

City of Portsmouth

v.

Department of Revenue Administration

Docket No.: 19493-02ER

DECISION

I. Introduction

The main issue in this appeal is whether the department of revenue administration (“DRA”) erred in deciding that certain revenue (\$1.2 million) the City of Portsmouth (“City”) estimated receiving from the Pease Development Authority (“PDA”) is a payment in lieu of tax (“PILOT”) that can and should be used to adjust the City’s 2002 equalized valuation. The effect of including this revenue, according to the City, is a “\$67,614,510 increase in [the City’s] revised total equalized valuation.” It is well recognized that an increase in the equalized valuation will result in a higher proportionate share of allocated taxes to be collected by a municipality and paid by its taxpayers. See Appeals of Towns of Bow, Newington and Seabrook, 133 N.H. 194, 195 (1990) (hereinafter “Bow”).

A. Board’s Authority and Burden of Proof

The board has broad authority under RSA 71-B:5, II.(a) to “hear and determine appeals by municipalities relating to the equalized valuation of property determined by the [DRA] pursuant to RSA 21-J:3, XIII.” The latter statute gives the DRA authority to “[e]qualize

annually by May 1 the valuation of the property as assessed . . .” and to include in this process “such adjustments in the value of other property from which the towns, cities and unincorporated places receive taxes or payments in lieu of taxes as may be equitable and just, so that any public taxes that may be apportioned among them shall be equal and just.” (Supp. 2002). (Emphasis added). The 2002 equalized valuations are used primarily in the determination of property tax rates, as well as in various cost allocation calculations prescribed by other statutes.

There is no dispute that the City is a municipality “aggrieved” under RSA 71-B:5 and has standing to maintain this appeal or that, pursuant to TAX 211.04, “[t]he municipality shall have the burden to prove the DRA erred in calculating the equalized valuation.”¹ See also Bow, supra at 204 (1990) (town failed to meet its burden of proof in equalization appeal).

In this appeal, the City contends the PDA revenue is not a PILOT, but should be viewed as an alternate and distinct revenue source not subject to equalization. PILOTs are recognized by both the New Hampshire statutes and the case law discussed infra and generally refer to sums paid by an otherwise tax exempt property owner (such as a nonprofit hospital or another governmental entity) to a municipality to compensate for the burdens of providing basic municipal services such as police and fire protection. The burden therefore lies with the City to prove the DRA erred in treating the PDA revenue as a PILOT and using it to adjust the City’s equalized valuation.

¹ While RSA 71-B:5, II contains no specific provision as to who has the burden in this type of appeal, it is well settled that in civil actions the burden of proof is generally on the plaintiff to establish its case by a preponderance of the evidence. Dunlop v. Daigle, 122 N.H. 295, 298 (1982); Jodoin v. Baroody, 95 N.H., 154-57 (1948). The same procedure applies in tax cases. See Appeal of Town of Sunapee, 126 N.H. 214, 217-218 (1985); and TAX 203.09.

B. Arguments Presented

The City argued:

(1) while RSA 21-J:3, XIII (Supp. 2002) authorizes adjustments to each municipality's equalized valuation based on a PILOT, neither the statutes nor any DRA regulation specifically defines what this term means and it should not be interpreted to include the \$1.2 million the City reported as revenue from the PDA;

(2) the DRA "revised" the City's 2002 equalized valuation to reflect the PDA revenue as a PILOT on May 22, 2003, but had not included it in its original determination or in previous years;

(3) under federal and state law, as well as agreements entered into between the PDA, the City and the Town of Newington ("Town") set forth in Municipality Exhibit 1, the PDA revenue should be considered as compensation for services provided (analogous to the provision of private-duty police officers to nightclub owners and others by the City), but should not be treated as a PILOT; and

(4) alternatively, to the extent a part of the PDA revenue is paid over to the Town and not retained by the City, it should be excluded from the City's equalized valuation determination.

