

Sharon Worster

v.

Town of New Durham

Docket No.: 23328-07LC

DECISION

The “Taxpayer” appeals, pursuant to RSA 79-A:10, the “Town’s” 2007 land use change tax (“LUCT”) of \$2,000 on a 0.63 acre lot at 4 Cedergren Road West (the “Property”) based on a \$20,000 full value assessment.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the Town’s LUCT assessment was erroneous or excessive. See Tax 205.06. For the reasons stated below, we find the Taxpayer did not carry her burden and therefore, the appeal for abatement is denied.

The Taxpayer argued the LUCT was erroneous or excessive because:

(1) the Property was part of a larger tract which was enrolled in current use in 1989 by the prior owners (Edmond G. and Fukiko A. Merrill) and was incorrectly identified on the list filed by the Town with the Strafford County Registry of Deeds (the “Registry”) as Tax Map 19, Lot 1, when in fact, the parcel was actually Map 19, Lot 5;

- (2) RSA 477:3-a requires that any instrument that affects title to real estate shall not be effective until it is recorded;
- (3) because the lot was incorrectly referenced in the current use recording at the Registry, a title search performed by the Taxpayer did not reveal the portion being purchased was encumbered with a current use contingent lien; and
- (4) no LUCT should be collected by the Town.

While at the beginning of the hearing the Taxpayer did present arguments relative to the \$20,000 LUCT assessment, her attorney who filed an appearance at the hearing, Phillip J. Stiles, Esq., stated the sole issue was the error in the recorded document (and whether it precluded any LUCT) and not the amount of the assessment.

The Town acknowledged a typographical error had incorrectly identified the parcel being enrolled in 1989 by the Merrills as Map 19, Lot 1 (rather than Lot 5). Because this was an issue that had never been addressed, the Town was hopeful the board would resolve it based on the facts and applicable law. On March 8, 2008, the Town had submitted to the board a packet of documents including several assessment-record cards and current use records related to the Property (“Town Submission”). At the hearing, the Town also presented detailed testimony as to why it believes the sale price of \$20,000 was a reasonable basis for assessing the LUCT.

Board’s Rulings

For the following reasons, the board finds the Taxpayer is liable for the \$2,000 LUCT.

This appeal involves the interpretation and application of several statutes, as well as considerations of fairness to the Taxpayer and the Town based on facts that are somewhat unique but not in dispute. In LUCT appeals, as in other tax abatement appeals, the board is authorized to make “such order[s] thereon as justice requires.” Cf. RSA 79-A:9, II and RSA 76:16-a.

While the Taxpayer makes a plausible technical argument for why she should not be liable for the LUCT, the board finds considerations of fairness and justice do not weigh in her favor. If her argument were sustained, the outcome would be an unjustifiable evasion of the tax due when land is removed from current use simply because of an inadvertent typographical error that was not discovered by the Town until many years later when it was identified by the Taxpayer. With this overview, the board will proceed to discuss the relevant statutes and facts involved in this appeal.

RSA 79-A:5, VI requires that the assessing officials, upon approval of a current use application, “shall file a notice of contingent lien with the register of deeds in the appropriate county within 14 days of said classification” and RSA 79-A:5, VII states in part: “[t]he notice of contingent lien shall constitute notice to all interested parties that a lien on the parcel shall be created if and when the land is subsequently disqualified from current use assessment, as provided in RSA 79-A:7, II(e) and RSA 80:85.”¹

RSA 79-A:7 requires that a lot be assessed a LUCT when open space land “is changed to a use which does not qualify for current use assessment.” RSA 79-A:7, IV(c) further states: “[f]or the purposes of this section land use shall be considered changed and the land use change tax shall become payable when: ... (c) [b]y reason of size, the site no longer conforms to criteria established by the board [current use board] under RSA 79-A:4, I.”

