

In Re: Mark Lutter

Docket No.: 21527-06OS

DECISION

In a March 8, 2006 “Review Order”, the board initiated a Board Review (TAX 207.02(a)(1)) and outlined concerns in a number of cases in which Mr. Mark Lutter had appeared before the board. After receiving and reviewing the Answer of Respondent Mark Lutter (“Answer”) (TAX 207.09(a)(c)), the board scheduled a June 26, 2006 adjudicative hearing (TAX 207.11). At the hearing Mr. Lutter was represented by counsel, Lisa M. Lee, Esq. Attorney Lee questioned and solicited testimony from Mr. Lutter relative to the various concerns outlined in the Review Order and at the conclusion of the hearing submitted a hearing memorandum and requests for rulings of law. Also during the hearing, the board posed questions to Mr. Lutter relative to the Review Order concerns. At the conclusion of the hearing, the record was kept open for Mr. Lutter to produce specifics as to his caseload in the past four years and educational courses he has taken relative to valuation issues. His response, The Verified Supplemental Submission (“Supplemental Submission”), was filed on July 5, 2006.

Applicable Statute and Rules

The following statutes and rules are pertinent to the issues at hand.

RSA 71-B:7-a establishes the general authority for tax consultants to represent taxpayers and for the board to regulate tax consultants:

Representation by Nonattorneys. Nonattorneys may commonly represent taxpayers in RSA 76:16 and RSA 76:16-a appeals before municipalities and the board. Nothing in this section shall prevent the board from denying representation by any individual it deems to be improper, inappropriate, or unable to adequately represent the interest of the taxpayer.

PART TAX 207 contains the rules to carry out the general provisions of

RSA 71-B:7-a. See specifically TAX 207.01:

Applicability. This part, as well as TAX 101 and TAX 201, shall apply to the rules governing the regulation of tax consultants. Pursuant to RSA 71-B:7-a, the Board shall ensure that tax consultants act appropriately and adequately in representing Taxpayers before the Board and before Municipalities. TAX 207 shall govern the conduct of tax consultants and the actions to be taken upon Board review or when a complaint alleges a tax consultant has failed to act appropriately and adequately in representing Taxpayers.

At TAX 207.03 the “Standards of Conduct” for tax consultants are enumerated:

(a) Criteria. Tax consultants shall:

- (1) Possess a working knowledge of the statutes, rules and caselaw relating to property taxation and abatement;
- (2) Possess a working knowledge of valuation principles and methods or employ individuals with such knowledge;
- (3) Act honestly in carrying out the role of tax consultant, including dealings with the represented Taxpayers and all state and local officials;
- (4) Comply with all statutes, rules, caselaw and Board orders when representing Taxpayers;

- (5) File only abatement requests to municipalities or appeals to the board that have a supportable and good-faith basis that the Taxpayer is entitled to an abatement; and
- (6) Take sufficient steps to adequately represent Taxpayers such as performing a value analysis based on market data and being prepared for Filing all Documents and appearing at all hearings.

TAX 207.05 establishes the basis for complaints, board review and sanctions of the tax consultant:

- (a) Basis of Complaint. Complaints, Board review and Board sanctions shall be based on the following:
 - (1) Failure to comply with TAX 207.03 standards of conduct;
 - (2) Commission of an act or omission involving dishonesty, fraud or misrepresentation that is substantially related to the qualifications and duties of a tax consultant; and/or
 - (3) Conviction, including the conviction based on a plea of guilty or nolo contendere, of a crime that is substantially related to the qualifications and duties of a tax consultant or has been convicted of a felony that has not been annulled.

TAX 207.06 details the sanctions the board can apply if cause is found that a tax consultant has not complied with the standards of conduct:

- (a) Itemization of Sanctions. If the Board finds a tax consultant failed to comply with RSA 71-B:7-a and/or TAX 207.03, the Board shall consistently impose one or more of the following sanctions, which are listed in order of severity:
 - (1) Require the tax consultant to participate in remedial action, such as completing a course in a selected area of valuation, taxation, ethics or administrative procedures;
 - (2) Written censure to be posted at the Board;
 - (3) Suspension for a specified time period not to exceed one year; and

- (4) Revocation of the right to act as a tax consultant before Municipalities or the Board.

TAX 207.12 establishes the standard of proof for ordering a sanction to be “by a preponderance of the evidence, that the tax consultant’s actions do not comply with RSA 71-B:7-a and TAX 207.05.”

Board Rulings

For the reasons detailed below, the board finds Mr. Lutter failed to adequately comply with the Standards of Conduct for tax consultants, specifically the criteria in TAX 207.03(a)(1), (4), (5) and (6), and thus the board orders Mr. Lutter to take additional educational courses (enumerated in detail later in this Decision) and that this Decision be posted at the board as a written censure, as provided by TAX 207.06(a)(2), until successful completion of the educational courses.

