

**Barry Tolman, et al.**

**v.**

**Town of Nelson**

**Docket No.: 18682-00PT**

**DECISION**

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2000 assessment of \$56,590 (land \$33,390; buildings \$23,200) on Lot 002-028-000, a 3.420-acre lot with a single-family home and tennis court; and \$163,700 (land \$106,200; buildings \$57,500) on Lot 002-046-000, a 62.670-acre lot with three cabins, various outbuildings and a ski hill (collectively, the “Property”). 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 assessment was too high or unlawful, resulting in the Taxpayer paying more than their share of taxes. See RSA 76:16-a; TAX 201.27(f); TAX 203.09(a); Appeal of City of Nashua, 138 N.H. 261, 265 (1994). To establish disproportionality, the Taxpayer must show the Property's assessment was higher than the general level of assessment in the municipality. Id. The Taxpayer carried this burden.

The Taxpayer questioned the assessments because:

- (1) the Town improperly and inconsistently assessed Lot 002-046-000 ("Lot 46") as having two building sites rather than one, with each valued at \$35,000;
- (2) the tax year 2000 revaluation conducted by the department of revenue administration ("DRA") on behalf of the Town was performed using a "CAMA" (computer-assisted mass appraisal) system, different from the manual approach employed by the DRA in 1981, the last time the Town underwent a revaluation;
- (3) the resulting assessments using the CAMA system have resulted in "disproportionalities" both "within each parcel" and with neighboring parcels; and
- (4) market value is not being questioned, but rather "fairness and consistency" on the part of the Town's assessor.

The Town argued the assessments were proper, except for the adjustment explained below, because:

- (1) the discrepancy noted by the Taxpayer on Lot 44 was a "data entry error" and should now be adjusted as follows: removal of the second building site value of \$35,000 and the addition of one acre of excess front land at a \$1,500 value, resulting in an abatement of \$33,500 (\$130,200 total adjusted assessment (land \$72,700; buildings \$57,500));
- (2) the CAMA system used by the Town in tax year 2000 was similar to those used in many other municipalities in New Hampshire;
- (3) many factors, not just those isolated differences noted by the Taxpayer, go into a CAMA system of valuation;
- (4) the CAMA system takes into account those factors known to have an effect on market value, and an isolated factor like waterfront square footage, for example, can lead to incorrect estimates

of market value; and

(5) the Taxpayer failed to meet his burden of proof.

### **Board's Rulings**

Based on the evidence, the board finds the proper assessments to be \$56,590 on Lot 002-028-000 (unchanged); and \$130,200 (land \$72,000; buildings \$57,500) on Lot 002-046-000 (an abatement from \$163,700).

It is evident at the outset that the Taxpayer, and related parties, own considerable land on and near Tolman Pond and have owned this property for generations. For this and other reasons, few, if any, comparable sales have occurred within this area, making the task of proper assessment more difficult than it otherwise might be.

The Town showed some flexibility in responding to the Taxpayer's concerns. When the Taxpayer filed his abatement application, the Town significantly lowered the per-acre base value for waterfront land with buildings (from \$80,000 to \$50,000). The Taxpayer filed an appeal with the board, however, because of his stated belief that further issues need to be addressed. The hearing held by the board was attended by the Town's three selectmen and two representatives from the DRA, the agency that performed the assessment on behalf of the Town.

At the hearing, the Taxpayer presented detailed testimony and considerable documentation, in the form of colored tax maps, a narrative and other information, to support his

arguments on this and a companion appeal (Docket No. 18681-00PT). Without objection from either party, the board held a consolidated hearing on both appeals.

The Taxpayer clearly questions the Town's assessment methodology. As he concluded at the hearing, the Town is 'driving a machine that does not work.' Despite his allegations and conclusions, however, the Taxpayer admits he is unclear as to exactly what relief he seeks from the board. (In response to board questioning, the Taxpayer stated "[I] don't know what I am seeking.")<sup>1</sup>

The Taxpayer chose not to present any evidence of market value of either the Property under appeal or comparables. The board believes he recognizes, however, that land on or near a scenic, unspoiled waterfront is scarce and very desirable, resulting in an appreciation in value especially in the recent period.<sup>2</sup> The board has considered the testimony and evidence and has also taken a view of the Property, attended by the Taxpayer and one selectman.

The Taxpayer did not contest the equalization ratio of 1.00 computed for the Town as a whole in tax year 2000, the year of the revaluation. The equalization ratio is, of course, a

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<sup>1</sup> The Taxpayer is knowledgeable of taxation issues and appears to be aware of available statutory remedies should he seek to have the Town undergo another revaluation. See, e.g., RSA 71-B:16, IV.