¹ The present language of RSA 79-A:5, VII was the result of a 1991 amendment. Prior to 1991, and at the time of the current use application and the filing of the notice at the registry of deeds in 1989, the term “contingent lien” was not part of the statute. The pertinent portion of the prior version of RSA 79-A:5, VI (1989 Supp.) stated: “[t]he assessing official shall file with the register of deeds in the appropriate county, on or before August 1 in each year, a list of all parcels of land classified under the provisions of this chapter.... The list filed pursuant to this paragraph shall be on a form approved by the board and provided by the commissioner, shall contain the name of each owner, the date of classification and a short description of each parcel of real estate together with such other information as the board may prescribe;...” It is this list, part of the Town Submission in this appeal, that the parties agree contains the incorrect lot reference and which the Taxpayer argues bars the assessment of the LUCT.

The Taxpayer (in Taxpayer Exhibit No. 1) relies on RSA 477:3-a, which provides:

Every deed or other conveyance of real estate and every court order or other instrument which affects title to any interest in real estate, except probate records and tax liens which are by law exempt from recording, shall be recorded at length in the registry of deeds for the county or counties in which the real estate lies and such deed, conveyance, court order or instrument shall not be effective as against bona fide purchasers for value until so recorded.

This reliance is misplaced. The Taxpayer has cited no case law applying this statute against a municipality filing a notice of contingent lien pursuant to RSA 79-A:5, VI and VII that contains an inadvertent typographical error. Even if, for the sake of argument, all of the other elements of RSA 477:3-a could be satisfied, the board finds the Taxpayer is not a 'bona fide purchaser for value' because she did not purchase the Property "without notice" of the fact the land was in current use and therefore subject to a LUCT assessment. See, e.g., Hawthorne Trust v. Maine Savings Bank, 136 N.H. 533, 537 (1992): "A bona fide purchaser for value is one who acquires title to property for value, in good faith, and without notice of competing claims or interests in the property. (Citation omitted.) Such competing claims may include equitable interests." (Emphasis added.)

While the legal issue (discussed further below) is somewhat novel, the facts are generally undisputed and can be summarized here. The Taxpayer owns Map 34, Lot 22, a small lot with a cottage on Merrymeeting Lake that her father had purchased in 1965. The Taxpayer had tried to acquire some additional land (to enlarge the waterfront lot) from Map 19, Lot 5 when it was owned by the Merrills, but they were unwilling to sell a portion of Lot 5 at that time. On December 8, 2005, G.G.E. Land Associates, LLC ("GGE") acquired Map 19, Lot 5 from the Merrills and subsequently, through a boundary line adjustment plan (see Municipality Exhibit No. A), created a number of small lots that could be annexed to the adjoining Merrymeeting Lake lots including the Taxpayer's Lot 22. On February 5, 2007, the Taxpayer acquired for

\$20,000 the additional area of 27,734 square feet, encumbered by Cedergren Road West and power line right-of-ways, from GGE (the “Acquired Parcel”).

In 1989 the Merrills applied for and were granted a current use assessment on three parcels, totaling approximately 208 acres identified on the current use application as Map 19, Lot 5, Map 20, Lot 1 and Map 34, Lot 17. On July 24, 1989, the Town submitted to the Registry a list of the new properties on which current use had been granted for the first time in 1989. The list included the Merrill’s parcels identified as Tax Map 19, Lot 1, Tax Map 20, Lot 1 and Tax Map 34, Lot 17. Regardless of the incorrect identification, Map 19, Lot 5 was assessed in current use during the Merrill’s ownership and subsequently, after GGE’s purchase in December, 2005, to GGE. Map 19, Lot 1, which inadvertently was recorded as being in current use, is owned by Robert and Alta Lord and was never assessed in current use.

Thus, the pivotal issue in this case is whether, due to the typographical error describing the parcel in current use as Lot 1 rather than Lot 5, the Taxpayer is liable for the \$2,000 LUCT. The Taxpayer testified she worked for a title company and, before acquiring the Property from GGE, had a title search done which revealed no current use lien relative to Map 19, Lot 5. She also responded to board questions that she had not been made aware, either by any written or verbal communications with the Merrills or GGE, that the Acquired Parcel was in current use. Consequently, she argued she had no actual or constructive notice of the contingent current use lien and thus should not be liable for the LUCT.

