

**Marijane H. Kennedy**

**v.**

**City of Nashua**

**Docket No.: 25751-11EX**

**DECISION**

The “Taxpayer” appeals, pursuant to RSA 72:34-a, the “City’s” denial of the Taxpayer’s application for an RSA 72:39-a elderly exemption for tax year 2011. The appeal is granted for the reasons stated below.

The Taxpayer has the burden of showing, by a preponderance of the evidence, she 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 board finds the Taxpayer met this burden.

The Taxpayer argued she was entitled to the elderly exemption because:

- (1) RSA 72:39-a defines “net assets” and specifically excludes good faith encumbrances from this definition;
- (2) the “equity loan” stated on the application to the City is a recorded “Open-End Mortgage” (see Municipality Exhibit A) and this indebtedness is a good faith encumbrance that has encumbered her residence since 2004 in the same manner as any other residential mortgage;

(3) another municipality (the Town of Hudson) does deduct residential mortgages and other good faith encumbrances in the calculation of net assets for purposes of the elderly exemption statute;

and

(4) the appeal should be granted.

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

(1) the City has adopted a \$125,000 net asset maximum for the elderly exemption and the Taxpayer's application showed she had \$145,724.19, which exceeds this limitation;

(2) the City investigated further after the denial and computed the Taxpayer's total assets were actually \$158,969.17 as of the April 1, 2011 assessment date (Municipality Exhibit B);

(3) the City has considered the "\$42,000 equity loan" shown on the Taxpayer's application (reflected by the mortgage in Municipality Exhibit A), but believes it does not reduce the Taxpayer's net assets because it is secured by the Taxpayer's residence which is an excluded asset under the elderly exemption statute; and

(4) the appeal should be denied.

### **Board's Rulings**

Based on the evidence presented, the board finds the Taxpayer sustained her burden of proving she was entitled to an RSA 72:39-a elderly exemption in tax year 2011. The appeal is therefore granted for the reasons explained below.

The key facts are not in material dispute and the Taxpayer's eligibility for an elderly exemption therefore hinges on the "net assets" provisions in the exemption statute.

RSA 72:39-a, I(c) requires the Taxpayer to own:

. . . 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. . . . "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 woodshed, 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.

(Emphasis added.)

There is no dispute the Taxpayer had net assets below the \$125,000 maximum prescribed by the City if the "\$42,000 equity loan" mentioned in her application is deducted as a good faith encumbrance (whether the gross total of her assets excluding the residence is \$145,724.19 or the higher amount of \$158,969.17 recomputed by the City). The City contends the \$42,000 equity loan should not be deducted in calculating the Taxpayer's net assets, arguing the legislature must have intended to exclude both the residence itself and any good faith encumbrances on the residence for determining qualification for an RSA 72:39-a elderly exemption. The board disagrees, based upon the plain meaning of the statute and the logic behind it.

The statute, in separate sentences, clarifies: (i) the "value" of a taxpayer's actual residence must be excluded from net assets; and (ii) aside from this exclusion, net assets means "the value of all assets, tangible and intangible, minus the value of any good faith encumbrances." Nowhere does the statute distinguish good faith encumbrances on the residence from other good faith encumbrances; instead, the statute requires the deduction of the value of any good faith encumbrances on all assets, whether the encumbrances secure the residence (through mortgages) or some other asset (through auto loans, for example).

This plain meaning is supported by the dictionary definition of the adjective “net,” which signifies something “free from all charges or deductions,” distinguishable from a “gross” amount. See, e.g., Webster’s Ninth New Collegiate Dictionary (1991). Net worth, for example, refers to all assets minus (free from) all liabilities (or encumbrances on those assets) and the equity value of a residence is its market value less any mortgage or other encumbrance.

The legislature could have prescribed in RSA 72:39-a, I(c) that both the residence and any good faith encumbrance on the residence should be excluded in determining eligibility, but no such statement appears in the statute and the board cannot add such words to change the meaning of the statute when there is no basis for doing so. There is also no basis for interpreting the phrase “value of the person’s actual residence” in the statute to mean, in effect, ‘market value less any good faith encumbrances on the residence.’ If that is what the legislature meant, surely different words would have been employed, such as *equity* value of the residence.

In matters of statutory interpretation, the board must ascribe the plain and ordinary meanings to the words used and not consider what the legislature might have said or add language the legislature did not see fit to include. Appeal of Ned Wilson, 161 N.H. 659, 662 (2011), citing Appeal of Kat Paw Acres Trust, 156 N.H. 536, 537 (2007).

