

Lynda H. Jablonski

v.

Town of Errol

Docket No.: 24361-08PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2008 total assessment of \$164,330 (“site value” \$95,000; dwelling and docks value \$69,330) on Map R002/Lot 0019-0000, a camp dwelling situated on federal land in the Lake Umbagog National Wildlife Refuge (the “Property”). For the reasons stated below, the appeal for abatement is granted.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the assessment was disproportionately high or unlawful, resulting in the Taxpayer paying a disproportionate share of taxes. See RSA 76:16-a; Tax 201.27(f); Tax 203.09(a); Appeal of City of Nashua, 138 N.H. 261, 265 (1994). The Taxpayer carried this burden.

The Taxpayer argued the assessment was excessive because:

- (1) the Property is located on land owned by the federal government (the Lake Umbagog National Wildlife Refuge) and not by her;
- (2) this federal ownership and the restrictions on her use of the Property is reflected in the “Camp Permit” (Taxpayer Exhibit No. 3) which defines the rights at issue and is not a real estate

lease, either “in perpetuity” or one that can be renewed indefinitely, and should not be interpreted to mean the federal government has consented to have the permittee (the Taxpayer) taxed on the land;

(3) the Camp Permit states it has a one year term, subject to annual renewals, and can only be transferred to others during the first thirty-five (35) years it is in effect (or to an “immediate family” member within the first fifty (50) years);

(4) the Town improperly assessed a “site” value of \$95,000, but this value is associated with the land, not the dwelling and docks the Town assessed separately (see Taxpayer Exhibit No. 4); and

(5) the assessment on the Property should be abated to the value of the dwelling and the docks only (\$69,330).

The Town argued the assessment was proper because:

(1) the Taxpayer does not dispute the market value of the Property, if she sold it, would be at least equal to the total assessment placed on it by the Town (\$164,330);

(2) as shown in Municipality Exhibits B, C and D, properties on leased land (in the Town and other municipalities) show site value assessments and the Town used a consistent methodology for the Property;

(3) the Town believes the sale of a property of this type would be treated as “qualified” by the department of revenue administration for equalization purposes and that a buyer would pay a real estate transfer tax based upon the full amount, including the “site” value associated with the rights resulting from the permit rights the Taxpayer enjoys; and

(4) no abatement is warranted.

Board's Rulings

Based on the evidence, the board finds the proper assessment to be \$69,330, the assessment for the dwelling and docks, but not the additional "site" value (\$95,000) added by the Town. The appeal is therefore granted for the reasons discussed below.

The sole issue raised in this appeal is whether it is proper under New Hampshire law to tax the property rights inherent in land owned by the federal government when the government has granted a renewable annual permit for its use. The board finds there is binding authority supporting the Taxpayer's arguments that such land is not taxable, either directly or indirectly as a "site" value assessment.

The temporary (non-permanent) right to occupy land is typically transferred through a short or long-term lease, but can also be accomplished in other ways, such as through a license or a permit. Here, the Taxpayer entered into an agreement with the federal government (the Camp Permit) which carefully defined and circumscribed the limited and somewhat unique rights acquired, as well as their temporary nature. (See Taxpayer Exhibit No. 3.) The Camp Permit has a one-year term but is renewed annually unless either party gives notice of non-renewal at least thirty (30) days prior to the end of each annual term. (See Section 1.) The "Permittee" (the Taxpayer) must pay "rent" which is subject to increase or decrease on an annual basis by the federal government; the occupancy is restricted to "noncommercial recreational use"; and the Permittee cannot use the site as a "domicile or principal place of residence." (See Sections 2 and 3.) The construction of any improvements, including buildings or roads or paths, must first be approved by the federal government; no permanent docks may be constructed; and no alteration of land can take place within 250 feet of the high water mark of any water body without specific

written approval. (See Section 4.) These provisions provide protections for the area as part of a national wildlife refuge.

Of particular note for purposes of this appeal are Sections 7 and 10 of the Camp Permit. Section 7 obligates the permittee to “pay all taxes levied on the Premises [an undefined term in the agreement]” and specifically mentions (with the word “including”) taxes on “the building, improvements, water supply and septic system thereon.” Section 10 states the “Permittee understands and acknowledges his only property interest in the Premises is that of a permit holder and that nothing in this agreement shall be interpreted to imply that the Permittee has any greater property interest in the Premises.” (Emphasis added.) This section goes on to mention the specific limitations on assignment and transfer mentioned above for the span of thirty-five (35) years (to third parties) and fifty (50) years (to “immediate family” members) from the time of issuance of the Camp Permit (May 1, 1997).

In general, land and other property rights owned by the federal government are not subject to taxation by states or municipalities, unless and until the federal government specifically consents to be taxed. The source of this prohibition is the supremacy clause (Article VI, clause 2) in the United States Constitution, as applied in cases dating back to McCulloch v. Maryland, 17 U.S. 316 (1819), and also other contexts in the U.S. Supreme Court cases cited in Taxpayer Exhibit No. 1. While interpretation of the Camp Permit is not free of all doubt, the board finds the federal government did not consent to the imposition of a tax on the land it owns when it gave the Taxpayer a limited permit to use it. Section 7 of the Camp Permit, read in the context of Section 10 (quoted above) and the entire agreement, is limited in scope. Fairly construed, the Camp Permit recognizes the taxability of the building and other improvements

that the Taxpayer may own or construct on the land, but does not specifically mention a tax on the land, which remains in federal ownership and control.