The issue of whether an inadvertent typographical error in the list recorded by the Town in 1989 of properties in current use should invalidate a taxpayer’s obligation to pay the LUCT is one of first impression for the board. The board is unaware of any New Hampshire case law precisely on point, but has reviewed the two cases included in Taxpayer Exhibit No. 1: Chagnon

Lumber Co., Inc. v. Stone Mill Construction Corp., 124 N.H. 820 (1984); and Thomas v. Finger, 144 N.H. 500 (1999). These cases involve mechanic's (labor and materials) lien claims and the issue of whether attachments were effective against the new property owner (pursuant to RSA 511-A:5 and RSA 447:2). They are also distinguishable because, unlike here, the property owner in each case was found by the trier of fact to be a bona fide purchaser for value who purchased the property without notice of the claim and in good faith. Cf. Finger, 144 N.H. at 503, where the court stated: in addition to recorded liens at the time of closing, "notice may also arise from the totality of circumstances that would place a reasonable buyer on notice that further inquiry should be made to ensure that no cloud on the title exists. (Citations omitted.)"

To help resolve this issue, and during its deliberations,² the board obtained from the Registry copies of the Taxpayer's deed from GGE (Book 3490, Page 359, recorded February 5, 2007) and the deed from Merrill to GGE (Book 3304, Page 704, recorded December 8, 2005). (These recorded deeds are attached as Exhibit A.) The February 5, 2007 deed from GGE to the Taxpayer contains no reference the Acquired Parcel is subject to current use, but the December 8, 2005 deed from the Merrills to GGE has a clear reference that Map 19, Lot 5 is subject to current use assessment. Page 705 identifies that a portion of Tract 1 is Map 19, Lot 5 and Page 706 of the deed clearly states the Property is subject to current use taxation. Consequently, the board finds the Taxpayer through normal title research should have received notice that the parcel she was acquiring was assessed in current use and would be subject to a LUCT.

Despite the Town's list of current use property (recorded at the Registry almost 20 years ago) having an incorrect lot reference, a brief search of the chain of title, which any title company would customarily make, reveals Lot 5 is subject to current use assessment and that a

² The board's general authority in RSA 71-B:5, I in part states: "[i]n determining matters before it, the board may institute its own investigation, or hold hearings, or take such other action as it shall deem necessary." (Emphasis added.)

bona fide purchaser would have notice that any action disqualifying any portion of Lot 5 would cause a LUCT to be assessed at that time.

For all of these reasons, the board finds the typographical error emphasized by the Taxpayer is not fatal to the Town's position because alternate public notice of the impending current use contingent lien (prescribed in RSA 79-A:5, VII) existed in the recorded deed from Merrill to GGE. In brief, the LUCT was properly assessed against the Property by the Town and the appeal is therefore denied.

The board further notes that, while the Taxpayer's attorney near the close of the hearing appeared to limit the issue before the board to the notice of the current use lien, the board would have found that \$20,000 assessment is reasonable based on the various analyses and testimony presented by Mr. Estey for the Town had it been asked to decide this issue. Last, Mr. Estey raised a question as to whether the Taxpayer's neighbors had been equitably treated who also had acquired rear lots to annex to their Merrymeeting Lake lots, paid the corresponding LUCTs but had filed no abatements. Given the board's conclusion in this case of the clear current use liability noted in the Merrill to GGE deed, the board finds that concern is moot and need not be addressed further by the board.

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. 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

Paul B. Franklin, Chairman

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: Phillip J. Stiles, Esq., PO Box 790, Alton, NH 02809, counsel for the Taxpayer; Chairman, Board of Selectmen, Town of New Durham, PO Box 207, New Durham, NH 03855; and Current Use Board, c/o Department of Revenue Administration, Post Office Box 457, Concord, NH 03302, Interested Party.

