NO. CV 05 4011562S	:	SUPERIOR COURT
GRISWOLD AIRPORT, INC.	:	JUDICIAL DISTRICT OF
	:	
	:	NEW BRITAIN
v.	:	
	:	
TOWN OF MADISON, ET AL.	:	MARCH 30, 2007

MEMORANDUM OF DECISION

This is a real estate tax appeal challenging the action of the assessor for the town of Madison (town) increasing the assessment of the plaintiff's property, as of the Grand List of October 1, 2004, by terminating the property's open space designation and instead valuing the property as a condominium development.

The parties' stipulation of facts can be summarized as follows:

- The plaintiff, Griswold Airport, Inc., is the owner of property known as the Griswold Airport located at 1362 Boston Post Road in the town. There is a small airport and associated structures located on the subject property.

- In 2000, Leyland Development LLC (Leyland) contracted to purchase the subject property contingent upon securing land use approvals for the development of an active adult housing complex.

- In November 2000, the town's planning and zoning commission approved, with modifications, Leyland's application to amend the text of § 4.1.37 of the town's zoning regulations in order to designate "planned adult community" as an allowed use with special exception approval for the subject property. On August 23, 2001, a citizens' group commenced an appeal in which the Supreme Court of Connecticut held that the trial court lack subject matter jurisdiction to

entertain the appeal because the plaintiff citizens were not statutorily aggrieved by the commission's decision. See Stauton v. Planning and Zoning Commission, 271 Conn. 152, 157, 856 A.2d 400 (2004).

- For the Grand List of October 1, 2003, the subject property was classified as open space land and valued at a fair market value of $345,900 and an assessed value of $294,420.

- On May 28, 2004, upon Leyland's application, the town's planning and zoning commission, pursuant to § 4.1.37 of the zoning regulations, granted a special exception permit and coastal site plan approval for a planned residential community for active adults on the subject property.

- After the zoning approvals were granted, the assessment of the subject property changed for the Grand List of October 1, 2004. The assessor terminated the open space designation and described the plaintiff's property as containing 127 condominium units.

- Based on the zoning approvals to build 127 condominium units, the town's assessor valued the subject property on the Grand List of October 1, 2004, at a fair market value of $25,000 per unit, for a total of $3,175,000, and an assessed value of $17,500 per unit, for a total assessment value of $2,222,500.

- The town recorded the special exception permit and coastal site plan approval on the town land records on October 19, 2004.

- A wastewater discharge permit filed by Leyland is pending with the Connecticut Department of Environmental Protection (DEP).

- The plaintiff is responsible for the taxes assessed against the subject property for the Grand List of October 1, 2004 and thereafter.

See stipulation of facts, dated 12/11/06.

The last town-wide revaluation occurred on October 1, 2002. However, when the town's planning and zoning commission approved Leyland's request to change the use of the subject property for the development and construction of 127 condominium units in

May 2004, the town's assessor testified that she considered this action as a termination of the subject property's open space designation. (Transcript of January 3, 2007 (hereinafter Tr.), p. 7.) The town's assessor, Patricia Hedwall, testified that the subject property was revalued for the October 1, 2004 Grand List as "127 condominium options and then the land" and "land that would be subject to being built for condominiums." (Tr., pp. 7, 13.)

The subject property contains 42 acres and has been used as an airport since 1968. In addition to its two runways, one of asphalt and one of grass, there are various structures on the property including cabins, dwellings, hangars and offices. Thirty-two acres of the subject property had been designated as open space land since 1969. Although there was a zone change in 1997 designating the subject property as industrial use, the property continued to be used as an airport through 2006.