The DRA argued:

(1) RSA 21-J:3, XIII is clear in requiring the DRA to apply PILOTs to adjust each municipality's equalized valuation and no additional statutory or regulatory definitions are needed in order to treat the PDA revenue received by the City in this manner;

(2) while RSA 12-G:14 does distinguish "airport district" from non-airport district property within the PDA, it expressly refers to the PDA revenue received by the City from airport district property as "payment of a municipal services fee in lieu of real estate taxes," cf. RSA

12-G:14, II and III, and the plain meaning of this statutory provision is that the payment is a PILOT;

(3) any alleged federal statutory prohibitions on the “diversion” of airport revenue, as well as the intent and wording of the operative documents negotiated in light of these prohibitions by the PDA, the City and the Town, are irrelevant to the discrete issue of whether the payment is a PILOT under state law; and

(4) the City failed to meet its burden of proof.

II. Board’s Rulings

For the reasons presented below, the board finds the City failed to meet its burden of proof on the main issue of whether the DRA erred in treating PDA revenue received and retained by the City as a PILOT and therefore using it to adjust the City’s equalized valuation for 2002. Because the undisputed evidence reflects that the City paid over to the Town a part of the total PDA revenue, however, the board further finds this small amount (approximately \$40,000 out of \$1.2 million -- about three percent) should be excluded from the equalized valuation calculation for the City.

The board reviewed the testimony of the PDA and City witnesses in light of the somewhat complicated agreements, statutes and other documents contained in Exhibit 1, as well as the maps submitted as Municipality Exhibits 2 and 3, in order to gain a better understanding of the nature and purpose of the PDA revenue at issue in this equalization appeal.

The PDA was a legislative response to the closing of the Pease Air Force Base. When the base closed, most of its land and buildings (located in the City, the Town and the Town of Greenland) became “surplus property” under the federal Surplus Property Act of 1944. The federal government transferred title of this property to the PDA, which was established by

RSA Ch. 12-G enacted in 1990, to convert and redevelop the former air base “for the benefit of the affected communities, the seacoast region, and the State . . . including the creation of employment and other business opportunities.” See RSA 12-G:1 (Declaration of Purpose). The PDA then began and still continues the process of operating part of the facility as Pease International Airport and redeveloping much of the remainder for rental or lease for primarily industrial uses and a few ancillary commercial uses.²

In furtherance of this process, property acquired by the PDA is designated as either being “within” or “outside” the airport district in RSA 12-G:14. Subparagraph II of this statute provides that property “outside of the airport district,” if owned or occupied by a person other than the PDA or another entity exempt from taxation under RSA 72:23, “shall be taxable by the municipality in which the property is located as though such property were not owned by the exempt entity and were held in fee simple.”

The parties do not dispute that property “outside of the airport district” is subject to taxation by the City under this provision and that its value should be included in the City’s equalized valuation. The City’s Assessor testified that tenants on PDA property “outside of the airport district” receive tax bills from the City based on the normal assessment process and the tax rate applied includes the schools component.³ Although in prior years the City apparently reported some or all of the amounts received on this (non-airport district) property

² The PDA website, http://www.peasedev.org/web/econ_dev/index.htm, describes the “Pease International Tradeport” as “a world class business & aviation industrial park encompassing 3,000 acres.”

³ See also *Resport LLC v. City of Portsmouth*, BTLA Docket No. 17952-98 PT (December 28, 2000) 2000 WL 33259616. In *Resport*, a 10-acre parcel was leased from the PDA for the development of an extended stay hotel; the land was removed from the airport district prior to the assessment date and the City assessed property taxes based on the market value of the property, including the improvements constructed by the lessee/taxpayer, consistent with what is now RSA 12-G:14, II (formerly RSA 12-G:11, II).

as a PILOT rather than separately reporting the valuation to the DRA (see also footnote 4 *infra*), the net impact has been to include it in the City's total equalized valuation on a consistent basis.

The dispute in this appeal centers instead on PDA property "within the airport district," referenced in RSA 12-G:14, III, which provides:

"III. For all airport property . . . within the airport district that is owned, leased, or occupied by a person other than the authority [PDA], who is subject to payment of a municipal services fee in lieu of real estate taxes for the provision of services by or on behalf of the authority which are traditionally provided by the [Town] and/or the [City], and to the extent such municipal services fee is based in whole or in part on the valuation of the property by the respective municipality for such purpose, subject to any equalization or proportionality factor to be applied within such municipality, if the lessee or authority determines that any valuation made by a municipality is excessive, it may seek a reduction of the valuation by following the procedures prescribed in RSA 76 for the abatement of taxes." (Emphasis added.)