<sup>2</sup> In some instances, property owners like the Taxpayer have protected themselves from increases in taxes by placing land in current use. See, generally, RSA Ch. 79-A. On this appeal, the Taxpayer is not questioning the assessments on land he holds in the current-use category, but rather the ad valorem assessments on the remaining land identified above.

yardstick measuring the relationship between assessed value and market value. An equalization ratio of 1.00 means that, as a whole, properties in the Town were being assessed at 100% of market value. See, generally, Sirrell v. State of New Hampshire, 146 N.H. 364, 368-69 (2001) (discussing process and significance of equalization).

The Taxpayer bases his criticisms of the CAMA system on “disproportionality” per se, rather than the relationship of the assessment to market value. In doing so, he ignores, to some degree, the relevant law enunciated in the statutes and prior decisions of the supreme court. These statutes and the case law must guide the board’s decision in this case. See, e.g., Appeal of Land Acquisition, 145 N.H. 492, 494, 496-98 (2000).

Under RSA 75:1, the selectmen have a responsibility to appraise “all taxable property at its full and true value . . . .” In other words, market value is the relevant assessment standard. Appeal of Town of Newmarket, 140 N.H. 279, 285 (1995). Especially when property has been held by the same owner for a long time, and may have high desirability because it is on or near a lake or a pond, the taxable value is the sales value, rather than its value to the owner. Trustees of Phillips Exeter Academy v. Exeter, 92 N.H. 473, 481 (1943).

In Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985), the court articulated the test of “disproportionality” that must govern a tax appeal: to carry the burden of proof, the taxpayer “must establish that his property is assessed at a higher percentage of fair market value than the percentage at which property is generally assessed in the town. (Citation omitted.)”

In this case, and as noted above, the Taxpayer presented no evidence of the “fair market value” of the Property or any evidence to cause the board to question the general level of assessment in the Town. Rather, he focused on alleged discrepancies in how the Town assessed

the Property and others on or near Tolman Pond.

These arguments fall short of the mark insofar as they seek a further remedy from the board. Under the applicable law, the underassessment of other properties, even if established, does not prove the overassessment of the Taxpayer's Property. See, e.g., Appeal of Michael D. Canata, 129 N.H. 399, 401 (1987).<sup>3</sup>

The DRA representatives indicated the same CAMA methodology was employed throughout the Town in the tax year 2000 revaluation. Utilization of the same standard of

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<sup>3</sup> "The fact that the assessment method underassesses some properties and overassesses others does not relieve the present taxpayers of their obligation to pay their fair share of taxes." Id., citing Amoskeag Mfg. Co. v. Manchester, 70 N.H. 200, 205-06 (1899):

"Equity requires that the plaintiffs be relieved by an abatement of such sum as they have paid in excess of their share of the common burden. Their share is such a proportion of the whole tax as the true value of their property bears to the true value of all the taxable estate in the city. . . . The plaintiffs are bound to pay their share. An unequal distribution of the remainder among the other taxpayers, because of erroneous appraisals among individual taxpayers, is no reason why the plaintiffs should pay less than their share. . . . The ground upon which an abatement is granted is the reduction of the plaintiff's assessment to their share of the tax. It is not granted merely to make their assessment similar with the assessment of other taxpayers . . . owning the same [comparable] property."

valuation is cognizable evidence of proportionality. See Bedford Development Company v. Town of Bedford, 122 N.H. 187, 189-90 (1982). The DRA's representative (John McSorley) testified that the prior assessment methodology (employed in 1981) was less than optimal because it may have focused, for example, on waterfront square footage measurements, resulting in greater inequities than one focused on a sales valuation model inherent in the CAMA system. While Mr. McSorley offered more generalities than details about the specific CAMA system used in the Town, the Taxpayer failed to present any relevant evidence the system was inherently flawed in estimating market values, either of their own or comparable properties in the Town.

The board appreciates the fact that the lack of recent sales makes the process of assessment more difficult. This inherent difficulty does not, however, mean the use of a CAMA system is flawed or in need of correction. These systems are widely employed both in New Hampshire and in other jurisdictions and have wide and growing acceptance in the appraisal field. See, generally, International Association of Assessing Officers (Gloude-mans, Robert J.), Mass Appraisals of Real Property (1999); and Property Appraisal and Assessment Administration (1990), Ch. 4 (“[ ]Mass Appraisal and Single-Property Appraisal”).<sup>4</sup> Based upon

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<sup>4</sup> “**Computer-assisted Mass Appraisal (CAMA)** – A system of appraising property . . . that incorporates computer-supported statistical analyses . . . to assist the appraiser in estimating values.” Id. at 360. “For purposes of appraisal, a [model is] a representation (in words or an equation) that explains the relationship between value or estimated sales price and variables representing factors of supply and demand.” Id. at 382.

the evidence presented, and the Taxpayer's burden of proof on this issue, the board is unable to conclude the CAMA appraisal model employed by the DRA for the Town in tax year 2000 was improper.

