

**Gretchen E. Ham**

**v.**

**Town of Milford**

**Docket No.: 27147-14LC**

**DECISION**

The “Taxpayer” appeals, pursuant to RSA 79-A:10, the “Town’s” 2014 land use change tax (“LUCT”) of \$5,800 on Map 47/14/1, Lovejoy Road, a 15.33 acre lot (the “Property”). The LUCT was issued after the Town removed 1.1 acres from current use (“CU”) and was based on a \$58,000 full value assessment. For the reasons stated below, the appeal for abatement is granted.

The Taxpayer has 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 Taxpayer carried her burden and therefore the appeal is granted.

The Taxpayer argued the land should not have been removed from CU and, if the removal was proper, the resulting LUCT was erroneous or excessive because:

(1) the Property still qualifies for CU as there are only three reasons a property could be disqualified including: development, subdivision resulting of a lot less than 10 acres in size and excavation;

(2) portions of the Property have been utilized as “granite rubble” piles from an adjacent quarry for many years (since the 1800s) and any activity occurring on the Property that would have disqualified it from CU was occurring well before the Taxpayer purchased it in September, 2012 and any LUCT should have been assessed to the prior owner;

(3) the Town should have discovered any excavation activity at the Property before September, 2012 as they inspected the abutting quarry property in April, 2011; and

(4) even if the LUCT is properly assessed to the Taxpayer, the 1.1 acres removed from CU is not a buildable house lot and should be valued much lower than \$58,000 (resulting in a LUCT of \$5,800).

The Town argued the removal of the 1.1 acres from CU was proper and the estimation of market value of \$58,000 (resulting in a LUCT of \$5,800) was appropriate because:

(1) the Town utilized proper due diligence and inspected the Property promptly when it received notification of the September, 2012 sale and noted the deed included a provision stating “the Grantors herein reserve for a period of six (6) months from the date of closing, all granite steps and posts located on the premises herein conveyed...” (see Municipality Exhibit B, p. 2; Fiduciary Deed, p. 2);

(2) a conversation with the Taxpayer after the September, 2012 purchase confirmed the prior owners were removing granite from the Property for commercial sale and Ms. Ham intended to continue to do so;

(3) the Taxpayer was the owner of record at the time the Town discovered the change in use and therefore she is both the “owner” of record and the “responsible party” (see RSA 79-A:7, II);

(4) the Town inspected the Property in September, 2012 and in December, 2012 discovered a “Zillow” listing of the adjacent quarry property that confirmed the Property was being utilized for commercial purposes;

(5) the size of the area disqualified from CU (1.1 acres) was calculated by a survey prepared by Fieldstone Land Consultants, PLLC dated April 18, 2013 (see Municipality Exhibit E); and

(6) the market value of the 1.1 acre parcel removed from CU was calculated by the Town’s Assessor utilizing several sales of house lots in the Town and is well supported (see Municipality Exhibit J).

### **Board’s Rulings**

Based on the evidence, the board finds the removal of the 1.1 acres from CU was timely and proper. However, the board further finds the Taxpayer carried her burden of proving the LUCT was excessive and therefore the appeal is granted.

### **Background**

The Property is an undeveloped 15.33-acre lot located on Lovejoy Road. It is adjacent to the Lovejoy Quarry (the “Quarry”), which has operated as a granite quarry for more than 100 years. In recent years, and until it was acquired by the Taxpayer in September, 2012, the Quarry and the Property were owned by the same parties (William J. and Diane Fitzpatrick) who deposited “quarry rubble” in several areas of the Property and sold it commercially. The area with the quarry rubble totals 1.1 acres and is the area the Town removed from current use. (See Municipality E, April, 2013 Survey by Fieldstone Land Consultants, PLLC.)

The Taxpayer (who owns an adjacent parcel improved with her residence) purchased the Property from the Fitzpatricks in September, 2012 for \$160,000, including the value of the

granite rubble piles. When the Town's Assessor reviewed the deed,<sup>1</sup> she noted the Fitzpatrick's reserved a right to remove "granite posts and steps" from the Property for up to six months.