Although somewhat convoluted in its syntax, this provision applies to property within the airport district owned, leased or occupied by someone other than the PDA and appears to:

- (i) authorize payment to the City "of a municipal services fee in lieu of real estate taxes";
- (ii) establish "valuation of the property" as a basis for determining the amount to be paid;
- (iii) recognize that the valuation of such property by the City is subject to "equalization"; and
- (iv) provide a means for appealing "(seek[ing] a reduction of the valuation") using the tax

abatement procedures set forth in RSA Ch. 76. The board finds these characteristics taken as a whole have striking similarities to property subject to ad valorem taxation and are more indicative of a PILOT than some alternative form of municipal revenue source not related to the current property tax system.

Additional support for this conclusion is contained in the Municipal Services Agreement between the PDA, the City and the Town included as Tab 3 in Exhibit 1. The municipal services covered by this agreement include fire, police and other public works (but

not water and wastewater services, which are subject to a separate agreement also included in Exhibit 1). Section 2.4 of the Municipal Services Agreement indicates the service cost to be paid “shall be an amount equal to the amount that would have been paid annually as ad valorem taxes but excluding any school tax component in respect to such property.” Section 2.1 gives the City the responsibility for calculating the service cost on a quarterly basis each year (based on actual occupancy on January 1, April 1, July 1 or October 1) and obligates the PDA to make payments on a semi-annual basis. In other words, the amount to be collected by the PDA and paid to the City is directly tied to the amount the City would have collected as property taxes when the property is occupied and covers all of the municipal and county tax components but not the school tax component, which was presumably omitted because none of the PDA property is residential.

The board finds the City’s contrary arguments that the PDA payments under the Municipal Services Agreement should be viewed as something other than a PILOT are not persuasive. The City makes an analogy to private-duty police officers requested and paid for by nightclubs and other businesses, but a closer look at this revenue source reveals important distinctions. Private-duty police officers provide extra services, but do not diminish the City’s basic responsibility for providing security and other municipal services to all its residents. The provision and payment for such extra services is entirely voluntary and are a matter of contract, not tax law. The cost of such services does not depend upon the valuation of the property to be protected by the officers, but rather the amount of services requested and rendered (for example: the number of police officers; their rank/compensation level; hours worked; and so forth). Equally significant, the remedy for an overcharge for these services is not a tax abatement proceeding, but a contract action. All of these distinctions are important to understanding why payments received by the City for private-duty police officers are

sufficiently unlike the PDA revenue at issue in this appeal so that the latter may properly be treated by the DRA as a PILOT.⁴

As noted above, the City assesses land within the airport district using the same valuation approaches as it does other property subject to ad valorem taxes, but excludes the school tax component and apparently does not assess property that is unoccupied or abandoned as of the start of each calendar quarter. The billing for the municipal services fee is prepared and sent to the PDA quarterly who collects the amounts due from the tenants and then remits the sums to the City on a semi-annual basis. The board heard testimony at the hearing that the special contract arrangements reflected in Exhibit 1 may have been worked out by the parties either primarily or in part because of concerns pertaining to prohibitions on airport ‘revenue diversion’ under federal law: specifically 49 U.S.C. § 47107 (submitted as Tab 6 of Exhibit 1).

The City’s reliance on this federal statute (see Requests for Findings Nos. 10 and 13) is somewhat misplaced, however, because it does not prohibit PILOTs as a class, but rather only those: (i) “payments in lieu of taxes that exceed the value of services provided” or (ii) “payments . . . for lost tax revenues exceeding stated tax rates.” 49 U.S.C. § 47107 (1)(2)(C) and (D) (emphasis added). The City presented no evidence that the PDA revenue it receives are payments “that exceed the value of services provided” nor that they are payments for lost tax revenues that “exceed[] stated tax rates.” In other words, this federal statute does not prohibit PILOTs per se, but only those that meet certain thresholds not established by the evidence in this case.

⁴ The board has reviewed one financial document from the City which breaks out estimated revenues by source for “FY 02/03.” In a section labeled “Permits, Licenses and Fees,” this document includes “Police Outside Detail” revenues of \$93,000. In a separate section labeled “Other Local Sources,” the document lists the \$1.2 million estimated revenue from the “PDA Airport District,” \$1.7 million from “PDA Non Airport (Pilots),” and \$157,000 listed as “Payment[s] in Lieu of Taxes” (the sources of which, from other documents, appear to be the Portsmouth Housing Authority, the Port Authority, and the Wentworth Home).