In reaching this Decision, the board is cognizant of and guided by the balance the legislature struck in enacting RSA 71-B:7-a in 1995 allowing nonattorney individuals to represent taxpayers (without being subject to the unauthorized practice of law provisions in RSA ch. 311) and, at the same time, authorizing the board to establish a method of regulation of those individuals to ensure they adequately represent taxpayers.

Before discussing the specific concerns raised in the Review Order, several comments relative to the board’s choice of sanctions are in order. The board deliberated at great length as to whether additional educational courses alone (the sanction suggested at the hearing by Mr. Lutter and his attorney) were a sufficient sanction to address the concerns or whether additional sanctions were necessary. The board has determined the censure sanction is necessary because some of Mr. Lutter’s lack of compliance with the

standards of conduct relate to him choosing not to comply with the clear letter of the law and his overzealous advocacy for his clients. These actions do not reflect as much on any gross lack of knowledge of valuation issues but more on his grasp of the appropriate role of a tax consultant. Moreover, Mr. Lutter has been a tax consultant for 16 years and stated he has already taken a number of educational courses. This existing experience and education would indicate any lack of compliance with standards of conduct may not be fully addressed solely with additional education; thus, the board finds a censure is necessary to impress upon Mr. Lutter the importance of acting appropriately within his role and alert the public as to the seriousness of the problem. Balancing the interests involved, and on the evidence presented, including Mr. Lutter's stated commitment to correct and learn from past mistakes, the board concluded the more severe sanctions of suspension or revocation of the right to act as a tax consultant need not be imposed at this time.

As pointed out during the hearing, the process in which all of us are involved is the equitable dividing up of the tax burden amongst taxpayers in keeping with the constitutional and statutory requirements that all pay their just and proportional share of taxes based on the market value of real estate owned. This goal must guide all participants in this process including initially municipal assessors, taxpayers or their representatives in challenging the assessment, or tribunals such as the board of tax and land appeals or the superior court when such assessments are appealed. Several times during the hearing Mr. Lutter stated he was a "taxpayer's advocate". Indeed, inherently a tax consultant's role is one of advocacy. However, Mr. Lutter's characterization of his role underscores what the board believes may be, at times, his inappropriate, overzealous representation of taxpayers to achieve a reduction in their tax burden that can not be justified. While it is

appropriate to vigorously represent clients, Mr. Lutter's presentation and arguments, as the board will discuss in detail in some of the specific allegations, have not always been based on well researched facts, entailed the application of proper appraisal principles and analyses and been within the confines of existing law. We find Mr. Lutter has, at times, lost sight of the primary goal of achieving assessment equity.

The specific concerns raised in the Review Order are addressed below in five subsections.

I. Failure to Obtain Taxpayer Signatures on Abatement Applications

This issue arose from six motions to dismiss filed in 2005 by municipalities in six appeals (Belmar/PAG Limited Partnership, et al., Docket Nos.: 21029-04PT, 20916-04PT, 20924-04PT, 20984-04PT, 21036-04PT and 21038-04PT) (collectively, the "Belmar Cases") where the municipalities sought dismissal of the appeals due to Mr. Lutter not obtaining the taxpayers' signatures on the abatement applications as provided in RSA 76:16, III and TAX 203.02(d). The board, in a May 18, 2006 order ("Reconsideration Order"), ultimately determined the taxpayers should not lose their right to appeal due to Mr. Lutter's lack of compliance with the law. We now find Mr. Lutter's purposeful noncompliance with the law is a violation of the standards of conduct in TAX 207.03(a)(1) and (4).

Mr. Lutter argued he had a good faith basis to interpret RSA 76:16, IV and the holdings of GGP Steeplegate, Inc. v. City of Concord, 150 N.H. 683 (2004) to conclude there was no requirement to obtain such signature. We disagree. RSA 76:16, IV does not relieve the applicant from providing the substantive information required in paragraph III, only from actual use of the form.

Further, even if Mr. Lutter was unclear as to how to interpret the statute in question, he chose to ignore the very plain wording of TAX 203.02(d) which requires the taxpayer sign the abatement application.

(d) Signature. The Taxpayer shall sign the Abatement Application. An attorney or Agent shall not sign the Abatement Application for the Taxpayer. An attorney or Agent may, however, sign the Abatement Application along with the Taxpayer to indicate the attorney's or Agent's representation.

Rules such as TAX 203.02(d) have the force of law when adopted to implement a statute. RSA 71-B:8; RSA 541-A:1, XV; and RSA 541-A:22, II¹.