After physically inspecting the Property, the Town's Assessor determined the areas with the "rubble" do not qualify for current use and should be removed. The Town and the Taxpayer disagreed regarding the size of the area in question, and an independent survey was obtained which calculated the size of 1.1 acres. The Assessor then estimated the market value of the 1.1 acres at \$58,000. Pursuant to 79-A:7, I, the Town issued a LUCT on May 30, 2013 for \$5,800 (10% of the market value of the area removed from current use) which was paid by the Taxpayer.

Further, the Town's Assessor stated she discovered a "Zillow" listing for the Quarry that referenced the Property as an "adjacent 15.33 acre building lot [which] contains thousands of tons of stone.... Present homeowner realizes \$30-\$40,000/year, working part time, from sale of this material..." (see Municipality Exhibit B, p. 15). This supported the Assessor's earlier findings that granite was being commercially sold on the Property.

Ms. Ham testified she purchased the Property "for buffer area" and intended to keep it in current use and not to develop it. She argued the sales activity of the quarry rubble has been ongoing for many years, and Mr. Fitzpatrick's April 17, 2014 letter to the board attested to that fact. (See Taxpayer Exhibit No. 6.) She further argued that even if the 1.1 acres was properly removed from CU, the LUCT should have been issued to the prior owners (the Fitzpatrick's) as they were the "responsible party" pursuant to RSA 79-A:7, II.

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<sup>1</sup> The Assessor testified it is the Town's policy to review deeds of all properties in current use, and that the removal clause raised questions and caused her to contact the Taxpayer and inspect the Property.

Removal of 1.1 acres from CU

RSA 79-A:7, IV (b)(2) states “sale of excavated materials shall constitute a land use change of the property from which the material was excavated.” The Taxpayer argued there has been no “excavation” on the Property which is defined in RSA 72-B:2, VI as “removing earth from its natural state of repose” and the material removed from the Property is not in a “state of natural repose.” She further argued the material removed from the Property does not meet the definition of “earth” which is defined in RSA 155-E:1 as “sand, gravel, rock, soil or construction aggregate produced by quarrying, crushing or any other mining activity or such other naturally-occurring unconsolidated materials that normally mask the bedrock.” The board finds the totality of the evidence does not support these assertions and the Town acted properly in removing the 1.1 acres from CU.

The board finds the Town properly assessed the LUCT to the Taxpayer. RSA 79A-7, II states “the land use change tax shall be due and payable by the owner, or by the responsible party pursuant to RSA 79-A:7, VI(e), at the time of the change in use to the town or city in which the property is located.” The board finds the Taxpayer is both the owner and the responsible party. This finding is supported not only from the Town’s evidence but also by Taxpayer Exhibit Nos. 4 and 5, which include a “PRICE LIST – Spring 2012” with the Taxpayer’s name listed as one of the operators and photographs of dimension stone labeled “DIMENSION STONE from Lot #14-1 Map #47.”<sup>2</sup> Thus, the remaining issue to be addressed is the value of the land removed from CU.

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<sup>2</sup> The Taxpayer purchased the Property in September, 2012 however, the evidence supports the finding she was actively engaged in the commercial removal of stone from the Property at least as early as “Spring, 2012.”

Value of Land Removed from CU:

The Town estimated the 1.1 acres removed from CU had a market value of \$58,000 and subsequently issued a LUCT for \$5,800. (See Municipality J.) The Town estimated the market value utilizing the assumption the 1.1 acres is a building lot, and the land remaining in CU is “residual land.” The Town first determined the market value of the 14.23 acres remaining in CU had a “residual land” value of \$7,150 per acre, or \$101,750. The Assessor then deducted that “residual land” value from the \$160,000 sale price of the Property and arrived at a \$58,000 value for the 1.1 acres removed from CU. This implies a market value for 1 acre of approximately \$52,700 ( $\$58,000 / 1.1$  acres), which is inconsistent with the \$7,150 per acre residual land value utilized by the Assessor.