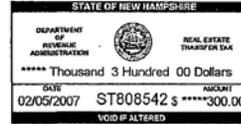
Date: May 27, 2008

Anne M. Stelmach, Clerk

EXHIBIT A
FIVE PAGES FROM THE STRAFFORD COUNTY REGISTRY OF DEEDS

Book 3490 Page 359 Docket 2314 This image for J at Copyrm1 at Strafford County on 08/04/22

Doc # 0002314 Feb 5, 2007 12:11 PM
Bk 3490 Pg 0359 Page 1 of 2 Pages
Register of Deeds, Strafford County



WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS that G.G.E. Land Associates, LLC, having a business address of 169 Mast Road, Town of Dover, County of Strafford and State of New Hampshire, for consideration paid, does hereby grant to Sharon Worster, of 368 Old Bay Road, Town of New Durham, and State of New Hampshire, with WARRANTY COVENANTS, all of its right, title and interest in the following described premises:

IN NEW DURHAM

A certain parcel of land shown as "Map 34-22 area to be conveyed" consisting of 27,734 square feet and abutting the existing Lot 34-22 as shown on plan entitled, "Boundary Line Adjustment Plan Between Tax Map 19 Lot 5 and Tax Map 19 Lots 16, 17, 18, 19, 20, 21, 22, 23, and 24 (owners shown on abutters list) Lions Camp Pride Way and Cedergren Rd. Merrymeeting Lake, Strafford County, New Durham, NH for G.G.E. Land Associates, LLC, Scale: 1" = 50' dated May 2006", prepared by Norway Plains Associates, Inc. and recorded in Strafford County Registry of Deeds at Plan Book 88, Page 63.

Subject to rights to pass and repass on foot and by vehicle and for utilities held by Grantor and/or third parties over the forty-eight foot (48') wide right of way known as Cedergren Road West, as shown on said plan. Grantee covenants that Grantee shall not construct, maintain, operate, park or store any structures, vehicles, personal property, wells, septic systems, utilities, ditches, or any other improvements of any kind upon the forty-eight foot right of way known as said Cedergren Road West. Grantee shall have the right to install and maintain underground pipes, lines and/or utilities from Grantee's presently existing house to the property herein conveyed underneath the said Cedergren Road West for the purpose of a septic system or well on the said properties, but such pipes, lines and/or utilities shall not interfere with the said rights to pass and repass and for utilities, and Grantee shall be responsible for the cost of repairing said Cedergren Road West after installation or maintenance of such pipes, and Grantee shall be solely responsible for any damage to such pipes, lines and/or utilities arising from any use of the said Cedergren Road West by Grantor or any third parties. These covenants shall be binding upon grantee, and grantee's heirs, successors, assigns and transferors and shall be a covenant which shall run with the land.

Subject to any and all matters, restrictions, easements and/or right-of-ways as shown on the above referenced plan.

Meaning and intending to describe and convey a portion of the premises conveyed to the

Grantors herein by warranty deed of Edmund G. Merrill and Fukiko A. Merrill, dated 11/21/05 and recorded at the Strafford County Registry of Deeds at Book 3304, Page 0704.

Witness my hand and seal this 31 day of January, 2007

G.G.E. Land Associates, LLC

Laurie Oliver
Witness

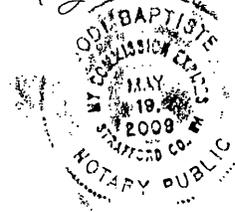
Lisa Kessler
LISA KESSLER member

STATE OF NEW HAMPSHIRE
COUNTY OF Strafford

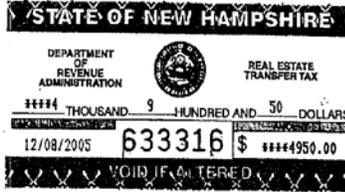
Personally appeared the above-named Lisa Kessler, as member of G.G.E. Land Associates, LLC known to me or satisfactorily proven to be the person(s) whose name(s) is/are subscribed to the foregoing instrument and acknowledged that they executed the same for the purposes therein contained.

Before me,

Jodi M. Boudreau
Justice of the Peace/Notary Public
My Commission Expires: May 19, 2009



MAIL TO: ⁵²
^{pd 18}
NINE EAST TITLE, INC.
71 SPITBROOK ROAD, SUITE 406
NASHUA, NH 03060



2005 DEC -8 PM 1:19
REGISTER OF DEEDS
STRAFFORD COUNTY

WARRANTY DEED

KNOWN ALL MEN BY THESE PRESENTS, THAT WE, Edmond G. Merrill and Fukiko A. Merrill, husband and wife joint tenants with rights of survivorship, of 307 Smith Hill Road, Franklin, Merrimack County, New Hampshire, 03235 For Consideration paid, grant to G.G.E. Land Associates, LLC, of 169 Mast Road, Dover, Strafford County, New Hampshire, 03820, with WARRANTY COVENANTS