The DRA conceded, however, that a certain change in methodology involving other waterfront property is in order. In particular, the DRA's representatives agreed to recommend to the Town's new appraisers (Earls, Nieder and Perkins) that several properties split with a Town right-of-way or road should be assessed as a single parcel, rather than as two parcels. Apparently, this was not done in the past with respect to several parcels to the east of Lot 46 and the board encourages the DRA to carry through on this commitment. In addition, the Taxpayer noted the tennis court on one of his lots is being assessed by the Town while several others (on unspecified properties) in the Town are being ignored. The board believes the Town should follow a consistent methodology in this area and expects the DRA to communicate this alleged discrepancy to the subsequent assessors.

If the taxes have been paid, the amount paid on the value in excess of the assessments ordered shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Pursuant to RSA 76:17-c II, and board rule TAX 203.05, unless the Town has undergone a general reassessment, the Town shall also refund any overpayment for tax year 2001. Until the Town undergoes a general reassessment, the Town shall use the ordered assessment for subsequent years with good-faith adjustments under RSA 75:8.

See RSA 76:17-c I.

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 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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Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

**Certification**

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to: Barry Tolman, Taxpayer; John McSorley, representative for the Town; and Chairman, Selectmen of Nelson.

Date: November 25, 2002

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Anne M. Bourque, Deputy Clerk

**Barry Tolman, et al.**

**v.**

**Town of Nelson**

**Docket No.: 18682-00PT**

**ORDER MODIFYING AND CLARIFYING DECISION**

The board has reviewed a letter dated December 2, 2002 from John W. McSorley of the New Hampshire Department of Revenue Administration (the “DRA”) on behalf of the “Town” and a letter dated December 20, 2002 from Karen Tolman on behalf of the “Taxpayer.” The Taxpayer’s letter mentions several points of “Clarification” with respect to the board’s Decision dated November 25, 2002 (the “Decision”) and discusses other issues. The board will treat the Taxpayer’s letter as a “Motion for Rehearing or Clarification” under TAX 201.37 and will respond accordingly and in some detail in order to clarify several issues of particular concern to the Taxpayer.

**Modification**

As a preliminary matter, the board will explain one aspect of the scope of a property tax appeal and modify the Decision accordingly. When a taxpayer has land in current use, the ad valorem calculations the Town may make on a separate assessment-record card, if not actually

used to levy taxes, cannot afford a basis for relief from the board because, in these circumstances, the taxpayer is not a “person aggrieved” by the calculations. See RSA 76:16-a; and, e.g., Hopkinton v. Wetterer, BTLA Docket No. 12324-91PT, 1994 WL 739256 (December 30, 1994).<sup>5</sup>

It is now apparent, especially after the additional submissions of the parties referenced below, that the Taxpayer was not actually taxed by the Town on the ad valorem value calculated on one assessment-record card, but rather on current use values established on a separate assessment-record card -- a card which included a much lower ad valorem assessment for a small portion of land (0.63 acres in Lot 002-046-000) held out of current use. Although the Town conceded at the hearing that, because of a “data entry error,” the value on the ad valorem assessment-record card for this lot was too high and should be adjusted, the Decision mistakenly referred to this voluntary adjustment as an “abatement.”

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<sup>5</sup> As the board stated in Wetterer, “[t]he board declines to rule on the appropriateness of ad valorem assessment calculations depicted on the assessment-record card that are negated by that portion of the Property being actually assessed and billed under current use. The board finds the Taxpayers are not ‘aggrieved’ by those calculations because: 1) they do not affect the final assessment; and 2) if at sometime in the near future they are the basis for the determination of a land use change tax (RSA 79-A:7), the Taxpayers have a remedy of appeal pursuant to RSA 79-A:10.” Id. See also RSA 79-A:7, I and III. Accord, Lang v. Town of Troy, BTLA Docket No. 18673-2000PT, 2002 WL 31855628 (December 6, 2002).