There is no evidence before the board that would allow it to find, as the Town did, that the 1.1 acres removed from CU has a significantly different value than the land remaining in CU. Using its judgment and experience<sup>3</sup>, the board finds it is more appropriate to value the entire Property consistently as residual land, or \$7,150 per acre. (See Municipality Exhibit J, p. 2, unnumbered.) This results in a market value estimate for the 1.1 acres removed from CU of \$7,900 ( $\$7,150 \times 1.1$  acres).

If the LUCT has been paid, the amount paid on the value in excess of \$790 ( $\$7,900 \times 10\%$ ) shall be refunded with interest at six percent per annum from date paid to refund date.

RSA 76:17-a.

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<sup>3</sup> The agency’s experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence. See RSA 541-A:33, VI; Appeal of City of Nashua, 138 N.H. 261, 264-65 (1994); see also Petition of Grimm, 138 N.H. 42, 53 (1993) (administrative board may use expertise and experience to evaluate evidence).

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(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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Michele E. LeBrun, Chair

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Theresa M. Walker, Member

**ADDENDUM**

**TOWN'S PROPOSED FINDINGS OF FACT**

The "Requests" received from the Town is 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 so broad or specific 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.

In accordance with Tax 201.36(c), "Unless granted leave by the board prior to or at the hearing, parties shall be limited to a combined total of 25 requests for findings of fact and/or rulings of law." Leave was not requested by the Town, therefore the board has answered the first 25 requests.

1. The parcel under question is known as Map 47 Lot 14-1, 0 Lovejoy Rd, in the town of Milford, NH.

**Granted.**

2. The subdivision plan creating the lot known as Map 47, Lot 14-1 was filed August 7, 1987, recorded as Plan# 20994, at the Hillsborough County Registry of Deeds.

**Granted.**

3. The entire parcel, known as Map 47, Lot 14-1, was placed into Current Use on September 21, 1992 by The Estate of Avery R. Johnson and recorded in the Hillsborough County Registry of Deeds, Book 5370, Page 1249.

**Granted.**

4. The lot was subsequently purchased by William and Diane Fitzpatrick on March 14, 1994, recorded in Hillsborough County Registry of Deeds, Book 5530, Page 1039.

**Neither granted nor denied.**

5. The lot was in Current Use at the time of the Fitzpatrick purchase.

**Granted.**

6. Aerial photos from Google Earth, indicating a 2003 time frame, show the parcel with rock slope and vegetation, including large trees growing on the property.

**Neither granted nor denied.**

7. In 2007, the Town of Milford commissioned Pictometry to provide aerial photographs.

**Granted.**

8. In August, 2010, the Milford Assessing Department sent a Current Use inquiry to the Fitzpatricks.

**Granted.**

9. The Current Use inquiry was returned to the Town of Milford by the Fitzpatricks.

**Granted.**

10. The Fitzpatricks stated on the inquiry that no changes had been made to the site.

**Neither granted nor denied.**

11. The Fitzpatricks returned a map appearing to be identical to the original map filed with the original Current Use application, as confirmation that no changes had occurred to the site.

**Granted.**

12. The 2007 Pictometry aerial appeared to confirm the statements on the inquiry made by the Fitzpatrick's.

**Neither granted nor denied.**

13. On September 7, 2012, the Hillsborough County Registry of Deeds Book 8467, Page 2916 indicates the site known as Map 47 Lot 14-1 was purchased by Ms. Gretchen Ham.

**Granted.**

14. The recorded deed, Book 8467, Page 2916 transferring the land to Ms. Ham contained a clause indicating the land was subject to Current Use.

**Granted.**

15. The recorded deed, Book 8467, Page 2916 transferring the land to Ms. Ham contained a clause allowing the Fitzpatrick's' to remove granite posts and steps from the site.

