

**Benevolent and Protective Order of Elks – Lodge 146 - Manchester**

**v.**

**Town of Hooksett**

**Docket No.: 19417-02EX**

**DECISION**

The Benevolent and Protective Order of Elks (“BPOE”) appeals, pursuant to RSA 72:34-a, the “Town’s” 2002 denial of the BPOE’s request for charitable exemption as provided under RSA 72:23, V on a 3.05-acre lot with a lodge building/function hall (the “Property”). For the reasons stated below, the appeal for abatement is denied.

The BPOE has the burden of showing, by a preponderance of the evidence, it was entitled to the statutory exemption for the year under appeal. See RSA 72:23-m; TAX 204.06.

The BPOE argued it was entitled to the charitable exemption because:

- (1) the BPOE is organized for social, recreational and charitable purposes;
- (2) the BPOE was registered as a charitable trust by the State of New Hampshire in May 1991;
- (3) the BPOE was certified as a non-profit by the secretary of state in July 1994; the facilities and services are provided to individuals, organizations and communities throughout the State; and

(4) the officers and trustees are not compensated; other than the secretary and treasurer receiving nominal compensation.

The Town argued the denial of the charitable exemption was proper because the BPOE is not obligated by its charter to perform charitable service to a substantial and indefinite segment of the general public as defined in RSA 72:23-1.

### **Board's Rulings**

Based on the evidence, the board finds the BPOE failed to prove the Property was entitled to a charitable exemption.

In reaching its decision, the board notes that RSA 72:23-m establishes the burden of demonstrating the applicability of an exemption rests with the BPOE and, further, in applying the applicable laws to the facts at hand, the “tax exemption statute is construed not with rigorous strictness but to give full effect to legislative intent of the statute . . . .” Wolfeboro Camp School v. Town of Wolfeboro, 138 N.H. 496, 499 (1994).

In 2002, the BPOE applied for a charitable exemption pursuant to RSA 72:23, V, which exempts: “[t]he buildings, land and personal property of charitable organizations and societies organized, incorporated, or legally doing business in this state, owned, used and occupied by them directly for the purposes for which they are established, provided that none of the income or profits thereof is used for any other purpose than the purpose for which they area established.”

RSA 72:23, V must be read in concert with RSA 72:23-1 as it contains the statutory definition of charitable as it relates to a tax exemption under RSA 72:23.

**72:23-1 Definition of “Charitable”.** The term “charitable” as used to describe a corporation, society or other organization within the scope of this chapter, including RSA 72:23 and 72:23-k, shall mean a corporation, society or organization established and administered for the purpose of performing, and obligated, by its charter or otherwise, to perform some service of public good or

welfare advancing the spiritual, physical, intellectual, social or economic well-being of the general public or a substantial and indefinite segment of the general public that includes residents of the state of New Hampshire, with no pecuniary profit or benefit to its officers or members, or any restrictions which confine its benefits or services to such officers or members, or those of any related organization. The fact that an organization's activities are not conducted for profit shall not in itself be sufficient to render the organization "charitable" for purposes of this chapter, nor shall the organization's treatment under the United States Internal Revenue Code of 1986, as amended. This section is not intended to abrogate the meaning of "charitable" under the common law of New Hampshire.

In addition to the provisions of RSA 72:23-1, several cases address the necessity of an enforceable charitable obligation to receive an exemption. In Society of Cincinnati v. Exeter, 92 N.H. 348, 352-353 (1943), the court found the option to perform patriotic services was solely at the uncontrolled discretion of the society and was not enforceable by any public entity. In Nature Conservancy v. Nelson, 107 N.H. 316, 317 (1966), the court stated, "[t]he public service which plaintiff is to render must be obligatory so as to enable the Attorney General or other public officer to enforce this right against it if the service is not performed. It follows that if the public benefit is limited to that which the plaintiff sees fit to provide at its option or in its uncontrolled discretion, the requirements of RSA 72:23, V are not satisfied." Further, in Appeal of the City of Franklin, 137 N.H. 622, 625 (1993), the court stated . . . "in order to qualify as a charitable institution, an obligation must exist to perform the organization's stated purpose to the public, rather than simply to members of the organization."

In short, both the statute and case law require that for an organization to be granted a charitable exemption it must be organized and obligated in some fashion to perform certain "service of public good or welfare . . . ." We find the BPOE is neither so organized nor obligated.

The BPOE's articles of agreement established that "[t]his corporation is organized for social, recreation, charitable purposes, and mental improvement . . . ." Further, the preamble to the constitution of the Benevolent and Protective Order of Elks of the United States of America reads as follows:

"To inculcate the principles of Charity, Justice, Brotherly Love and Fidelity; to recognize a belief in God; to promote the welfare and enhance the happiness of its members; to quicken the spirit of American patriotism; to cultivate good fellowship; to perpetuate itself a fraternal organization, and to provide for its government, the Benevolent and Protective Order of Elks of the United States of America, ordains this Constitution."

The board finds that neither the BPOE's articles of agreement nor its general constitution create any enforceable obligation to perform charitable functions. Nor does the fact that the BPOE's finances indicate it is a not-for-profit entity and has received a certificate of registration from the department of attorney general, division of charitable trusts (Taxpayer Exhibit #1) collectively fulfill the requirements for an entity to receive an RSA 72:23, V charitable exemption.

Officers of the BPOE presented testimony and evidence that many of its members perform volunteer service to many worthy organizations including hospitals, food pantries, drug prevention programs, etc. (see summation of service in Taxpayer Exhibit #2). Further, they testified the BPOE also provides use of its building to various local not-for-profit organizations such as Boy Scouts and Girl Scouts. While certainly such activities are supportive of charitable and community service organizations, it is clear from the testimony and review of the financial statements submitted that the BPOE was under no obligation to provide their volunteer time or for the BPOE to contribute financial support for such organizations. In fact, in response to the board's questions as

to the BPOE's financial viability, its response was that it provides volunteer support as it can muster it and charitable contributions when its other expenses have been met.

Further, the board finds the BPOE's granting use of its Property to non-BPOE related entities is not required by any of its organizational documents. While certainly community minded, the BPOE's allowance of the use of its Property is also voluntary.

A review of the BPOE's documents, and in particular, its financial statements and internal revenue service returns, indicates that the focus of the BPOE is more fraternal as opposed to charitable. The majority of the use of the building is for the members' social activities.

In short, the board finds nothing in the BPOE's organizational documents nor in its recent functions and activities obligate it to perform enforceable charitable functions and, thus, the board finds the BPOE does not qualify for an RSA 72:23, V exemption.

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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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: Frank T. Colby, Trustee, Benevolent and Protective Order of Elks, 39 Londonderry Turnpike, Hooksett, New Hampshire 03106, BPOE's representative; and Chairman, Board of Assessors, Town of Hooksett, 16 Main Street, Hooksett, New Hampshire 03106.

Date: July 9, 2003

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Anne M. Bourque, Deputy Clerk