Mr. Lutter did subsequently, in June 2005, petition for a rule change relative to the signature requirement of TAX 203.02(d), which the board denied for the reasons contained in its June 30, 2005 order. (See In Re: Rule Change Petition, Docket No.: 20659-05 (June 30, 2005) ("Rule Petition Order")).

Mr. Lutter was also cautioned strongly in a March 25, 2004 order (Greenhoe, et al. v. City of Laconia, Docket No.: 19859-02PT) that he has the responsibility "to comply fully with the board's rules" or "the board will enforce the responsibilities and obligations undertaken by tax consultants and apply the sanctions provided in its rules and the statute." Mr. Lutter's petition for rule change was filed more than a year later and in that interim he continued to not comply with the law, or heed the board's caution in Greenhoe to diligently seek taxpayers' signatures on abatement applications.

As evidenced by Mr. Lutter's testimony at the hearing, he continues to modify the abatement application form even after the rule change petition denial by crossing out the

¹ RSA 541-A:22, II. Rules shall be valid and binding on persons they affect, and shall have the force of law unless amended or revised or unless a court of competent jurisdiction determines otherwise. Except as provided by RSA 541-A:22, RSA 541-A:13, VI, rules shall be prima facie evidence of the proper interpretation of the matter that they refer to.

certification in section H of the form that the taxpayer “has signed this application” and inserts the word “authorized”. Mr. Lutter bases this modification on the Rule Petition Order’s observation that there was some logic contained in the City of Manchester’s submission at that hearing that an abatement application might be acceptable without a taxpayer’s signature if accompanied with a limited direct authorization for power of attorney or agent authorization which: “1) is obtained subsequent to the final notice of tax but prior to March 1 following the notice of tax; and 2) is specific to the person aggrieved, the municipality and the property for which the abatement is sought, and the year at issue.” Rule Petition Order at p. 2. The board did not definitively rule that such authorization would be acceptable, but only that taxpayers on appeal (if the abatement application is questioned by the municipality) could argue it was properly and timely filed with such attached authorization.

The board must question why Mr. Lutter continues to not explicitly comply with the statute and rules after being cautioned in Greenhoe and denied a rule change on the issue. Mr. Lutter’s attempt to supplant the taxpayer’s signature with an attached authorization document is illustrative of his attitude of not complying with the law if it is not convenient to him or to his liking. The board has noted before, and will note again, the signature is intended to fulfill a policy enumerated in the statute and rules that the applicant, in addition to having authorized the tax consultant, is certifying there is a good faith basis for the reasons in the abatement application in the eyes of the applicant, not just in the eyes of the tax consultant.

In short, it is appropriate for Mr. Lutter to attempt to change certain aspects of the law, whether in statutes or rules, if he believes they need be. However, it is his

responsibility as a tax consultant prior to, during and after any such attempt to comply with the law that is in effect to protect the interest of his clients. Mr. Lutter might argue that his clients were not prejudiced in the Belmar Cases because the board, in the Reconsideration Order, did not dismiss the appeals. However, the issues addressed in the Reconsideration Order may still be subject to appeal and, at the very least, the taxpayers incurred the additional expense of hiring an attorney to represent their interests in the various motions to dismiss. Thus, the board concludes Mr. Lutter's lack of compliance with the law has interfered with his ability to "adequately represent the interests of the taxpayer."

RSA 71-B:7-a.

II. Mount Washington Hotel Preservation v. Town of Carroll
Docket No.: 19177-01PT and 19856-02PT

In the Review Order, the board raised two concerns relative to Mr. Lutter's performance in these consolidated appeals: 1) "inattention and lack of adequate compliance with prehearing statements;" and 2) "lack of understanding of burden of proof when taxpayer owns multiple properties not all of which are appealed."

TAX 201.20(a) provides for the submission of prehearing statements and this requirement applied to the Mount Washington appeals. Mr. Lutter, in lieu of completing and submitting a prehearing submission in the form provided by the board (stating that he had misplaced it and did not bother to request another form from the board or replicate the form on his own), submitted a one-page letter on the last date the prehearing statement was due. The information in the one-page letter was sparse and did not include at least two important sections of the information required on the board's form, (section E) reasons supporting the appeal and (section G) the property's value.

To ensure the submission of prehearing statements is a significant event to be complied with by the parties, the prehearing submission form clearly states the parties will be limited at the hearing to presenting only the evidence that is identified in the prehearing statement, including; arguments, witnesses, exhibits, appraisals, etc. Mr. Lutter's one-page letter failed to identify all such evidence and contributed to the board, in its September 21, 2005 order in response to the Town of Carroll's ("Town") motion for summary judgment, limiting the evidence he could present at hearing to only those items referenced in his one-page letter. Mr. Lutter's inattention to this critical step indicates he did not understand the importance of complying with the board's prehearing submission process. His inattention worked to the detriment of his clients and did not comply with TAX 207.03(a)(4) and (6).

