality or a taxpayer to revisit the voluntary current use classification application and approval decision for a prior year under the “any

³ In re Thomas M., 141 NH 55, 59 (1996), cited in the Motion, is clearly distinguishable since it involved the issue of parental rights (with respect to “abuse and neglect” of two minor sons) and a legislative mandate for the superior court “to hold a de novo dispositional hearing pursuant to RSA 169-C:28” prior to issuing an order adjudicating those parental rights.

source” provision in RSA 79-A:12, II would run counter to the statutory framework of annual assessments and taxation of property. (See, e.g., RSA 74:1, 75:1 and 75:8.)

Allowing such a “back door” procedural avenue to allow a municipality or a taxpayer, for that matter, to undo prior year assessment determinations is disfavored, as the board has held in the prior rulings cited in the Decision (p. 3).⁴ These rulings are consistent with the concerns expressed by the supreme court in limiting a municipality’s right to “correct omissions or improper assessments” only until “expiration of the tax year for which the tax has been assessed,” pursuant to RSA 76:14, rather than permitting the municipality to do so retrospectively. LSP Assn. v. Gilford, 142 N.H. 369, 374-75 (1997). As explained in LSP:

The rationale for the one-year restriction on making such corrections is that the Legislature may have considered that a revision by selectmen of the doings of their predecessors would produce greater mischief than the occasional escape of taxable property from taxation.

Id. [quoting from 16 P. Loughlin, New Hampshire Practice, Municipal Law and Taxation, §15.06 at 204 (1993)]. Accord, Pheasant Lane Realty Trust v. City of Nashua, 143 N.H. 140, 142-43 (1998). In LSP, the municipality made the same “fair share” arguments as the Town (Motion, pp. 16-18) that the tribunal in an appellate proceeding can order an increase in tax liability “in order to avoid an unjust and disproportionate tax burden from being placed on other taxpayers in the community,” 142 N.H. at 374, but the supreme court rejected these arguments.

IV. The Town’s Additional Statutory and Other Arguments

The Motion (p. 1) also contends RSA 79-A:7, I-a “expressly prohibits the Town” from taking ‘unilateral action’ to correct a prior alleged error in approving a current use application since this section provides such land “shall be assessed at current use values until a change in

⁴ Contrary to the Motion (p. 14), the board’s December 9, 2011 In re: Town of Richmond decision is published on Westlaw.

land use occurs pursuant to RSA 79-A:7, IV, V or VI.” The board does not agree. This provision should be interpreted within the context of RSA 79-A:7 (Land Use Change Tax--“LUCT”) as a whole, which addresses when and how the LUCT can be assessed, and not in isolation. See, e.g., Appeal of Kat Paw Acres, 156 N.H. 536, 537 (2007).

The legislature enacted this tax in RSA 79-A:7 at the rate of 10% of market value, but limited its application to circumstances when land, previously approved, “is changed to a use which does not qualify for current use assessment.” See, e.g., Tyler Road Development Corp. v. Town of Londonderry, 145 N.H. 615, 616 (2000):

The purpose of the current use taxation statute is to encourage the preservation of open space. . . . When the land is changed to a use that no longer qualifies for current use assessment, it falls out of current use, and a land use change tax is assessed against the market value of the land. See RSA 79-A:7, I.

This LUCT statute further provides that a landowner is obligated to notify the municipality when “land is accorded current use classification in one category is changed to any other qualifying category,” but no LUCT shall be assessed when “[I]and accorded current use assessment in one category is changed in use to any other qualifying category.” [See RSA 79-A:7, VII and VI (c).]

The Legislature no doubt concluded imposition of a LUCT should occur only when there has been a “change in land use” by a taxpayer, not when a municipality decides to reexamine a current use classification it has already approved in a prior year. Consequently, the board finds it would be unreasonable to conclude RSA 79-A:7, I-a “expressly prohibits” a municipality from reviewing a prior current use classification decision and modifying it appropriately and prospectively (rather than retroactively, as the Town seeks to do in the Petition), provided there is no attempt to assess a LUCT when there has been no change in land use. A taxpayer could then decide whether to file an appeal with the board of the municipality’s decision.

These conclusions are supported by RSA 79-A:5, IV, which the Motion does not mention. This statute imposes affirmative obligations (through the use of the word “shall”) and requires the assessing officials in each municipality annually (prior to July 1 of each year) “to determine if previously classified lands have been reapplied” and to file an annual list “of all classified lands and their owners.” (See also RSA 79-A:5, V-a and VI.) Further, the rules adopted by the Current Use Board (“CUB”) recognize the right of a municipality to reclassify land in current use when it discovers a previously granted classification is incorrect and to make appropriate changes “at any time during the tax year.” [Cub 305.01 (a).] In other words, annual municipal review of current use land classifications is part of the statutory and regulatory framework of RSA ch. 79-A. A municipality need not undertake the cumbersome and time-consuming process of ‘petitioning’ the board in advance for permission to change a current use land classification, provided municipal officials act on a prospective basis and in good faith.⁵

Finally, and as noted in the Objection (pp. 3-5), the prior board decisions cited in the Motion regarding RSA 79-A:12 and RSA 71-B:16 are distinguishable. In none of them did the board allow an appeal to proceed when the only basis of asserted jurisdiction was a municipality’s claim that it had “improperly” classified land in current use and could not correct the error on its own without board intervention. While “the Town interprets the term ‘any source’ to include any municipality, including the municipality in which the land is located” (Motion, p. 11), the board does not agree with this interpretation and therefore denies the Motion.

⁵ Cf. RSA 31:104 (granting immunity to municipal officials for decisions made in good faith). As one example, lack of good faith might be established by a showing the municipality’s assessing officials ‘changed their minds’ about a previous assessment decision only out of a motive to retaliate against a taxpayer for taking some action, such as filing a tax abatement application and appeal.

Pursuant to RSA 541:6, any appeal of the Decision must be by petition to the supreme court 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, Chair

Albert F. Shamash, Esq., Member

Theresa M. Walker, Member

CERTIFICATION

I hereby certify that a copy of the foregoing Order has this date been mailed, postage prepaid, to: Adele M. Fulton, Esq. and Joshua M. Pantescio, Esq., Gardner, Fulton & Waugh PLLC, 78 Bank Street, Lebanon, NH 03766, counsel for the Town; Chairman, Board of Selectmen, Town of Charlestown, 26 Railroad Square - PO Box 385, Charlestown, NH 03603; and Michael D. Ramsdell, Esq., Ramsdell Law Firm, P.L.L.C., 46 South Main Street, Concord, NH 03301, counsel for TransCanada Hydro Northeast, Inc.

Date: 4/8/13

Anne M. Stelmach, Clerk