In addition, and contrary to the City's arguments, the lack of a codified definition of what precisely constitutes a PILOT is not fatal to the DRA's position. The nature and purpose of a PILOT is generally and widely understood, even if the term is not specifically defined by the DRA in its regulations or by New Hampshire statutes or case law. Most recently, in Lower Village Hydroelectric Associates v. City of Claremont, 147 N.H. 73, 74 and 77 (2001), the supreme court upheld a PILOT agreement authorized under former RSA 362-A:6 to encourage the development of certain local power production and cogeneration facilities (by exempting them from ad valorem taxes in exchange for payments based on annual gross revenues from the facility). See also Opinion of the Justices (Municipal Tax Exemptions for Electric Utility Personal Property), 144 N.H. 374, 375 (1999) (upholding the constitutionality of legislation exempting property from local property taxation but providing for payments in lieu of taxes as an alternative). A number of other current statutes authorize the use of PILOTs, including RSA 72:11 and 72:11-a (water works and flood control property held in another city or town); RSA 72:23-d et seq. (specific nonprofit institutions); RSA 203:22 (housing authority); 204-C:51; RSA 227-H:17 (public forest lands), RSA 374-B:14 (electric power facilities); and RSA 423:9 (aeronautical facilities outside municipal boundaries). The board finds these statutes reflect a widely accepted understanding of the general meaning of a PILOT sufficient to support the DRA's determination in this case, even in the absence of a formal and exact definition.

As noted above, the DRA is expressly authorized by RSA 21-J:3, XIII (Supp. 2002) to use PILOTs to adjust each municipality's equalized valuation to make it "equitable and just, so that any public taxes that may be apportioned shall be equal and just." This standard is consistent with the constitutional requirements for taxation reviewed most recently in Sirrell v. State of New Hampshire, 146 N.H. 364 (2001). Upon review of the evidence presented, the

board finds the DRA's inclusion of the PDA revenue as a PILOT to increase the equalized valuation of the City is more "equitable and just" than excluding it because it takes into account a substantial revenue stream (derived from the valuation of land and buildings located within the City's boundaries) not available to other municipalities within Rockingham County and the State.

Finally, the parties appear to agree that not all of the \$1.2 million in reported PDA revenue was retained by the City, but that a small part of it was paid over to the Town for police services provided, pursuant to Section 2.3 of the Municipal Services Agreement and Appendix III thereto. This payment was generally understood to be in the "\$40,000 range" and was later specifically identified by one witness, Deputy City Manager Ted Jankowski, as \$38,211.85 for fiscal year 2002. The DRA now appears to agree that this sum paid over to the Town should be excluded from the City's equalized valuation adjustment.

In summary, the board denies the appeal by the City, except for the small amount of PDA revenue paid over by the City to the Town which the DRA will exclude from the City's equalized valuation. The board has responded to the City's requests for findings in Addendum A to this Decision.

As provided in RSA 71-B:5, II.(a) any appeal must be filed directly with the supreme court within 20 days after the clerk's date of this Decision.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Concurred, unavailable for signature
Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Addendum A

Responses to
Requests for Findings of Fact and Rulings of Law
by the City of Portsmouth

Docket No.: 19493-02ER

The “Requests” received from the City of Portsmouth are replicated below, in the form submitted and without any typographical corrections or other changes. The board’s responses are in bold face. With respect to the Requests, “neither granted nor denied” generally means one of the following:

- a. the Request contained multiple requests for which a consistent response could not be given;
- b. the Request contained words, especially adjectives or adverbs, that made the request so broad or specific that the request could not be granted or denied;
- c. the Request contained matters not in evidence or not sufficiently supported to grant or deny;
- d. the Request was irrelevant; or
- e. the Request is specifically addressed in the Decision.

Requests For Findings Of Fact And Rulings Of Law:

1. By notice dated May 22, 2003, the Department of Revenue Administration (“DRA”) revised and substantially increased Portsmouth’s 2002 total equalized valuation.

Granted.

2. This increase in Portsmouth’s 2002 total equalized valuation was solely the result of the DRA’s decision to consider a \$1,200,000 payment from the Pease Development Authority (the “PDA”) airport district to Portsmouth as a payment in lieu of taxes, as opposed to a payment for services rendered.

