

Onway Village, Inc.

v.

Town of Raymond

Docket No.: 6242-89

**DECISION**

Introduction

Onway Village, Inc. (Taxpayer) appeals, pursuant to RSA 79-A:10, a \$500,000 RSA 79-A:7, land-use-change tax (the Tax) assessed by the Town of Raymond (Town). A hearing was held on February 28, 1992, and evidence was presented on whether the Taxpayer had timely filed an appeal with the board. At the hearing, the board provided the parties 20 days to submit further offers of proof and memoranda of law on the timely filing issue.

The first section of this decision will address the pivotal issue -- whether the Taxpayer timely filed an appeal with the board thereby giving the board jurisdiction to hear and rule on the merits of the case. The Taxpayer raised several red herrings in its arguments, which, since they were raised, will be addressed in the second section of this decision.

I. Timely filing and jurisdiction:

A) Ruling

The board rules the Taxpayer did not timely appeal to the board, as required in RSA 79-A:10 and RSA 76:16-a, and therefore, the board does not have jurisdiction over the appeal.

Based on the recent caselaw, the board does not have the authority to deviate from the statutorily created deadlines. See Appeal of Gillin, 132 N.H. 311, 313 (1989) (board cannot deviate from statutes); Appeal of

Roketenetz, 122 N.H. 869, 870 (1982) (timely filing requirement is a

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jurisdictional prerequisite); Arlington Sample Book Company v. Board of Taxation, 116 N.H. 575, 576 (1976) (board cannot even deviate from deadlines when there has been accident, mistake or misfortune); see also, Daniel v. B & J Realty, 134 N.H. 174 (1991).

B) Discussion

In support of this ruling, the board finds the following chronology of events occurred leading up to this appeal:

**January 30, 1989** first land-use-change tax bill issued by the Town;

**April 3, 1989** first land-use-change tax bill abated by Town due to incorrect description of land, acreage and date of change in use;

**April 3, 1989** new land-use-change tax bill issued by Town;

**April 4, 1989** Attorney George R. Moore files a request for abatement with Town "on behalf of my client, Charles Mutrie";

**August 3, 1989** deadline to file appeal with the board (RSA 76:16-a (effective 1989));

**September 28, 1989** based on advice of Michael J. Donahue, attorney for the Town, the Town's tax collector sends a late notice of current-use lien, as required by RSA 80:65, to a mortgagee, United Savings Bank of Manchester (Bank);

**late 1989** Attorney Donahue and Russell F. Hilliard, attorney for "Bank", reach a verbal agreement as to the late filing of mortgagee's notice of tax lien and the date of notice of lien to be the date from which any appeal would run;

**December 21, 1989** Attorney Hilliard files with the Town a request for abatement of the land-use-change tax on behalf of the owner and "Bank"; and

**March 26, 1990** Attorney Moore, representing Onway Village, Inc., files with the board a Petition to Abate Land Use Change Tax.

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The Taxpayer clearly missed the appeal deadlines as calculated from the date the Tax bill was mailed, resulting in the appeal being untimely. Nevertheless, the Taxpayer makes two related but distinct arguments to avoid dismissal:

1) the parties' agreement to calculate the appeal deadlines from the date the Bank was notified, rather than the date the Tax bill was mailed to the Taxpayer, is a valid agreement that extended the appeal deadlines; and

2) the Bank was acting as the property owner and therefore the deadlines could not begin to run until the Bank received notice, which notice the Bank received with the lien notice. Neither argument has any merit.

The Taxpayer's first argument fails because it is contrary to the law.

To appeal the Tax, taxpayers must comply with RSA 79-A:10, which states:  
**79-A:10 Abatement of Land Use Change Tax.** Any land owner who is required to pay a land use change tax as provided in RSA 79-A:7 may have the land use change tax abated in the same manner as real property taxes are abated pursuant to RSA 76.

RSA 76:16-a, the controlling statute, states in part:

**76:16-a By Board of Tax and Land Appeals.**

I. If the selectmen neglect or refuse to so abate, any person aggrieved, having complied with the requirements of RSA 74, upon payment of a \$40 filing fee, may, within 6 months after notice of such tax, and not afterwards, apply in writing to the board of tax and land appeals which, after inquiry and investigation, shall hold a hearing if requested as provided in this section and shall make such order thereon as justice requires . . . (emphasis added).

The triggering event for the appeal deadlines is the notice-of-tax date. In land-use-change tax cases, the notice-of-tax date is the date the municipality mails the Tax bill. The Town mailed the final Tax bill on April 3, 1989, resulting in an August 3, 1989 deadline to appeal to the board. The

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appeal, however, was filed March 26, 1990. Having missed the deadline, the

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Taxpayer argued the notice-of-tax date was September 28, 1989, the date the RSA 80:65 notice of tax lien was sent to the Bank.

The Taxpayer's first argument fails because, under the statutory deadlines, the appeal must be dismissed as untimely. The parties' agreement to, in essence, extend the deadlines is void, and therefore, did not alter the deadlines. See Daniel, 134 at 176 (town's lack authority to alter statutory deadlines).