Two (2) Tracts of land located in the Town of New Durham, more particularly bounded and described as follows:

TRACT 1 - The lot begins at its southwest corner at an iron pipe at the southeasterly side of the right-of-way for a new road as surveyed by O.P. Wallace, Sr., recorded May 22, 1972 as Plan #44, Pocket 6, Folder 3, Strafford County Registry of Deeds, where said new road is intersected by Peter Brook, so-called.

It runs northeasterly and northerly along the easterly side of said right-of-way two thousand three hundred eighty three (2,383) feet, more or less, to Goodwin Brook, so-called, the exact distances and bearings being set out in Plan #23A-13, Plan #21-68 and Plan #44, Pocket 6, Folder 3, Strafford County Records.

It then runs northerly and northwesterly along the Camp Road, so-called, North 20 degrees West (N 20° W), one hundred sixty five (165) feet, more or less; North 28 degrees West (N 28° W), one hundred (100) feet, more or less; North thirteen degrees West (N 13° W), one hundred (100) feet, more or less; North three and one-half degrees West (N 3 ½° W), one hundred (100) feet, more or less; North seven and six tenths degrees West (N 7.6° W), one hundred seventy (170) feet, more or less; South fifty one degrees West (S 51° W) one hundred thirty-seven (137) feet, more or less; North sixty five and one-half degrees West (N 65 ½° W) one hundred (100) feet, more or less; North 50 and one-half degrees West (N 50 ½° W) one hundred fifteen (115) feet, more or less; North fifty-nine degrees West (N 59° W), one hundred (100) feet, more or less; North forty-one degrees West (N 41° W), one hundred (100) feet, more or less; North twenty-four degrees West (N 24° W), one hundred (100) feet, more or less; North fifty-nine degrees West (N 59° W), forty-five (45) feet, more or less; North forty-five and three fourths degrees West (N 45 ¾° W), four hundred (400) feet, more or less; North twenty-eight degrees West (N 28° W), two hundred (200) feet, more or less; and North fifty-nine degrees West (N 59° W), four hundred ten (410) feet, more or less to a stake at the end of the road, which stake is eighty-two (82) feet northerly of an iron pipe in cement at the corner of the lake lot, so-called, at a bearing of North seven degrees East (N 7° E).

It then runs northerly North seven degrees East (N 7° E), one thousand five hundred fifty (1,550) feet, more or less along land now or formerly of Peter De Jager, formerly of B. Clock, to a red-painted stake, and northeasterly North fifty-five degrees East (N 55° E), one thousand six hundred fifty (1,650) feet, more or less, across the access road and along said De Jager land to an iron pipe, both lines having been marked in 1974 by Lakes Region Survey Service, Wolfeboro, New Hampshire.

It then runs southerly South seven degrees East (S 7° E), one hundred (100) feet, more or less, to a wire fence, then South nine and one-half degrees East (S 9 ½° E) six hundred eighty (680) feet, more or less, along said wire fence along land now or formerly of M.D.

031849

BK 3304 PG 0704

Lemmon, to an iron pipe, the line having been surveyed and marked by Singer & Gile, 1970; then South fourteen degrees East (S 14° E), four hundred thirty-nine (439) feet, more or less, and South one degree East (S 1° E), ninety (90) feet, more or less, along said fence and Lemmon land to another iron pipe; then South seven degrees East (S 7° E) twenty-five (25) fence turns along said fence and Lemmon land one thousand three hundred eighty-five (1,385) feet, more or less to another iron pipe in the swamp area marking the westerly elbow corner of the original lot 95 of the "Second Subdivision of the Town of New Durham". This line was marked and painted red by a prior unknown survey.

It then runs easterly to another iron pipe, then southwesterly to another iron pipe along the edge of the wet land and pond flowage area as described in Book 239, Page 569, Strafford County Records.