As discussed below, the parties agree that no abatement is warranted because taxes were not incurred based upon the calculations on the ad valorem assessment-record card submitted by the Town and mentioned in the Decision.<sup>6</sup> The Decision is hereby modified to the extent it inappropriately focused on the ad valorem assessment-record card for this lot and indicated the appeal was “granted” because of the Town’s acknowledged error. In actuality, the board finds, as further explained below, the Taxpayer is not entitled to an “abatement” with regard to the taxes actually assessed on the Property.

In addition, the board notes two minor typographical errors which can be corrected. First, the reference on page 2, (second) subparagraph 1 of the Decision should be to Lot “46,” not “44.” Second, on page 3, the figure should be, as stated on page 2, “\$72,700,” not “72,000.” Neither inadvertent error has been noted by the parties, perhaps because these errors did not affect the substance of the Decision.

#### Clarification

As noted, much of the land portion of the Property is enrolled in current use and is therefore taxed by the Town at the much lower values prescribed in RSA Ch. 79-A (Current Use Taxation), rather than the “ad valorem” valuations prescribed in RSA Ch. 75. The DRA, on behalf of the Town, forwarded with its letter separate assessment-record cards showing the current use and ad valorem values for each lot: Lot 002-028-000 (“Lot 28”); and Lot 002-046-000 (“Lot 46”). On the original ad valorem card for Lot 46, the DRA computed a land value of

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<sup>6</sup> As stated in the Taxpayer’s letter, “this land is partially in Current Use, and therefore . . . our tax bill will not change under this decision.”

\$106,200, based on two “building sites” of 1-acre each (valued at \$31,500 and \$35,000) and additional excess “front,” “rear” and “waste” land valued at \$1,500, \$1,000 and \$100 per acre, respectively.

In presenting his case to the board, the Taxpayer referred to Lot 46 as the “Ski Hill Property”<sup>7</sup> and stated “[w]e are appealing the value of [Lot 46] at \$106,200: 62.67 acres.” See Taxpayer’s Exhibit 3 at p. 7. This, of course, is the ad valorem value established by the Town. It is not the value on which the Property’s taxes were based, because it does not reflect the much lower value (\$30,732) shown on a separate assessment-record card reflecting current use. At the hearing, the DRA conceded the addition of the second building site was a “data entry error” and that the acre in question should be categorized as excess “front” instead of as a second building site (net difference: \$35,000 - \$1,500 = \$33,500). The parties now appear to agree this change to the ad valorem assessment-record card prepared by the DRA did not affect the amount of taxes owed; hence no abatement (refund of taxes or interest) is warranted, as the DRA points out.

The board has reviewed in some detail the assessment-record cards, supplied by Mr. McSorley of the DRA, showing the “C.U.” (current use) values for Lot 46, with only 0.63 acres (out of the total 62.67 acres) subject to ad valorem taxation. The land not in current use

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<sup>7</sup> As a result of this nomenclature by the Taxpayer, the board mentioned the “ski hill” in the first paragraph of the Decision. No part of the valuation, however, was dependent on this description.

("NICU") is valued at \$27,200 (after size factor and other adjustments). The three buildings on this land are valued at \$57,500, but this value is not in dispute.

The remaining 62.04 acres in Lot 46 is being taxed at much lower current use values: 8 acres of "Farm Land" at \$25 per acre (\$160 total after adjustments); and 54.04 acres as forest land – "Hard Wood n STU" (with stewardship) -- at \$78 per acre (\$3,372 total after adjustments). These are values in the range prescribed by the Current Use Board ("CUB") to relieve developmental pressures on land preserved by Taxpayer as "open space."

See RSA 79-A:1, 79-A:2, VI and VII and 79-A:4, III, IV.<sup>8</sup>

The Taxpayer takes exception to the methodology used by the DRA on behalf of the Town because it allegedly results in a "lopsided apportionment of land values within this parcel."

In other words, as stated in the Taxpayer's original appeal document and the recent letter, "1%" of the land (0.63 out of 62.67 total acres in Lot 46) bears the brunt of property taxation, which the Taxpayer argued is not "fair." Instead, the Taxpayer would prefer the Town use a "blended"

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<sup>8</sup> The Taxpayer extracts an unintended interpretation from footnote 2 of the Decision. The Legislature chose the incentive of reduced taxation of privately-owned land (rather than other forms of subsidization) to achieve the public benefit goals of the current use law. In other words, rather than compelling the preservation of open space (or paying for its preservation directly), the Legislature gave property owners a tax incentive for doing so. Stating these facts does not impugn the Taxpayer's motive or diminish the stated intent to 'protect the town' from "growth pressures."

approach to arrive at a lower per acre value. See also Taxpayer's Exhibit 3 at p. 9. The Taxpayer made this computation in the original appeal document, asserting a land value of \$9,438 per acre (arrived at by taking the \$75,500 ad valorem value shown on Town's assessment-record card for the two 1-acre building sites and six excess "front" acres, and dividing by 8 acres) should have been applied.