The Taxpayer's second argument -- the timelines began when the Bank received notice -- is meritless, both legally and factually. Legally, the Bank was not entitled to notice of the Tax. The Bank was, however, provided notice of a lien, as required by RSA 80:65, because the Taxpayer had not paid the Tax. The purpose of the RSA 80:65 lien notice to a mortgagee is quite different from the RSA 79-A:7 Tax notice to the property owner. Thus, it is unreasonable and unsupported to conclude the lien notice was a required substitute for the Tax notice. See Blue Mountain Forest Association v. Town of Croydon, 117 N.H. 365, 374 (1977).

Factually, the Taxpayer's second argument also fails. The Taxpayer argued the Bank was acting as owner when the Tax was billed, and therefore, it was logical for the lien notice to be a substitute notice for the Tax bill. The board finds otherwise. Charles Mutrie, President of Onway Village, Inc. testified he personally received the Tax bill, conferred with his attorney, George R. Moore, about the bill, and pursued an abatement with the Town. The Bank's subsequent payment of the 1988 property taxes and the Taxpayer's attorney's referral of an erosion concern by the Town to the Bank in June, 1990, do not substantiate the Taxpayer's claim. In fact, it is common for a mortgagee to redeem back taxes to protect its interest in a property, but that in itself does not create a cloak of ownership. The record is replete with evidence that Mr. Mutrie has to date continued to act fully as the owner of the Property within certain financial constraints imposed by the Bank. If the Taxpayer or the Bank felt strongly about this "owner" issue, either one could

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have asked the Town to send tax bills to the Bank. Having failed to do so,

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the notice to the Taxpayer was legally sufficient. See State v. Fraser, 116 N.H. 642 (1976) (notice to current address valid; parties have responsibility to inform a change in address).

The board is painfully aware of the fatality to the Taxpayer's appeal rights that this ruling causes. The land-use-change tax is a one-time tax assessed at the time of change (RSA 79-A:7). In contrast an appeal from a regular property tax bill (RSA 76:2, 5 and 10) can be taken each year (RSA 76:16). The appeal process of the one time, land-use-change tax, however, is identical to that of the annual property tax bill (RSA 79-A:10), and thus cannot be procedurally handled any differently. The New Hampshire Supreme Court has consistently held the board's jurisdiction is strictly statutory (cases cited on page 2) with the exception of H.J.H., Inc. v. State Tax Commission, 108 N.H. 203 (1967). That case dealt, however, with an inventory filing requirement under RSA 74 which was subsequently amended by the legislature. Thus, it is not on point with the issue at bar and has been implicitly overruled by subsequent cases.

In the extreme, however, one could argue that if a taxpayer was without legal representation and unfamiliar with New Hampshire statutes, then perhaps the general thrust of H.J.H., Inc. might apply (i.e., as long as a taxpayer is not slothful or purposely contentious, government should be flexible in its adherence to fixed deadlines). However, the evidence here established that Mr. Mutrie was not a novice property owner and taxpayer; he acted prudently as a knowledgeable owner when he received the tax bill. Nor are Mr. Mutrie's attorneys, George R. Moore and John T. Broderick, Jr., neophytes in the nuances and requirements of New Hampshire tax statutes. Consequently, even the most liberal interpretation of the caselaw would not support a different ruling.

## II. Red herrings

The Taxpayer raised several arguments that were peripheral to the jurisdictional issue addressed in the first section. However, since they were

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raised by the Taxpayer, the board will now address in this section why those arguments were not convincing.

A. The Taxpayer argued the Town did not properly bill the Taxpayer because: (1) Camp SE-SA-MA-CA Inc. was the owner as of the date of change, not Onway Village, Inc.; and (2) the address on the bill is for Onway Village, Inc., not Camp SE-SA-MA-CA Inc.

This argument is without any merit. Mr. Mutrie, as president of Onway Village, Inc., the owner of the property as of the date of the bill, and president of Camp SE-SA-MA-CA Inc., Onway Village, Inc.'s predecessor as of the date of change, surely received notice. Mr. Mutrie testified he personally received and dealt with the Tax bill. Further, in compliance with RSA 80:6, the Town properly gave notice by the bill to a principal officer of the corporation owning the property at the time of the bill. Any technical defect in notice was cured by actual notice. See e.g., Town of Newport v. State, 115 N.H. 506, 507 (1975) (actual notice cures any technical defects).

B. The Taxpayer argued the Town should be estopped from raising the timely filing issue because the Taxpayer relied on the agreement with the Town concerning the appeal deadlines. This is, basically, the same argument discussed in Section I, but with the estoppel twist. The elements needed to establish estoppel are stated in City of Concord v. Tompkins, 124 N.H. 463, 467 (1984). The Taxpayer did not and cannot on these facts establish estoppel. Appeal deadlines are a matter of law, not fact, and thus, the Taxpayer cannot claim to have relied upon a misrepresentation of fact. The Taxpayer, a real estate developer, with legal counsel, is bound by the law. As discussed above, the purported agreement with the Town was legally non-binding. If the Taxpayer relied upon that agreement (something not proved), the Taxpayer made a clear mistake of law. Finally, as will be discussed next, estoppel does not create jurisdiction where jurisdiction does not exist. See Matheisel's Appeal, 107 N.H. 479 (1966) (tribunal has authority, on its own

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motion, to determine if it has jurisdiction).