Mr. Lutter, at the hearing, in the Answer and in his requests for rulings of law, continues to rely upon the justification that the Town was not timely in replying to Mr. Lutter's interrogatories as to which, if any, of the other properties the Town was going to argue were underassessed. His continued assertion and reliance on the Town's dallying indicates Mr. Lutter does not fully understand that prior to any abatement being filed with a municipality, a taxpayer (or in this case, Mr. Lutter as a representative) must be knowledgeable first, of what property a taxpayer owns in a taxing jurisdiction and second, whether a taxpayer's entire estate is disproportionality assessed. While certainly there are times when municipalities will stipulate to non-appealed properties being proportionately assessed, it is not reasonable for the taxpayer or its representative to assume without such stipulation that non-appealed properties are reasonably assessed without doing their own due diligence of identifying all properties owned and their own separate analysis and valuation review of those properties. As the board repeatedly emphasized in both the

September 21, 2005 order and its December 14, 2005 decision in the Mount Washington appeals, Appeal of Town of Sunapee, 126 N.H. 214 (1985) firmly establishes the burden rests with the taxpayer in determining whether the aggregate value of a taxpayer's estate within a taxing jurisdiction is proportionately assessed or not. Without that proper initial determination by the taxpayer's representative, the taxpayer runs the distinct risk that the tribunal will find the taxpayer has failed in its burden of proof. Consequently, the board concludes Mr. Lutter's actions did not comply with the standards of conduct in TAX 207.03(a)(1), (4), (5) and (6).

In the Answer at 8, Mr. Lutter argues the legal and appraisal fees he incurred in the Mount Washington appeal (which were uncompensated because the appeal was dismissed and he received no contingency fee) are sanctions enough for his lack of compliance with the board's rules, procedures and case law. While he may have suffered some financial loss in that appeal, that is the inherent risk in representing taxpayers on a contingency basis. Despite the financial loss, Mr. Lutter, in defense of his actions, while verbalizing the responsibility to consider a taxpayer's entire estate, continues to attempt to transfer blame to the Town for not stipulating or providing information on the non-appealed properties. When representing taxpayers, especially those owning large interrelated properties, Mr. Lutter must do so in a fashion that is reflective of understanding the statutory and rule requirements.

Mr. Lutter's hearing memorandum argues, and his requests for rulings of law J and K would have the board find, that it is not appropriate to sanction Mr. Lutter because the board did not in a similar fashion sanction the Town in the Mount Washington appeals for not acting in a more forthcoming manner. The board has denied those requests because the

legislature has specifically not granted the board, the New Hampshire Department of Revenue Administration (“DRA”), or the assessing standards board (Cf. RSA 21-J:11-a; RSA 21-J:14-b; RSA 21-J:14-f; and RSA 21-J:14-g) the authority to sanction assessing officials in a manner similar to that granted the board to oversee and discipline tax consultants. Thus, there is no basis for asserting the board should have sanctioned the Town and the lack of doing so constituted a violation of Mr. Lutter’s constitutional rights.

III. Joan Brassill Living Trust v. Town of Gorham
Docket No.: 19734-02PT

In the Board Review, this case was cited for Mr. Lutter’s failure to verify data and information and present credible evidence in the sales and income approaches to value. In the Answer (at paragraph 23), it is noted “[a]s the finder of fact, the Board is charged with assigning weight and credibility to evidence submitted.” While true, Mr. Lutter’s presentation included numerous flawed assumptions and the use of unverified information that goes beyond the often conflicting competent assumptions and facts the board routinely has to weigh. Rather it is illustrative of his shortcomings in performing adequate value analyses based on market data to adequately represent his clients and thus is not compliant with the standards of conduct in TAX 207.03(a)(1), (2), (5) and (6).

In his sales comparison approach, he inappropriately deducted a business value from two of the four sales where in one sale the buyer attributed no business value to the consideration and in another sale the motel had changed names due to financial problems and the buyer indicated no business value on its PA-34 form. These are examples of where Mr. Lutter, without any legitimate basis, is attempting to reduce the indicated market value to the benefit of his client.

