

**Nicolina Foti**

**v.**

**Town of Derry**

**Docket No.: 22934-07EX**

**DECISION**

The “Taxpayer” appeals, pursuant to RSA 72:34-a, the “Town’s” 2007 denial of the Taxpayer’s request for an elderly exemption as provided under RSA 72:39-a. For the reasons stated below, the appeal for abatement is denied.

The Taxpayer 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 72:34-a; RSA 72:39-a; and Tax 204.05.

The Taxpayer, represented at the hearing by her son, Biagio Foti, argued she was entitled to the elderly exemption because:

- (1) she is 77 years old and has received the elderly exemption in prior years from the Town;
- (2) she desires an “explanation” as to why the exemption was denied; and
- (3) she had a lot of expenses in the last year which depleted her assets and her income.

The Town argued the denial of the elderly exemption was proper because:

- (1) pursuant to RSA 72:39-b, the Town adopted an income limitation of \$28,000 and an asset limitation of \$100,000;
- (2) the Town reviewed the Taxpayer's application and her "1040" (income tax return, Municipality Exhibit No. C) for 2006 and concluded her income (\$30,943.50) exceeded the Town's income limit (\$28,000);
- (3) the Town reviewed other documents, including bank statements, to estimate her assets, not including her residence, at \$134,737.76, which also exceeds the limit (\$100,000) to qualify for an exemption (see Municipality Exhibit No. A); and
- (4) the Taxpayer did not meet her burden of proof.

### **Board's Rulings**

Based on the evidence, the board finds the Taxpayer is not eligible for an RSA 72:39-a elderly exemption for tax year 2007 because her net income and net assets exceed the Town's voted limitations of \$28,000 and \$100,000 respectively.

The Town explained the exemption was denied because, during a general review of all taxpayers who had previously been determined eligible for elderly exemptions, it discovered the Taxpayer's net income and net assets, including her savings account, exceeded the Town's RSA 72:39-b net income limitation of \$28,000 and net asset limitation of \$100,000. The Town further pointed out it had no discretion to ignore, waive or overlook these limits and the Taxpayer can reapply for the exemption if her income and assets are at the point where she does qualify.

RSA 72:39-a has both an annual net income and a net asset ceiling. Although the Town denied the appeal on the basis that the Taxpayers' net income, as defined in RSA 72:39-a, I (c),

exceeded the Town's adopted ceiling of \$28,000, the Taxpayer's net assets also exceeded the Town's adopted ceiling of \$100,000. The applicable portion of RSA 72:39-a reads as follows:

**RSA 72:39-a Conditions for Elderly Exemption .**

I. No exemption shall be allowed under RSA 72:39-b unless the person applying therefore: ...

(b) Had in the calendar year preceding said April 1 a net income from all sources...of not more than the respective amount applicable to each age group as determined by the city or town for purposes of RSA 72:39-b....The net income shall be determined by deducting from all moneys received, from any source including social security or pension payments, the amount of any of the following or the sum thereof:

- (1) Life insurance paid on the death of an insured;
- (2) Expenses and costs incurred in the course of conducting a business enterprise;
- (3) Proceeds from the sale of assets.

(c) Owns net assets not in excess of the amount determined by the city or town for purposes of RSA 72:39-b, excluding the value of the person's actual residence and the land upon which it is located up to the greater of 2 acres or the minimum single family residential lot size specified in the local zoning ordinance. The amount determined by the city or town shall not be less than \$35,000. "Net assets" means the value of all assets, tangible and intangible, minus the value of any good faith encumbrances. "Residence" means the housing unit, and related structures such as an unattached garage or wood shed, which is the person's principal home, and which the person in good faith regards as home to the exclusion of any other places where the person may temporarily live. "Residence" shall exclude attached dwelling units and unattached structures used or intended for commercial or other nonresidential purposes.