Thus, the Town is prohibited from taxing this land and, apparently in recognition that the Taxpayer has no ownership of the land, did not attempt to do so directly on the assessment-record card (which shows a zero land value). The board finds the “site” value assessment is an indirect attempt to impose a real estate tax on the value of the land or the Taxpayer’s contractual right to use the land under the Camp Permit, a right which may be valuable and transmissible, but is not real estate.

New Hampshire case law has addressed the question of taxation of land owned by the government. In Indian Head National Bank v. City of Portsmouth, 117 N.H. 954, 957 (1977), a private bank had leased land on a federal military installation (Pease Air Force Base) to erect and operate a branch of the bank, where the federal statute allowing for such a lease specifically provided “The interest of a lessee of property leased . . . may be taxed by State or local governments.” See also Appeal of Reid, 143 N.H. 246, 249-50 (1998) (none of the leases on land owned by the municipality “contain(ed) a provision indicating that the lessees agreed to pay property taxes on the underlying value of the leasehold” and it was therefore error to conclude the “leasehold interests were taxable”).

For property “owned” by the State of New Hampshire or its subdivisions, the legislature has enacted a specific statute, RSA 72:23, I, which provides an exemption from taxation when it is held by the government and specific guidance when a lease of such land is entered with a private party and is subject to taxation. This statute requires such leases to state specifically the “lessee’s obligations regarding the payment of both current and potential real and personal property taxes.” In other words, the Legislature has recognized state and municipal land is

exempt from taxation unless it is leased to a private party, at which point any lease entered into is required to recognize the liability for imposition of taxes. Cf. Town of Ossipee v. Whittier Lifts Trust, 149 N.H. 679, 685 (2003) (state ordered to amend its agreement with licensee to add the language contained in RSA 72:23). This statute is not applicable to land owned by the federal government, of course, but illustrates the parallel principle of a tax exemption that exists unless specific consent is granted to allow taxation.

Even if the specific consent issue is set aside, a second meritorious argument for the Taxpayer is that the Camp Permit is not a “perpetual” lease or a lease that is “renewable indefinitely.” Appeal of Reid, 143 N.H. at 249, citing Indian Head, 117 N.H. at 955 and Hampton Beach Casino v. Town of Hampton, 140 N.H. 785, 790 (1996). The board has also had occasion to decide the taxability of private rights to occupy and use federal land, such as the permits to use forest land obtained by ski areas. In Meadow Green-Wildcat Corp. v. Coos County Commissioners, BTLA Docket Nos. 15046-94PT and 15047-94RA (January 9, 1996), the board considered whether a 20-year term special use permit to use forestry service land, which created rights similar to a 20-year leasehold, was taxable as a leasehold interest and concluded that it was not, citing the 25-year lease in Indian Head and discussing the distinction between “real estate” subject to taxation under the New Hampshire statutes, see RSA 72:6, and “personalty” which is not subject to this tax. In Indian Head, neither the land, owned by the federal government but leased to the bank, nor the bank’s “leasehold interest” was taxable, but the bank building constructed on the federal land was taxable. 117 N.H. at 954-55.

The board finds the legal distinctions drawn in these cases prohibit the Town from taxing the value of the land on the Property, either directly or through a “site” value. While there is no dispute the rights conveyed under the Camp Permit make the Property more valuable, and a

“residual” component of value exists beyond the value of the dwelling and docks that is transmissible to potential buyers (albeit for a declining period of time), the rights associated with occupancy and use of the federal land involved in this appeal are exempt from taxation under long established constitutional and statutory principles.

At the hearing, the Town’s assessor did not challenge these principles or present any conflicting legal authority. While he did question the “fairness” of this outcome, similar questions could be raised regarding other classes of exempt property. See, e.g., the many other specific exemptions provided in RSA 72:23 et seq. It is also not persuasive to refer to sales of similar properties that may be treated as “qualified” sales by the DRA for calculation of equalization ratios or that buyers customarily report the full purchase price in such transactions when calculating the real estate transfer tax collectible under RSA ch. 78-B. Those issues are not before the board in this appeal.¹

If the taxes have been paid, the amount paid on the value in excess of \$69,330 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Until the Town undergoes a general reassessment or in good faith reappraises the property pursuant to RSA 75:8, the Town shall use the ordered assessment for subsequent years. RSA 76:17-c, I and II.

Any party seeking a rehearing, reconsideration or clarification of this decision must file a motion (collectively “rehearing motion”) within thirty (30) days of the clerk’s date below, not the date this decision is received. RSA 541:3; Tax 201.37(a). 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

¹ Since it is the value of “real estate” (not personalty) that is to be measured and taxed, however, a plausible argument can be made that the value associated with the Camp Permit should be excluded in those contexts as well.

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(g). 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 with a copy provided to the board in accordance with Supreme Court Rule 10(7).

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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: John J. Jablonski, 98 Meadowcrest Drive, Bedford, NH 03110, representative for the Taxpayer; Chairman, Board of Selectmen, Town of Errol, PO Box 100, Errol, NH 03579; and Commerford Nieder Perkins, LLC, 556 Pembroke Street - Suite #1, Pembroke, NH 03275, Contracted Assessing Firm.

Date: August 17, 2010

Anne M. Stelmach, Clerk