To summarize the facts, in 2000, Leyland had entered into an agreement with the plaintiff to purchase the subject property and, by May 2004, had obtained a zone change, special exception permit and coastal site plan approval to build 127 condominium units as a planned adult community. As recited in the stipulation of facts, Leyland's application with DEP on the wastewater discharge permit for a community septic system is pending.[1] No condominium units may be built on the subject property until a wastewater discharge permit is issued and the septic system is approved. Furthermore, no declaration pursuant

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[1] Maryann Griswold, the president of the plaintiff corporation, testified that there is a tentative approval for a septic system that is in the comment period until January 2007. See Tr., p. 35.

to the Connecticut Common Interest Ownership Act (CIOA), General Statutes § 47-200 et seq., has been filed on the town's land records to create the condominium units.[2]

The two issues presented in this case are 1) whether the assessor has the authority to terminate the subject property's open space designation when a zoning approval has been granted changing the use and 2) whether, as of October 1, 2004, the assessor may revalue the subject property for condominium use before a CIOA declaration is filed.

When considering the termination of open space land classification for the subject property, General Statutes § 12-504h provides, in relevant part, that "[a]ny land which has been classified by the record owner as . . . open space land pursuant to section 12-107e shall remain so classified without the filing of any new application . . . until either of the following shall occur: (1) The use of such land is changed to a use other than that described in the application for the existing classification by said record owner, or (2) such land is sold by said record owner."[3]

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[2] General Statutes § 47-220 provides, in relevant part, as follows: "**Creation of common interest community.** (a) A common interest community may be created pursuant to this chapter only by recording a declaration executed in the same manner as a deed and, in a cooperative, by conveying the real property subject to that declaration to the association. The declaration shall be recorded in every town in which any portion of the common interest community is located . . . . (b) A declaration, or an amendment to a declaration adding units, may not be recorded unless all structural components of all buildings containing or comprising any units thereby created are substantially completed in accordance with the plans, as evidenced by a recorded certificate of completion executed by a registered engineer, surveyor or architect."

[3] Public Act 05-190 repealed and amended § 12-504h for sales, transfers or changes in use of land classified as farm land, forest land or open space land occurring on or after July 1, 2005.

In terminating the open space classification of the subject property, the assessor based her decision on the holding made in Johnson v. Killingworth, Superior Court, judicial district of Middlesex at Middletown, Docket No. 64578 (July 25, 1994, *Spallone, J.T.R.*), where the assessor in that case concluded that there was a change of use pursuant to § 12-504h and declassified the forest land designation when the property owners obtained an approval for a subdivision from the town's planning and zoning commission.[4]

The assessor's reliance on the Johnson decision is misplaced because Johnson dealt with forest land, not open space land. The Supreme Court in Carmel Hollow Associates Ltd. v. Bethlehem, 269 Conn. 120,134-37, 848 A.2d 451 (2004), set out the difference in the statute regarding the designation of forest land and open space land, specifically observing that the legislature gave the state forester the sole authority to cancel forest land classification, while the legislature provided assessors with discretionary authority to classify property as farm and open space land.[5]

The old version of § 12-504h will be recited and referenced herein as this appeal concerns the October 1, 2004 Grand List.

[4]

In Johnson, the trial court stated that § 12-504h "expressly states that a change in use is a condition subsequent that upon occurrence removes the classification of forest land. Section 12-504h does not require that the state forester take any action to remove the classification as forest land. The language of [§] 12-504h cannot be more clear. When one changes the classified use, one loses the designation."

[5]

General Statutes § 12-107e (b) provides, in relevant part, as follows: "The assessor shall determine whether there has been any change in the area designated as an area of open space land upon the plan of development which adversely affects its essential character as an area

In the present case, the issue before the court is whether the change of zone and the granting of a special exception for the proposed use of the subject property for residential condominium use is a change in the "essential character as an area of open space land." General Statutes § 12-107e (b). The essential character of the area of open space land relates back to § 12-504h, which provides that open space classification terminates when the use of the land has changed from the use in existence at the time of the original application for open space designation.

The genesis of the open space classification, according to § 12-107e (a), is the preparation of a plan of development by the town planning commission and the subsequent approval of the plan by a majority vote of the town's legislative body. The plan of development designates areas on the plan that the planning commission recommends for preservation as areas of open space land. See plaintiff's Exhibit A, the town's comprehensive plan of development, effective December 1988 and amended, effective July 1997. The town's comprehensive plan specifically sets out areas recommended as open space, including land used for airport purposes.