The board is unable to agree with the outcome of this approach insofar as this tax appeal is concerned. The Taxpayer made no effort to establish the market value of the 0.63 acres of land NICU to show it was below the assessment amount (\$27,200) in tax year 2000. The evidence presented also failed to establish the DRA's valuation model erroneously arrived at a value for the Property as a whole and then arbitrarily attributed most of the value to the 0.63 acres in order to 'top-load' the valuation process to increase the value of land subject to ad valorem taxation in the Town.

The alternative "blended value" approach urged by the Taxpayer appears to miss the point of the current use law, which is to tax land remaining in current use "based upon the income-producing capability of the land in its current use." RSA 79-A:2, V. This value should not be influenced by the ad valorem value of contiguous land NICU, whether owned by the same taxpayer or by others. Just as the Town does not have the power to raise taxes on land held in current use (above those prescribed by the CUB), it does not have the power to lower the ad valorem value of property NICU simply because the Taxpayer owns additional land placed in

current use and wishes to “blend” values over the entire acreage.<sup>9</sup>

In the letter, the Taxpayer asserts parcels like Lot 46 which have both current use and NICU acreage are “disproportionately assessed *within themselves*.” (Italics in original). On appeal, however, the board’s inquiry must focus on the entire taxable estate rather than on individual components of the assessment: “a taxpayer is not entitled to an abatement on any given parcel unless the aggregate valuation placed on all of his property is unfavorably disproportionate to the assessment of property generally in the town.” Appeal of Town of Sunapee, 126 N.H. 214, 217 (1958). (Emphasis added). (Citations omitted). In this regard, the Taxpayer’s letter concedes “[w]e never argued that our properties were overassessed or underassessed in their entirety.”

While it is evident the Taxpayer would prefer to allocate more of the aggregate valuation of the Property to the land held in current use, reducing the overall tax burden, this preference does not reflect the legal standard that must govern the appeal. Cf. Appeal of Town of Bow, 133 N.H. 194, 197 and 199 (1990) (recognizing differences in valuation methodology for current use and public utility property, in comparison to other property, and rejecting efforts to require the

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<sup>9</sup> It is entirely possible, indeed probable, that the relative valuations of land held in current use and land NICU will change dramatically over time, especially, as here, when there is a gap of almost 20 years between Town-wide revaluations. Only if current use value ranges established by the CUB increase in lock step with market values of land NICU would the relationship remain unchanged. A change in relative valuations is not necessarily evidence of disproportionality or overvaluation of land NICU.

DRA to use an alternative “blended” approach to valuing public utility property in an equalization appeal): “In order to determine whether the DRA’s scheme is constitutional, we must ask whether it causes disproportionate taxation. [Citations omitted.] . . . [Taxpayers] must prove that they . . . have been assessed at greater than market value in order to prove disproportionality.” As noted above, the Taxpayer failed to present any evidence of market value to prove such disproportionality, either with respect to the portion of the Property NICU or for the Property as a whole.

The Taxpayer’s letter emphasizes he is “not seeking an abatement” and does not wish to “lay any further financial burden on the Town,” presumably through a revaluation of the assessments made for tax year 2000 by the DRA. As the board noted in footnote 1 of the Decision, a statutory procedure is available for taxpayers interested in seeking a revaluation. See RSA 71-B:16, IV. The board is without statutory authority, however, to aid the Taxpayer’s stated desire for the Town to “get its money back” from the DRA for the tax year 2000 revaluation. Monitoring the DRA’s recommendation, and the Town’s implementation of certain changes (noted in the Decision at page 7) with respect to other property, is also beyond the scope of this property tax appeal.

Any appeal of the Decision, as modified herein, must be by petition to the supreme court within thirty (30) days after this Order, pursuant to RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Douglas S. Ricard, Member

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Barry Tolman, et al. v. Town of Nelson  
Docket No.: 18682-00PT

Albert F. Shamash, Esq., Member

**Certification**

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to: Barry Tolman, et al., 18 Tolman Pond Road, Marlborough, NH 03455, Taxpayer; John W. McSorley, Department of Revenue Administration, P.O. Box 457, Concord, NH 03302, representative for the Town; and Chairman, Board of Selectmen, Town of Nelson, HCR 33, Box 660, Nelson, NH 03457.

Date: January 8, 2003

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Anne M. Bourque, Deputy Clerk