In her appeal, the Taxpayer properly relies on another elderly exemption appeal, Penelli v. Town of Pelham, 148 N.H. 365 (2002), where the supreme court confirmed the “evident purpose of the elderly tax exemption ‘is to protect elderly homeowners from loss of their homes by reason of taxation beyond their means.’ (Citation omitted.)” Id. at 368. In Pelham, the court considered the net assets provision in this statute in detail and concluded “RSA72:39-a, I(c) . . . is clear on its face” and “the plain language of the statute speaks for itself.” Id. at 368-69. Pelham therefore supports the Taxpayer’s arguments in this appeal.

Applying the statute to allow deduction of any good faith encumbrance to determine net assets is also more logical and reasonable than the City's argument that a mortgage or other good faith encumbrance on the residence should be ignored. For example, a taxpayer who has reported assets of \$120,000 with no mortgage on her residence is certainly better off financially (in terms of having resources to pay property taxes) than a taxpayer who has reported assets of \$145,000 and a \$40,000 mortgage encumbrance on her residence. Yet, under the City's approach, the first taxpayer would qualify for the elderly exemption and the second would not, even though the net assets of the first taxpayer are higher by \$15,000, even if the residences have the same value.<sup>1</sup> The board finds such an approach to be illogical and less reasonable, given the recognized purpose of the elderly exemption statute.

In light of the issues presented, the City may wish to review the form used to determine eligibility for the elderly exemption and improve its transparency to reflect the provisions of the statute. The City's form, titled "Asset Information," asks each applicant to list "banking resources" and then allows for the summation of "Total Assets." There is no place on the form for a listing of liabilities that may be good faith encumbrances so as to allow a net asset computation to be made directly. (In this appeal, the Taxpayer added the information regarding the \$42,000 equity loan as a footnoted "Comment" to the form.) The City should consider revising the form to make it better conform to the net asset computation required in the elderly exemption statute.

In summary, the board finds the Taxpayer's elderly exemption application for tax year 2011 should not have been denied by the City. The appeal is therefore granted.

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<sup>1</sup> The board notes the elderly exemption, as presently enacted, applies irrespective of whether the value of a taxpayer's actual residence is large or small. For example, taxpayers whose residences are multi-million dollar waterfront homes or modest studio condominiums equally qualify for the elderly exemption, provided their net assets (excluding the residence) are below the \$125,000 prescribed maximum in the City.

If the taxes have been paid, the amount paid to the City without application of the elderly exemption for tax year 2011 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

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

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Douglas S. Ricard, Member

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Albert F. Shamash, Esq., Member

**DISSENTING OPINION**

I respectfully dissent from the majority's opinion that the RSA 72:39-a elderly exemption be granted and would rule the Taxpayer did not qualify for the 2011 tax year for the following reasons.

Unless clearly ambiguous or contradictory "[t]he starting point in any statutory interpretation case is the language of the statute itself" and the plain and ordinary meaning of the words must be applied. Pennelli v. Town of Pelham, 148 N.H. 365, 366 (2002). "We will not consider what the legislature might have said or add words that the legislature did not include." Appeal of Town of Nottingham, 153 N.H. 539, 547 (2006).

My interpretation of RSA 72:39-a, I(c) differs from the majority. The majority cites Pennelli as being on point with the issue in this appeal which is whether the definition of "net assets" includes a "good faith encumbrance" on the person's actual residence. I disagree. The issue in Pennelli was whether or not an attached dwelling unit occupied by the plaintiff's daughter-in-law and grandchildren was part of the plaintiff's "residence." The court ruled it was and the plaintiff was thus entitled to the elderly exemption.

RSA 72:39-a, I(c) sets forth the requirements of net assets which excludes "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." Pennelli states "the term 'residence,' as used in RSA 72:39-a, I(c), 'means the housing unit and related structures... which is the person's principal home, and which the person in good faith regards as home.'" The court, in Pennelli, did not make any rulings as to whether or not a "good faith encumbrance" could be construed as an encumbrance to the person's actual residence.

The first sentence of section RSA 72:39-a, I(c) states the person must own net assets not in excess of the amount determined by the city or town for purposes of RSA 72:39-b. This portion of the sentence is then followed by a comma with the remaining portion of the sentence “excluding” the value of the person’s actual residence....” Had the legislature intended for a mortgage on a residence to be considered in the calculation of “net assets,” it would not have excluded the “value of the person’s actual residence...” in the first sentence. The legislature could have used the term “net value of the person’s actual residence” in the first sentence or could have defined “net assets” to include a “good faith encumbrance” on the actual residence. It did neither and this board member finds the statute is clear in that the legislature did not intend to include a mortgage on the actual residence in the net asset calculation.

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Michele E. LeBrun, Chair

**Certification**

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Marijane H. Kennedy, 27 Ledgewood Hills Drive, Nashua, NH 03062, Taxpayer; and Stephen M. Bennett, Esq., City of Nashua, PO Box 2019, Nashua, NH 03061.

Date: January 25, 2012

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Anne M. Stelmach, Clerk