Mr. Lutter also relied upon information from his client as to observations of the comparable sales and certain expenses in the income approach. Any individual attempting to perform a supportable and reliable opinion of value must verify information obtained from any source, including one's own client, to determine if it is reliable to produce a defensible value conclusion rather than just accepting it as fact without any verification or analysis. Evidence presented in the Brassill appeal indicates that with further investigation Mr. Lutter would have concluded that, for instance, the Mount Madison Hotel had a number of issues that made it inferior rather than superior to the property under appeal. The fact that the Town of Gorham ("Town") presented those factors does not relieve Mr. Lutter of his responsibility to determine initially whether market evidence he is utilizing provides a good faith basis for filing an abatement and appeal.

Mr. Lutter also estimated an owner's salary deduction as a management expense in the income approach based on a nation-wide estimate for a front desk casino manager from an internet source, a figure that clearly had little or no relevance to a modest 36-bedroom motel in northern New Hampshire. Without further research to determine the relevancy of such an estimate (which clearly on its face is not relevant), leads the board to conclude either Mr. Lutter was purposely attempting to lower his value conclusion or did not understand the property or market he was involved with. Either conclusion raises the concern of whether Mr. Lutter had objectively determined there was a good faith basis for the appeal.

Several times during the June 26, 2006 hearing Mr. Lutter described himself as a "taxpayer advocate". While it is not inappropriate to be an advocate for taxpayers, it must be done with a full and working knowledge of the law and evaluation principles to

determine initially at the abatement level and then on appeal whether a good faith basis exists for challenging the assessment. Without proper verification of information, the development of reasoned assumptions and presentation of credible evidence to support a claim of overassessment, a tax consultant has not fully complied with the standards of conduct contained in TAX 207.03. Again, as a result of Mr. Lutter's shortcomings in thoroughly researching and preparing this case, he did not "adequately represent the interests of the taxpayer." RSA 71-B:7-a.

IV. Rosebrook Water Co., Inc. v. Town of Carroll
Docket No.: 19382-01PT

As in Brassill, the Rosebrook appeal raises concerns as to Mr. Lutter's lack of adequate knowledge of or verification of the data and assumptions utilized in his value estimate. Specifically, Mr. Lutter conceded he had no experience in valuing public utilities and yet proceeded to argue a high capitalization rate (15%) when the evidence indicated that Rosebrook, regulated by the New Hampshire Public Utility Commission (PUC), had a guaranteed rate of return of 10% which minimizes risk and lowers any capitalization rate utilized in an income approach estimate. Mr. Lutter did not investigate whether the \$29,000 management and owner salary that he deducted was appropriate for the type and size of property involved and whether such management charges were allowable under the PUC's regulations as a pass-through expense as the town testified they were. Mr. Lutter also argued the 1999 stock transfer price of \$250,000 was indicative of market value but provided no evidence as to whether such transfer met the requirements of an arm's-length transaction, including being openly marketed, and whether the grantor and grantee were unduly motivated in the transaction. As the board noted in its decision, the transfer

occurred between Mr. Satter (who previously had an ownership interest in the Mount Washington Hotel) and Rosebrook, whose principals purchased the Mount Washington Hotel. Thus, the board found the transaction had a number of factors that made it suspect as an arm's-length transaction. The board's concern with Mr. Lutter here is not that he presented the transaction as evidence, but that he had no further evidence or arguments to submit that it was indeed indicative of market value given the nature of the transfer. As in Brassill, the board finds Mr. Lutter's presentation reflected the lack of good preparation and research necessary to initially establish a good faith basis existed for the abatement and thus the appeal.

Also in Rosebrook Mr. Lutter changed, at hearing, the grounds of the appeal from those stated in the appeal document which is expressly prohibited by TAX 203.03(g).

(g) Grounds Limited. Throughout the appeal, the issues raised by the Taxpayer in the Abatement Application and Appeal Document may differ, but the grounds stated in the Appeal Document shall control the issues before the Board.

The appeal document argued an assessed value of \$187,949 based on DRA's valuation of the property for the RSA 83-F state utility property tax. The appeal also stated the water pipes were older than what accounted for by the town in its 2001 reassessment. The appeal document contained no mention of the stock transfer or income approach in valuing the property which were the primary arguments at hearing. At hearing, the reasons for the appeal (DRA's value and age of pipe) were minimally or not at all presented. While "the Town graciously waived objecting to Mr. Lutter's subsequently-developed income approach argument..." (Rosebrook March 24, 2004 decision at 8), the rule is intended to have the taxpayer finally solidify its grounds for appeal subsequent to the abatement

request when an appeal is filed, so the municipality has an understanding as to why the taxpayer is aggrieved and can anticipate the issues that will be raised at hearing. To allow a taxpayer to be able to continually revise its reasons for an abatement would subject the municipality to try to hit a moving target on defense.