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C. The Taxpayer next argued the board improperly reversed "sua sponte its order of August 8, 1990, in which [the board] had withdrawn the timeliness issue." This argument fails.

Timely compliance with RSA 79-A:10 and RSA 76:16-a are prerequisites for the board to have subject-matter jurisdiction, and for a taxpayer to have the right to appeal. See Arlington American Sample Book Co. v. Board of Taxation, 116 N.H. 575, 576 (1976); see also Appeal Gillin, 132 N.H. at 213 (board's powers entirely statutory); Appeal of Town of Sunapee, 126 N.H. 214, 216 (1985) (taxpayers' rights before the board are entirely statutory). As a jurisdictional matter, this issue can be raised at any time during the proceedings. See Cooperman v. MacNeil, 123 N.H. 696, 700 (1983). Parties cannot by agreement alter deadlines to, in essence, attempt to confer jurisdiction to the board. See Pokigo v. International Brotherhood of Electrical Workers, 106 N.H. 384, 385 (1965).

Initially, the board raised the issue on May 9, 1990, based on preliminary information from the Town. What followed was a series of correspondence from all parties. Attorney Moore responded on May 25, 1990, stating that the Town had rescinded the first two land-use-change tax bills and issued a third notice on September 28, 1989. The board responded on June 7, 1990, stating the investigation of the appeal would be resumed, but that the timely filing issue was still outstanding and would be heard first when the appeal was scheduled for hearing. Subsequently, on July 12, 1992, based on additional conflicting information from the Selectmen's Office (letter of April 16, 1990) and Attorney Moore (letter of June 5, 1990 with enclosure), the board issued a hearing notice limited to the issue of timely filing. On July 31, 1990, Attorney Ciandella, on behalf of the Town, stated the Town does not dispute the timeliness of filing the appeal. Following this flurry of misinformation, the board erred in issuing its August 8, 1990 letter canceling the separate hearing on the timely issue. However, once done, this error did not preclude the board from subsequently correcting it, as was done.

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D. As an ancillary issue to the issue just discussed above, the Taxpayer questioned the sufficiency of the notice for the timely filing issue. The board realized there was still a jurisdictional issue outstanding when it drafted the November 14, 1991, hearing notice. On that notice it was clearly stated, "(t)he first issue to be addressed will be that of timely filing with Board." This notice fulfills the notice requirements of RSA 541-A:16 III. See Duclos v. Duclos, 134 N.H. 42, 44-45 (1991). Before the hearing, neither party, separately or as part of their motions for continuance or objections thereto, queried the board about the timely issue on the hearing notice or asked for additional clarification as allowed in RSA 541-A:16 III(d).

Second, the board allowed the parties 20 days after the hearing date to submit offers of proof and memoranda of law. What was submitted was very thorough, and allowed the parties an opportunity to exhaustively expound on their respective positions. The facts were not disputed. What was left to argue and analyze were the legal conclusions. The Taxpayer had an adequate opportunity to brief the legal issues.

In short, the board could not ignore a jurisdictional issue that existed regardless of an agreement between the parties or any initial confusion on the board's part. The statutes do not give the board that discretion. The parties were then properly noticed of the timely filing issue, a hearing held and additional time allowed for the parties to fully submit their arguments.

#### Conclusion

The board, therefore, dismisses the appeal for lack of jurisdiction pursuant to RSA 79-A:10 and 76:16-a.

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Paul B. Franklin, Member

Michele E. LeBrun, Member

CERTIFICATION

I hereby certify that a copy of the foregoing decision has been mailed this date, postage prepaid, to George Moore, Esq., John T. Broderick, Jr., Esq., co-counsels for the Taxpayer; Robert D. Ciandella, Esq., Representative for the Town; and Chairman, Selectmen of Raymond.

Dated: August 7, 1992  
Valerie B. Lanigan, Clerk

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**ORDER RE: MOTION FOR REHEARING**

On August 25, 1992, the Board of Tax and Land Appeals (board) received a motion for rehearing from the taxpayers. An objection to the motion was filed by the Town on September 11, 1992.

The board denies the taxpayer's motion as the issues raised in the motion were raised by the parties at the initial hearing and were addressed in the board's decision of August 7, 1992.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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George Twigg, III, Chairman

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Paul B. Franklin, Member

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Michele E. LeBrun, Member

CERTIFICATION

I hereby certify that a copy of the foregoing order has been mailed this date, postage prepaid, to George Moore, Esq., John T. Broderick, Jr., Esq., co-counsel for the Taxpayer; Robert D. Ciandella, Esq., representative for

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the Town; and Chairman, Selectmen of Raymond.

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Melanie J. Ekstrom, Deputy Clerk

Date: September 22, 1992

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