As discussed above, the plaintiff acquired the subject property in 1968 and has used it as an airport from that date through 2006. The subject property was granted open space designation in 1969, as provided in the town's plan of development. It was zoned for industrial use in 1997 but continued to operate as an airport. The assessor testified that

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of open space land and, if the assessor determines that there has been no such change, said assessor shall classify such land as open space land and include it as such on the grand list."

while the zone change allowed for an industrial complex, the property was not divided for multiple use or multiple structures, and continued to have its open space classification. See Tr., p. 10. It is the assessor's position that the approval to build 127 residential condominium units is "equivalent to a subdivision[.]" (Tr., p. 12.) The assessor places much weight on the fact that there exists a present ability to build 127 units on the subject property. With this in mind, the key date for the court's consideration is October 1, 2004, which is the date of the revaluation by the assessor and the termination of the open space classification. On October 1, 2004, the use of the subject property was for airport purposes, not for the development of residential condominium units.

In addition to Johnson, the town also relies on Pauker v. Roig, 232 Conn. 335, 336, 654 A.2d 1233 (1995) where "the only issue is whether it is proper to revalue and reassess real property once a subdivision of the property has been approved and recorded, even though the conditions attached to the subdivision approval have not yet been fulfilled." The court in Pauker v. Roig "discern[ed] a bright-line rule underlying our taxing and real property statutes with regard to subdivision approvals. Absent an appeal challenging its validity, the approval of a subdivision authorizes a tax assessor to tax the property as sub-divided lots rather than as the undifferentiated parcel or parcels that preceded the approval." Id., 345.

The facts in the present case are dissimilar to the facts in Pauker v. Roig. The subdivision of the lots in Pauker v. Roig had been approved and subdivision maps were

recorded on the town land records for the entire subdivision project. The Pauker v. Roig lots, therefore, were saleable subject to the performance of certain conditions attached to the subdivision approval.

In the present action, however, while the approval of the special exception was granted, there was a key component of the special exception that remained outstanding – the requirement that there be a filing of a declaration of condominium use pursuant to § 47-220.

According to Pauker v. Roig, the approval of a subdivision of land creates separate lots, allowing an assessor to change the designated owner of one parcel to owners of each lot created by the subdivision. In contrast, in the present action, condominium ownership cannot be created until the declaration of a common interest community is filed and recorded on the town land records pursuant to § 47-220 (a) and the declaration itself cannot be filed and recorded on the town land records until the structural components of the condominium have been completed with a certificate of completion filed and recorded in the town records pursuant to § 47-220 (b).

Neither of these conditions, with regard to the declaration, have been met in the present action.[6]

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[6] See also Fyber Properties Killingworth Limited Partnership v. Shanoff, 228 Conn. 476, 484, 636 A.2d 834 (1994).

The assessor further relies on General Statutes § 12-55[7] for her authority to terminate the open space designation and reassess the subject property following the zone change that permitted residential condominium use. However, the authority to terminate the open space designation comes from § 12-504h, not § 12-55.[8]

The assessor recognizes that the condominium units "have not as yet been built and therefore [the units] cannot be considered condominiums until they are declared." (Tr., p. 12.) In spite of this recognition, the assessor created 127 field cards identifying individual condominium units and revalued the subject property by assigning a fair market value of $25,000 to each unit, for a total fair market value of $3,175,000, and an assessed value of $2,222,500. See 12/11/06 stipulation of facts.

Given the court's finding that the use of the subject property was that of an active airport on October 1, 2004, the assessor was without authority to terminate the open space classification and then revalue the subject property for condominium use.

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General Statutes § 12-55 (b) provides, in relevant part, as follows: "Prior to taking and subscribing to the oath upon the grand list, the assessor . . . shall equalize the assessments of property in the town, if necessary, and make any assessment omitted by mistake or required by law."

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It is also important to note that § 12-504h refers to the record owner of the property, not an equitable owner operating under a contract to purchase, such as Leyland. More specifically, Section 12-504h allows an assessor to terminate an open space classification only if the "record owner" has changed the use of the property.

Accordingly, judgment may enter in favor of the plaintiff, sustaining its appeal, without costs to either party.

Arnold W. Aronson
Judge Trial Referee