While Rosebrook is the only appeal in which the board has written its concern about Mr. Lutter's expansion of the grounds of the appeal, the board has cautioned Mr. Lutter during other hearings of this practice. Mr. Lutter has been a tax consultant for 16 years during which time (but for the first year) this basic appellate process provision has been in effect. His lack of compliance indicates either he is unfamiliar with it or he chooses to ignore it when it is to his client's benefit. In either event, the board concludes his actions in Rosebrook failed to meet standards of conduct in TAX 207.03(a)(1), (4), (5) and (6)

V. Pemigewasset National Bank v. City of Franklin
Docket No.: 19031-01PT

The board's concerns in this appeal are two-fold. First, Mr. Lutter failed to understand clearly that a settlement agreement, with the provisions such as those agreed to in Pemigewasset, runs with the property and controls the assessment, regardless of whether it is subsequently sold or not, until a reassessment or good faith change occurs as provided by RSA 76:17-c. Mr. Lutter had represented Pemigewasset's predecessor in title (see First Savings of New Hampshire v. City of Franklin, Docket No.: 17664-97PT) in tax appeals from 1996 and 1997. Mr. Lutter, representing First Savings, and the City of Franklin ("City") entered into a settlement for those tax years in 1999 and included in the settlement agreement "that the \$135,000 assessment shall be used until revised in good faith pursuant

to RSA 75:8 or until a municipal-wide reassessment period”. When the property transferred in 1999 (the same year the settlement was reached), Mr. Lutter then representing the new owner, Pemigewasset, argued in a 2001 appeal the 1999 sale price and the 1998 liquidation appraisal should be considered and be the basis for Pemigewasset to file a new appeal. The board extensively discussed how Mr. Lutter’s arguments were flawed in both an initial order and rehearing decision.

The board was concerned then, as it is now, with Mr. Lutter’s apparent lack of understanding that such a settlement agreement is a contract for the term of the agreement that controls the property’s assessment regardless of ownership². As the City appropriately noted in its March 10, 2003 motion to dismiss:

“It is assumed that both parties enter into an agreement in good faith, and if the subject appeal remains open to further discussion it has wider repercussions than just the case at hand. Rather, it brings to question the good faith assumptions applied when the settlement occurred in the first place, and could legitimately raise doubts about the sustainability of a settlement agreement reached for either side.”

While the Answer states Mr. Lutter has revised his settlement agreement language, it was not made clear to the board at the hearing or in the Answer that Mr. Lutter understands the import of settlement agreements and that they must be abided by.

Second, in his response to the City’s motion to dismiss and in his motion for rehearing/reconsideration, Mr. Lutter mischaracterizes the board’s decision in another case, First Savings & Loan Assoc. v. Town of Tilton, Docket No.: 17667-97PT. In his March 17, 2003 response to the City’s motion to dismiss, Mr. Lutter argued “the Board would not

² When Pemigewasset was acquiring First Savings of New Hampshire’s interest in the property in 1999, it is reasonable to assume it would have been made aware of that settlement agreement, especially since Mr. Lutter had authorization to represent both banks in tax appeals and was the individual who reached and signed the settlement agreement on behalf of First Savings of New Hampshire.

enforce the settlement agreement” (in First Savings & Loan Assoc.). In his April 25, 2003 motion for rehearing/reconsideration (at 3) he states “the Board appears to make settlement agreements only binding for the taxpayer and not the Town.” Both statements misrepresent the board’s denial of Mr. Lutter’s motion in First Savings & Loan Assoc. for enforcing a settlement. As addressed in the orders relating to First Savings & Loan Assoc., Mr. Lutter’s motion was denied because it was made several years after Tilton sent out tax bills not in line with the settlement agreement’s assessment. The board’s denial was based on the timelines for filing an enforcement motion in TAX 203.05(h) and (j) which are intended to have taxpayers act in a timely manner and not sleep on their rights for two to three years, as Mr. Lutter did, in trying to follow up on the Town’s lack of compliance to the settlement agreement. Instead of chastising the board for not enforcing a settlement agreement that was not timely brought to the board, Mr. Lutter should realize that to appropriately represent his client, he must act promptly in compliance with board rules and general case law. (Hatch v. Kelly, 63 N.H. 29, (1884) “The law favors those who are vigilant, not those who sleep on their rights.” (Citations omitted.))

The board finds Mr. Lutter’s actions in the Pemigewasset case indicates a lack of compliance with Standard of Conduct TAX 207.03(a)(1) and (4).

VI. Summary

In summary, the board has addressed a number of specific deficiencies in Mr. Lutter’s conduct in each of the above appeals. The board has done so to illustrate the systemic and pervasive nature of these problems and why they require the imposition of appropriate sanctions at this time. The board has focused on the specifics of these appeals at some length because the Answer filed on Mr. Lutter’s behalf and his

presentation at the hearing challenged and questioned various details pertaining to each of them. While the board finds each of the noted deficiencies and infractions to be significant, they are also symptomatic of an overall pattern of conduct that has accumulated to the point where they must be addressed and corrected.

