

**Saga Communications of NE, Inc.**

**v.**

**Town of Merrimack**

**Docket No.: 17643-97PT**

**DECISION**

The "Taxpayer" appeals the "Town's" 1997 assessment of \$548,500 (land \$391,300; buildings \$157,200). The Property consists of 16.67 acres with a small office building and two radio towers (200 feet and 356 feet in height) (the "Property"). The board held a hearing on June 21, 1999, on the sole issue of whether the towers are taxable as real estate.

The Taxpayer argued the towers were not taxable because:

- 1) they are personal property as defined by the decision in New England Telephone and Telegraph Company v. Franklin, 141 N.H. 449 (1996);
- 2) they are easily removed and are not permanently affixed to the Property; and
- 3) the site location is not dependent on terrain features as was the case in King Ridge v. Sutton, 115 N.H. 294 (1975).

The Town argued the towers were taxable because:

- 1) as a general rule in New Hampshire, all real estate is taxable unless it is specifically exempted (RSA 72:6 and 7);

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- 2) there are no New Hampshire cases which say towers are not taxable;
- 3) where there is ambiguity in the law and a long-time application of a law which goes unchallenged, it is to be taken as consent by the legislature;
- 4) in 1994, the legislature enacted RSA 72:7-c specifically exempting radio antennae and towers related to amateur operators; therefore, the status of the law as of 1994 was commercial towers are taxable, amateur towers are non-taxable;
- 5) in King Ridge, the supreme court stated ski lifts, cables, engines, boxes and towers were taxable;
- 6) the New England Telephone case can not be read to say that commercial radio towers are not taxable; the court's analysis focused on the fact that the poles were removable and found they were readily adaptable to placement in other locations;
- 7) the towers are a permanent adaptation to the Property, once they are in ground and approved by the Federal Communications Commission (FCC), they are not going to be removed because it would violate their FCC license; and
- 8) radio towers are not considered by the legislature to be telecommunications equipment (RSA 82-A).

### **Board's Rulings**

The board rules the towers are taxable as real estate under RSA 72:6 for two general reasons: 1) the towers are taxable as fixtures; and 2) the enactment of RSA 72:7-c in 1994, read in connection with RSA 72:6, strongly infers taxability.

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### **Taxable as Fixtures**

The authority to tax fixtures as real estate is found in RSA 72:6 and RSA 21:21. RSA

72:6 states: "All real estate, whether improved or unimproved, shall be taxed except as otherwise provided." This statute is to be broadly interpreted. King Ridge, Inc. v. Sutton, 115 N.H. 294, 298-99 (1975). RSA 21:21 states: "The words 'land,' 'lands' or 'real estate' shall include lands, tenements, and hereditaments, and all rights thereto and interests therein." (Emphasis added).

In addition to these statutory criteria, the case law on fixtures must be examined -- fixtures being taxable as realty. As stated in New England Telephone Co. v. City of Franklin, 141 N.H. 449, 453 (1993):

A mixed question of law and fact, Graton & Knight Co. v. Company, 69 N.H. 177, 178, 38 A. 790, 790 (1897), whether an item of property is properly classified as either personalty or a fixture turns on several factors, including: the item's nature and use; the intent of the party making the annexation; the degree and extent to which the item is specially adapted to the realty; the degree and extent of the item's annexation to the realty; and the relationship between the realty's owner and the person claiming the item." See, e.g., The Saver's Bank, 125 N.H. at 195, 480 A.2d at 84; Automatic Sprinkler Corp. v. Marston, 94 N.H. 375, 376, 54 A.2d 154, 155 (1947); Graton & Knight Co. v. Company, 69 N.H. at 178, 38 A. at 790; Dana v. Burke, 62 N.H. 627, 629 (1883); Wadleigh v. Janvrin, 41 N.H. 503, 518 (1860). The central factors are "the nature of the article and its use, as connected with the use" of the underlying land, Langdon v. Buchanan, 62 N.H. 657, 660 (1883); see Despatch Line of Packets v. Bellamy Man. Co., 12 N.H. 205, 233 (1841), because these factors provide the basis for ascertaining the intent of the party who affixes or annexes the item in question. Wadleigh 41 N.H. at 518."