**Granted.**

16. During a discussion between the Milford Assessor and Ms. Ham, Ms. Ham confirmed the terms of sale, and further stated her intent to facilitate and participate in the removal of stone from her newly acquired site, and that such stone was to be sold for commercial enterprise.

**Neither granted nor denied.**

17. In confirmation of her intent, Ms. Ham stated that she had also purchased a \$20,000 excavator from the Fitzpatrick's.

**Neither granted nor denied.**

18. On or around September 20, 2012, the Milford Assessor visited the site with the NH State Gravel Agent, Ms. Mary Pinkham Langer and witnessed significant disturbance occurring at the site.

**Granted.**

19. On September 21, 2012, the Milford Assessor corresponded with Ms. Ham explaining the requirements for disturbance of Current Use lands, and offered a remedy.

**Neither granted nor denied.**

20. In December 2012, the Milford Assessor became aware of the property listing posted on the *Zillow* web site, which claimed significant income of “\$30,000 to \$40,000 annual part time” derived from the removal of stone located on the site.

**Granted.**

21. Between September and October 2012, the Milford Assessor witnessed on two separate occasions dumpsters being filled with stone to be removed from the site for commercial gain.

**Neither granted nor denied.**

22. In April of 2013, Fieldstone Land Consultants conducted a survey, with Ms. Ham’s permission, to determine the extent of disturbed land.

**Granted.**

23. On that same April 2013 visit, the Milford Assessor witnessed that a new driveway had been built for access and continued removal of the stone.

**Granted.**

24. An April 2013 aerial view of the property indicates continued disturbance to the land since Ms. Ham had purchased it in September of 2012.

**Granted.**

25. A comparison of the April 2013 aerial view and the 1992 recorded subdivision plan of the lot known as Map 47, Lot 14-1 indicates the new driveway that was built between September 2012 and April 2013 coincides with the driveway location delineated on the 1992 recorded subdivision plan of the same lot.

**Neither granted nor denied.**

26. Ms Ham was the property owner at the time the Milford Assessor discovered the disturbance to the Current Use land.
27. Ms. Ham remains the property owner as of this date.
28. Ms. Ham has expanded the area used for removal and sale of stone product, and has continued to sell stone using the new driveway and expanded extraction area.
29. Ms. Ham has allowed on-going disturbance to her site after her purchase of the property although she had been made aware of the Current Use criteria.
30. The land has experienced significant and on-going disturbance since Ms. Ham's purchase.
31. Material has been dug, sorted, and removed from the site and sold for commercial gain since Ms. Ham's purchase of the lot.
32. RSA 79-A:7 IV (b) states that "land use shall be considered changed and the land use change tax shall become payable when topsoil, gravel or minerals are excavated **or dug** from the site" (emphasis added)
33. Cub 303.03 affirms that "land used in operations involving removal for sale of soil, gravel, stone and other surface minerals shall not qualify for current use assessment except as allowed in RSA 79-A:7 IV (b)
34. RSA 79-A:7 IV (b) clearly states that "sale of excavated materials shall constitute a land use change of the property from which the material was excavated."
35. Current Use Handbook p. 29 instructs in item "D" that "the land use change tax bill shall be assessed and mailed within 12 months of the date the local assessing official are either notified by the landowner of a change in use or when they discover that a change in use has occurred. "
36. By permitting and participating in the disturbance to her land, construction of access roadways, and sale of the earth materials dug or excavated from the site since September 2012, Ms. Ham is the responsible party to whom the Land Use Change Tax Warrant should be issued.

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**Certification**

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Gretchen E. Ham, 100 Lovejoy Road, Milford, NH 03055, Taxpayer; Chairman, Board of Selectmen, Town of Milford, 1 Union Square, Milford, NH 03055; and Current Use Board, c/o Department of Revenue Administration, 109 Pleasant Street, Concord, NH 03301, Interested Party.

Date: 7/16/14

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Anne M. Stelmach, Clerk