In Respondent's Hearing Memorandum (at p. 1), Mr. Lutter defends his conduct as simply being that of a consultant who "acted as a diligent advocate for his clients." Because diligence requires a fuller understanding of the tax assessment, abatement and appeal process and the statutes and rules that govern it, the board does not agree with this defense and characterization, especially in light of the specific Standards of Conduct set forth in the board's rules that have been quoted above.

Throughout these proceedings, the board has gained little confidence that Mr. Lutter as yet understands the important difference between what can be permitted as "diligent" or even zealous advocacy, which no tribunal wishes to discourage, and what must be termed as an overzealous or excessive approach which tempts him, at various times, to ignore or misrepresent inconvenient facts, rules and statutes and distort assessment appraisal methodology in order to gain an abatement. Such tactics are impermissible and are ultimately self-defeating, whether used by attorneys representing taxpayers or by taxpayers themselves, because they harm the credibility of the party presenting such evidence and arguments and detract from the goal of achieving assessment equity efficiently and expeditiously.

The tax consultant was clearly intended by the legislature to have an intermediate role: he or she may not have the same degree and extent of knowledge (regarding law and legal process) or obligations (disciplinary sanctions including loss or suspension of

license to practice) as attorneys, but can and must be charged in these respects with more knowledge and obligations than self-represented taxpayers who may be inexperienced in seeking a tax abatement at the municipal level or filing an appeal with the board. Like any taxpayer, the tax consultant is required to take an oath to tell the truth (under penalty of perjury) before presenting evidence to the tribunal. In addition, the taxpayer seeks help from the consultant presumably because of his deeper knowledge of property tax law and procedures and experience regarding what is achievable. The consultant therefore has a clear obligation to limit evidence and arguments to those that can be presented in good faith with a reasonable and supportable basis in both fact and law. In particular, (i) the facts presented and any analysis of them should not be distorted by the consultant simply to suit the convenience of any party's position; and, (ii) if the consultant is seeking to change established law or procedures, such attempts must be properly disclosed to the tribunal, without ignoring or misstating the existing rules that must apply to all until they are changed.

Because of these continuing concerns, the board is ordering the sanctions described below for the violation of the Standards of Conduct by Mr. Lutter.

Ordered Sanctions

A. Educational Courses

Pursuant to TAX 207.06(a)(1), the board orders the following educational courses be taken by Mr. Lutter and passed successfully by September 30, 2007. The board acknowledges the courses Mr. Lutter has taken, as indicated in the Supplemental Submission, but due to the time elapsed since many were taken, the board concludes the following courses are appropriate.

- 1) New Hampshire Association of Assessing Officials and Department of Revenue Administration, State Statutes Course;
- 2) International Association of Assessing Officers, Course 102, Income Approach to Valuation or the Appraisal Institute General Appraiser Income Approach/ Part 1 (either course with live attendance, rather than online); and
- 3) The Appraisal Foundation's 15 Hour National USPAP Course (with live attendance, rather than online).

Mr. Lutter shall provide evidence of successful completion of the above courses no later than September 30, 2007 unless, for good cause, an extension of time is requested and granted by the board.

B. Censure

This order is to be considered a written censure in accordance with TAX 207.06(a)(2) which will be posted at the board after appeal timelines have passed pursuant to TAX 207.15(c).

No further sanctions at this time are warranted based on Mr. Lutter's actions. In the Answer, Mr. Lutter indicates he is voluntarily decreasing his caseload and marketing efforts. The board reviewed the abatements and appeals filed over the last four years as detailed in the Supplemental Submission and recorded in the board's docket. The board finds it is not necessary to order any reduction in his caseload and believes that with improved diligence, education and management, he should be able to adequately represent clients in the pending cases.

Any appeal by Mr. Lutter of this Decision is to the New Hampshire Supreme Court compliant with the rehearing and appeal timelines contained in RSA ch. 541, RSA 71-B:12

and TAX 207.15. Once the appeal timelines have passed and if no appeal has been taken, the censure shall be posted until successful completion of the courses listed above has occurred.

Responses to Requests of Findings of Fact and Rulings of Law

The “Requests” received from the respondent are replicated below, in the form submitted and without any typographical corrections or other changes. The board’s responses are in bold face.

The board responds to Mr. Lutter’s request for rulings of law as follows. In these responses, “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 overly broad or narrow so 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.

RESPONDENT’S REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW

A. Proceedings before the BTLA are adversarial in nature.

Granted.