Further, as stated in The Saver's Bank at 195:

A chattel loses its character as personalty and becomes part of the realty when there exists "an actual or constructive annexation to the realty **with the intention of making it a permanent accession to the freehold**, and an appropriation or

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adaptation to the use or purpose of that part of the realty with which it is connected."

However, if a chattel becomes an intrinsic, inseparable and untraceable part of the realty, it is deemed a fixture regardless of the intent of the parties. (Citations omitted).

Black's Law Dictionary defines "fixture," in part, as "an article in the nature of personal property which has been so annexed to the realty that it is regarded as a part of the land. Goods are fixtures when they become so related to particular real estate that an interest in them arises under real estate law." Black's Law Dictionary 574 (5th ed. 1979).

While there is no New Hampshire case law specifically on radio towers, ski towers were addressed initially in King Ridge, Inc. v. Town of Sutton, 115 N.H. 294 (1975) and in Linwood Development Corporation v. Town of Lincoln, 117 N.H. 709 (1977). Both of those cases put forth the concept that for an item of personalty to become a fixture, it must be "intimately intertwined with the primary use of the land itself." King Ridge, Inc. at 299. This concept was further elaborated relative to factory machinery in Crown Paper Company v. City of Berlin, 142 N.H. 563, 569 (1977).

"For a piece of factory machinery to be intimately intertwined with the underlying realty and thus taxable, the trial court must determine that such characteristic of the underlying realty makes a special or other use of the factory machinery useful, and that special or other use of the factory machinery renders the underlying realty useful."

First, the overriding factor that leads the board to conclude the towers are fixtures is their sheer size. See Automatic Sprinkler Corp. v. Marston, 94 N.H. 375 (1947); Babbitt v.

Charlestown, BTLA Docket No. 6389-89. The largest tower is 356 feet high with significant guys affixed to bolts anchored in the ground. While it is conceivable that either tower could be dismantled and removed, the mere fact that they are removable is not controlling as to the determination of being a fixture. Many items commonly considered real estate are movable and frequently are moved. Cf. RSA 21:21 II and 674:31 (Manufactured housing while designed to be movable is considered realty when erected on site and connected to required utilities);

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Westinghouse Broadcasting, Inc. v. Director, Division of Taxation, 141 N.J. Super. 301 (App. Div. 1976) (the ability for a structure to be disassembled and removed is not controlling because

virtually all property can be removed from land without materially damaging the land.)

Second, there was testimony that the interrelationship and distance between the two towers is critical for broadcasting at their licensed radio frequencies. Besides being affixed to the ground, there is wiring between the two towers and the support building associated with their use. Thus, the relationship between the two towers, the support building and their specific location on the site supports their determination as fixtures.

Third, the sixty-year historical use of the Property for radio broadcasting and the presence of towers over that period of time clearly reflect a long standing intent to use the towers in conjunction with the real estate. Certainly, the November 15, 1989 letter from a former owner of the Property to the Town's assessor (attached to Town's memorandum of law) plainly states the owner's clear intention of continued use of the Property for broadcasting purposes.

Lastly, while not pivotal in the board's determination of the towers as fixtures, the board does note that the owner of the land is the same as the owner of the improvements on the land. As was discussed during the hearing (but for which no definitive evidence was submitted), the board's general observations of radio transmission towers is that they are located on relatively

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large tracts of land owned by the broadcasting entity. This is significantly different than most recently constructed cellular phone towers which are generally located on leased sites. Whether it be the history of the development of radio broadcasting sites, the size and visual impact of the towers or safety concerns, the board finds the "relationship between the realty's owner and the person claiming the item," New England Telephone Co. v. City of Franklin, 141 N.H. 449, 453 (1993), is a factor to be considered.