It then runs southeasterly South fifty-one degrees East (S 51° E), one thousand eight hundred twenty (1,820) feet, more or less along the original division line of lot 95 and land now or formerly of R. Lord to an iron pipe located approximately two hundred twenty (220) feet southwesterly of a stone wall at a bearing of South fifty-seven degrees West (S 57° W).

It then runs southwesterly South fifty-seven degrees West (S 57° W), one thousand six hundred eighty (1,680) feet, more or less, to an iron pipe set in rocks, then South thirty degrees West (S 30° W), one thousand seven hundred forty (1,740) feet, more or less, along a blazed and red painted line on other land of R. Lord to another iron pipe painted red and set in rocks, then South sixty degrees West (S 60° W) three hundred twenty (320) feet, more or less to Peter Brook.

It then runs along Peter Brook in a generally westerly direction one thousand five hundred (1,500) feet, more or less, to the point of beginning.

The above description is taken from a boundary survey by O.P. Wallace, Sr. dated September, 1977, approved for recording purposes only by the New Durham Planning Board on October 6, 1980 and recorded October 16, 1980 as Plan # 21-68, Strafford County Records, and is subject to any inaccuracies therein.

Excepting and reserving from Tract 1 any portion of the above described land that may comprise any portion of Tax Map 19, Lot 6 and Tax Map 20, Lot 2.

Tract 1 is approximately shown on the tax maps of New Durham as lots #19-5 and #20-1.

TRACT 2 - The parcel begins on the westerly side of the "Camp Road", so-called, at the northeast boundary of land now or formerly of Bardwell, conveyed to said Bardwell by Deed of O.W. Cedergren recorded at Book 808, Page 395, Strafford County Records. It runs westerly along said Bardwell land to the easterly shore of Merrymeeting Lake; thence northerly along the lake shore to the outflow point of the Goodwin Brook, so-called, then further northerly along the lake shore seventy (70) feet, more or less, to other land formerly owned by O.W. Cedergren, being the southernmost of the lots of his north shore development; thence easterly one hundred five (105) feet, more or less, along said lot to the Camp Road; thence southerly along said Camp Road, across the Goodwin Brook, one hundred twenty-five (125) feet, more or less, to the point of beginning.

Tract 2 is approximately shown on the tax maps of New Durham as lot # 034-017, but is not exact.

The Grantor also transfers the right to pass and repass by foot, team, automobile or otherwise from the highway leading from New Durham to Wolfeboro over the old roadway and wood road, the rights to the above right-of-way having been transferred to Oscar Cedergren by quitclaim deed of Bessie E. Clock dated April 30, 1946 and recorded May 24, 1946 at Book 536, Page 359, Strafford County Records.

BK 3304 PG 0705

The property is subject to:

1. The rights-of-way of Public Service Co. of New Hampshire as recorded January 28, 1954 at Book 626, Page 170, Strafford County Records and of the Union Telephone Co. as recorded June 29, 1978 at Book 1017, Page 322, Strafford County Records, to the extent they apply to the subject property.
2. Right-of-Way granted in Book 1330, Page 508 and corrected in Book 1608, Page 123.
3. Current use Taxation as recorded at Book 1461, Page 545.
4. Rights-of-Way in deed recorded at Book 1090, Page 710.

Meaning and intending to convey all the land conveyed to us by deed of Oscar W. Cedergren dated December 2, 1982 and recorded with the Strafford County Registry of Deeds at Book 1090, Page 710.

The above Tracts 1 and 2 are undeveloped and are not homestead property for me or my spouse.

IN WITNESS WHEREOF, I have hereunto set my hand this 21st day of November, 2005.

Edmond G. Merrill
Edmond G. Merrill

Fukiko A. Merrill
Fukiko A. Merrill

STATE OF NEW HAMPSHIRE

COUNTY OF Merrimack

On this 21st day of November, 2005, personally appeared Edmond G. Merrill and Fukiko A. Merrill known to me or satisfactory proven to be the persons whose names are subscribed to the foregoing instrument and acknowledged that they executed the same for the purposes therein contained as their free act and deed before me.

Marie N. Sapienza
Notary Public
Commission Expires:

MARIE N. SAPIENZA
Notary Public - New Hampshire
My Commission Expires July 18, 2008



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