B. It is the function of the BTLA to hear and weigh evidence and decide whether the appellant has met its burden of proof.

Granted.

- C. If an appellant or its tax consultant does not meet its burden of proof, this does not constitute a violation of the Standards of Conduct set forth in Tax 207.03.

Neither granted nor denied.

- D. Even though Mr. Lutter did not ultimately persuade the Board in the Brassill and Rosebrook cases, he did not violate the Standards of Conduct set forth in Tax 207.03.

Denied.

- E. In the Rosebrook case, Mr. Lutter did not violate Tax 203.03(g) when he expanded the grounds of appeal with the consent of the municipality and eventual approval of the Board to do so.

Denied.

- F. In the Mount Washington case, the Board acknowledged that the Town “could have been more forthcoming and diligent in stating its intention to dispute the assessments on all properties owned by the Taxpayer” Order at 13.

Neither granted nor denied.

- G. In the Mount Washington case, Mr. Lutter’s failure to list expert evidence on his pretrial statement was a result of the Town’s unwillingness to be forthcoming about whether it would challenge the non-appealed properties.

Denied.

- H. It was reasonable for Mr. Lutter to rely on the Town’s repeated assurances that it would inform him if the Town sought to challenge the assessments of the non-appealed properties.

Denied.

- I. In the Mount Washington case, Mr. Lutter understood the applicable burden of proof.

Denied.

- J. Even though the Board recognized that the Town acted in a less than forthcoming manner and that it could have been more diligent, the Board did not sanction the Town in any way or initiate any disciplinary proceedings regarding that conduct.

Neither granted nor denied.

- K. The Board's initiation of a Board Review against Mr. Lutter for violating certain rules and its failure comparably sanction the Town in the Mount Washington case constitutes a violation of Mr. Lutter's equal protection rights under the state and federal constitutions.

Denied.

- L. Mr. Lutter's position on the taxpayer signature issue was one he arrived at based on a good faith interpretation of the applicable laws and rules.

Denied.

- M. Mr. Lutter's clients did not suffer prejudice as a result of his signing the applications on their behalf because the Board ultimately agreed that it is improper to dismiss an application based on failure of the taxpayer to sign the form.

Denied. Mr. Lutter's clients incurred additional costs due to the hiring of Attorney Hodes in the Belmar Cases and subjected his clients to further delay and uncertainty of the ultimate resolution of their appeals.

- N. In the Pemigewasset case, Mr. Lutter had a good faith basis to argue that the settlement document did not bind his client.

Denied.

- O. Prior to the June 26, 2006 hearing, the Board made a determination that Mr. Lutter violated the Standards of Conduct. Making such a finding prior to the adjudicatory hearing constitutes a violation of Mr. Lutter's rights to due process under the state and federal constitutions.

Denied. The board made no preliminary determination that Mr. Lutter had violated the standards of conduct. The board's reference in the Reconsideration Order in the Belmar Cases about authority to regulate tax consultants pursuant to RSA 71-b:7-a and the board review under Tax 207, was simply a statement that an investigation was being initiated under the board's authority contained in the statute and rules.

- P. Mr. Lutter possesses a working knowledge of the statutes, rules and case law relating to property taxation and abatement. Tax 207.03(a)(1).

Denied.

Q. Mr. Lutter has acted honestly in carrying out his role as tax consultant, including dealings with represented taxpayers and all state and local officials. Tax 207.03(a)(3).

Neither granted nor denied.

R. Mr. Lutter has reasonably complied with all statutes, rules, case law and Board orders when representing taxpayers. Tax 207.03(a)(4).

Denied.

S. Mr. Lutter has filed only abatement requests to municipalities or appeals to the Board that have a supportable good-faith basis that the taxpayer is entitled to an abatement. Tax 207.03(a)(5).

Denied.

T. Mr. Lutter has taken sufficient steps to adequately represent all taxpayers. Tax 207.03(a)(6).

Denied.

U. Mr. Lutter should not be sanctioned for any of his conduct that is at issue in this Board Review.

Denied.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

CERTIFICATION

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Steven E. Hengen, Esq. and Lisa M. Lee, Esq., Ransmeier & Spellman PC, PO Box 600, Concord, NH 03302, counsel for Mark Lutter; Mark Lutter, Northeast Property Tax Consultants, 14 Roy Drive, Hudson, NH 03051; Stephan W. Hamilton, City of Manchester, Chairman, Board of Assessors, One City Hall Plaza-West Wing, Manchester, NH 03101, Interested Party; and City of Nashua, Chairman, Board of Assessors PO Box 2019 Nashua, NH 03061, Interested Party.

Dated: September 15, 2006

Anne M. Stelmach, Clerk