Granted.

3. Pursuant to the provisions of NH RSA 71-B:5 (II), Portsmouth timely filed an appeal of its revised 2002 total equalized valuation.

Granted.

4. According to Linda Kennedy, Manager of the DRA's Equalization Bureau, she is not aware of a strict definition for the term "payment in lieu of taxes" at the DRA.

Granted.

5. According to Linda Kennedy, Manager of the DRA's Equalization Bureau, there are a whole host of revenues that a New Hampshire municipality might receive that would not be included in the calculation of its total equalized valuation.

Neither granted nor denied.

6. According to Linda Kennedy, Manager of the DRA's Equalization Bureau, one example of a type of revenue that a New Hampshire municipality might receive that would not be included in the calculation of its total equalized valuation is payment to a municipality for providing private duty police services.

Granted.

7. The \$1,200,000 payment that Portsmouth received from the PDA airport district is analogous to payments that Portsmouth receives for providing private duty police services.

Denied.

8. The \$1,200,000 payment that Portsmouth received from the PDA airport district is not properly considered a payment in lieu of taxes for purposes of computing Portsmouth's total equalized valuation.

Denied.

9. The \$1,200,000 payment that Portsmouth received from the PDA is actually a payment for services (police, fire, wastewater management, etc.) that Portsmouth has contractually agreed to provide, and is now contractually obligated to provide, to the PDA airport district.

Neither granted nor denied.

10. As a matter of federal law, the PDA is not permitted to divert revenue generated by the airport district to Portsmouth (or to any other municipality) simply to compensate the municipality for lost property tax revenue. 49 USC 47107.

Neither granted nor denied.

11. As a matter of federal law, the PDA is permitted to enter into a contractual relationship with Portsmouth (or any other party) to obtain services for the airport district, and to pay for the actual value of such services.

Granted.

12. In accordance with the relevant federal law restricting the diversion of airport district revenue (49 USC 47107), New Hampshire law provides that “[a]ny municipality providing police services to the authority within the airport district shall be reimbursed in timely manner pursuant to a contract with the authority for all costs incurred by the municipality in providing such services, including but not limited to, salaries, benefits, insurance, equipment, and associated administrative expenses.” RSA 12-G:14(IV)(a).

Neither granted nor denied.

13. In accordance with the relevant federal law restricting the diversion of airport district revenue (49 USC 47107), New Hampshire law further provides that “[t]he provision of all other services to land, buildings, and people in the airport district which are traditionally provided by the town of Newington and/or the city of Portsmouth shall be exclusively the

responsibility of the authority. These services shall include, but not be limited to, the provision of fire protection, roadway maintenance, runway and parking apron maintenance, maintenance of all underground storage facilities, public assistance, public education, and public utilities. In accordance with the provisions of RSA 12-G:8 (VIII), the authority may contract with any person for the provision of these services.” RSA 12-G:14(IV)(a).

Neither granted nor denied.

14. Absent its contractual relationships with the PDA, Portsmouth would have no obligation to provide any services to the PDA airport district.

Neither granted nor denied.

15. Equalizing the \$1,200,000 payment from the PDA airport district and including it is Portsmouth’s 2002 total equalized valuation is in error because doing so fails to account for the significant cost to Portsmouth in providing services to the PDA airport district.

Denied.

16. Equalizing the \$1,200,000 payment from the PDA airport district and including it is Portsmouth’s 2002 total equalized valuation is also in error because doing so fails to account for the fact that a significant portion of the PDA airport district is actually located in Newington.

Neither granted nor denied.

17. Portsmouth’s 2002 total equalized valuation should be revised to remove the \$1,200,000 payment from the PDA airport district as a payment in lieu of taxes.

Denied.

Certification

I hereby certify that copies of the foregoing Decision have been faxed and mailed this date, postage prepaid, to Thomas M. Closson, Esq., Post Office Box 439, Exeter, New Hampshire 03833, counsel for the City of Portsmouth; Chairman, Board of Assessors, City of Portsmouth, 1 Junkins Avenue, Portsmouth, New Hampshire 03801; and Mark J. Bennett, Esq. and Kathleen J. Sher, Esq., 45 Chenell Drive, Concord, New Hampshire 03301, counsel for the Department of Revenue Administration.

Date: 08/11/03

Anne M. Bourque, Deputy Clerk