The board finds the specific rulings in New England Telephone are not directly on point with the issue of the taxability of these towers. The equipment in contention in New England

Telephone involved electronic telephone equipment located within buildings and wooden telephone poles located primarily in public right-of-ways. The towers at issue here are not readily adaptable to many other areas as the electronic telephone equipment and telephone poles were due to the towers' size, guying and interrelated configuration. In other words, while the towers are conceivably removable, their utility could not be easily replicated at another site without significant permitting and licensing work<sup>1</sup>.

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#### Enactment of RSA 72:7-c

In 1994, RSA 72:7-c was enacted and reads as follows.

**72:7-c Exemption; Radio Towers, Antennas and Related Structures.** Radio antennas, towers and related or supporting structures used exclusively in the operation of an amateur communications station under Federal Communications Commission amateur radio services rules and regulations, shall be considered personal property and are not taxable as real estate.

RSA 72:6 requires all real estate "shall be taxed except as otherwise provided."

Certainly, the legislature's exemption of amateur communication towers from taxation in 1994 would not have been necessary if the Taxpayer's argument was correct that telecommunication towers in general are not taxable as real estate. As argued by the Town, all the statutes relating to assessing telecommunication towers need to be considered in determining the taxability of the

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<sup>1</sup> The board notes the presence of a license from FCC for a specific broadcasting frequency can influence the highest and best use determination of a property and, thus, inherently its market value. See Roehm v. Orange County, et al., 196 P. 2d 550 (1948) and Susquehanna Co. v. Tax Commission, U.S. Reports Vol. 283, 291 (1930). All communication towers are erected for the purpose of receiving and/or transmitting certain frequencies for various uses that are all regulated by the FCC. The fact that a license exists for a certain frequency at a specific location does lend support to the owner's intention of permanency and does strengthen the finding of the towers as fixtures.

towers. Thus, if all real estate is taxed “except as otherwise provided” and the legislature does specifically exempt a subset (amateur radio towers) of a larger category of property (telecommunication towers), it is reasonable to infer that the balance of the category remains taxable. Barksdale v. Town of Epsom, 136 N.H. 511, 514 (1992) and Great Lakes Aircraft Company, Inc. v. City of Claremont, 135 N.H. 270, 277 (1992) (The board must read the language at issue in the context of the entire statute and the statutory scheme); New Hampshire Retail Grocers Association v. State Tax Commission, 113 N.H. 511 (1973); Collins v. Town of Derry, 109 N.H. 470 (1969) (Language of amendment to a statute is some evidence of the legislative intent of the original statute.); Whispering Springs Tenant Association v. Barrett, 137 N.H. 203, 208-09 (1993); Opinion of the Justices, 135 N.H. 543, 545 (1992); Swiezynski v. Civiello, 126 N.H. 142 (1985) (Particular statutory provisions should be construed consistently

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with the statute and other statutes dealing with the same subject matter as a whole.) Further, the board gives some weight to the evidence submitted of the long standing practice of assessing towers within the state and with the legislature’s clear determination in 1994 that “amateur radio antennas are permanent structures and therefore should not be taxed as real estate.” House Journal, February 15, 1994, Report of Science, Technology and Energy Committee. Farrelly v. Timberlane Regional School District, 114 N.H. 560 (1974) (Long standing interpretation of a statute of a doubtful or ambiguous meaning is some evidence that it conforms with the legislative intent.)

### Conclusion

During the hearing, the parties indicated that if the board found the towers were taxable, the valuation issue could likely be resolved by the parties requiring no further hearing or deliberation by the board. Consequently, the board orders the parties to file a joint statement, no

later than 45 days from the date on this decision, indicating the status of the remaining valuation issues.

A motion for rehearing, reconsideration or clarification (collectively "rehearing motion") of this decision must be filed 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

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as stated in board rule TAX 201.37(e). 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.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Michele E. LeBrun, Member

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Douglas S. Ricard, Member

**Certification**

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to Mark Lutter, representative for the Taxpayer; Jay L. Hodes, Esq., counsel for the Town; and Chairman, Selectmen of Merrimack.

Date: July 9, 1999

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Lynn M. Wheeler, Clerk

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