A review of Mrs. Foti's 2006 Form 1040 tax return submitted by the Town (Municipality Exhibit No. C), shows the Taxpayer's income consisted of pensions and annuities in the amount of \$16,800, taxable interest of \$1,975 and social security benefits in the amount of \$12,858 for a total net income of \$31,633, which exceeds the \$28,000 limit adopted by the Town. The Taxpayer indicated, through Mr. Foti, she was not aware that social security benefits had to be considered as part of her income. Further, the Taxpayer did not dispute the documentation supplied by the Town in Municipality Exhibit No. A indicating a total of \$134,737.76 in assets, which the Town ascertained from savings and checking account information provided to them by

Mrs. Foti. This total also exceeds the Town's adopted limit of \$100,000. Mrs. Foti and her son both stated Mrs. Foti had suffered recent tragedies which depleted her assets. While the board sympathizes with Mrs. Foti's financial circumstances, based on the net income and net assets described above, she does not qualify for the elderly exemption for tax year 2007 and the appeal must be denied.

The Town stated it had increased its net income and net asset limitations in 2008 to \$35,000 and \$150,000 respectively and advised Mrs. Foti she could apply, pursuant to RSA 72:33, for an elderly exemption for tax year 2008 and receive the exemption if she meets the current requirements.

The "Requests" received from the Town 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.

#### **FINDINGS OF FACT**

1. The Petitioner Nicolina Foti ("Petitioner") is a single person who was denied an elderly exemption for the year 2007 for property she owns at 1 True Avenue, Derry , New Hampshire.

**Granted.**

2. In order to be eligible for an elderly exemption in the Town of Derry for 2007, an applicant who is single must have a net income of less than \$28,000.00 and not have assets greater than \$100,000.00, excluding the value of the persons residence, and up to two acres of land.

**Granted.**

3. The Petitioner had a net income for 2007 of \$30,943.50.

**Granted, except the income refers to 2006.**

4. The Petitioner had assets, exclusive of her residence, for 2007 of \$134,737.76.

**Granted, except the assets refer to 2006.**

5. The Petitioner's net income exceeds the \$28,000.00 limit allowed by the Town of Derry in order to be eligible for an elderly exemption.

**Granted.**

6. The Petitioner's assets exceed the \$100,000.00 limit allowed by the Town of Derry in order to be eligible for an elderly exemption.

**Granted.**

7. The evidence in the record supports the decision to deny the Petitioner an elderly exemption for the year 2007 for property she owns at 1 True Avenue, Derry, New Hampshire.

**Granted.**

#### **RULINGS OF LAW**

1. The Town has no authority to waive the income and asset limits adopted by the Town pursuant to RSA 72:39-a.

**Granted.**

2. If an applicant exceeds the income limit and/or asset limit adopted by the Town then an application for an elderly exemption must be denied.

**Granted.**

3. The evidence in the record shows that the Petitioner's net income for 2007 exceeded the \$28,000 limit allowed by the Town of Derry.

**Granted except the income refers to 2006.**

4. The evidence in the record shows that the Petitioner's net assets for 2007 exceeded the \$100,000 limit allowed by the Town of Derry.

**Granted except the assets refer to 2006.**

5. The Town of Derry properly denied the Petitioner's application for an elderly exemption for 2007 because she exceeded the net income limit.

**Granted.**

6. The Petitioner's appeal is dismissed for 2007 because she exceeds the net income limit for the Town of Derry for the year under appeal.

**Neither granted nor denied.**

7. The Petitioner's appeal is dismissed for 2007 because she exceeds the asset limit adopted by the Town of Derry.

**Neither granted nor denied.**

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(f). 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.

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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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Michele E. LeBrun, Member

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Douglas S. Ricard, Member

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Albert F. Shamash, Esq., Member

**Certification**

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Biagio Foti, 859 Chandler Street, Tewksbury, Massachusetts 01876, representative for the Taxpayer; Steven A. Clark, Esq., Boutin & Altieri, P.L.L.C, PO Box 1107, Londonderry, NH 03053, counsel for the Town; Corcoran Consulting Associates, Inc., Bayside Village, PO Box 1175, Wolfeboro Falls, NH 03896, contracted assessing firm for the Town; and Chairman, Town Council, Town of Derry, 14 Manning Street, Derry, NH 03038.

Date: April 16, 2008

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Anne M. Stelmach, Clerk