

**Coos County Commissioners on behalf of the
Unincorporated Place of Dixville, NH**

v.

**Department of Revenue Administration
Docket No.: 26676-13ER**

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**Coos County Commissioners on behalf of the
Unincorporated Place of Millsfield, NH**

v.

**Department of Revenue Administration
Docket No.: 26677-13ER**

DECISION

On June 28, 2013, the board held a consolidated hearing in the above equalization appeals filed by the Coos County Commissioners (“CCC”) on May 23, 2013 against the department of revenue administration (“DRA”). CCC represents the interests of two ‘unincorporated places’ within Coos County: Dixville and Millsfield. Pursuant to RSA 71-B:5, II(a), the board is required to hear and decide these appeals within sixty (60) days.

The board processed each appeal and held a telephone conference with the parties on June 6, 2013 to establish discovery timelines and a hearing date. (See Tax 211.03.) As stated in the June 7, 2013 Structuring Order and Hearing Notice, the parties at this conference agreed to meet prior to the hearing on the merits, to exchange various documents and to be ready for a

hearing on the merits on June 28, 2013. CCC's attorney (Jonathan S. Frizzell) stated he wished to obtain a copy of the "DRA Windpark appraisal (prepared pursuant to RSA ch. 83-F)" and "would either obtain a 'release' from the Granite Reliable Windpark ('Windpark') or file an appropriate motion" with the board to compel its production by the DRA. (Id. at p. 2.)

Attorneys Philip R. Waystack and Attorney Frizzell of Waystack Frizzell represented CCC and Attorney Kathryn E. Skouteris represented the DRA in these appeals. In light of the similar facts and issues, and with the consent of these attorneys, the board consolidated the appeals for hearing and decision. The following individuals testified at the June 28, 2013 hearing on the merits: Frederick King, Coos County Treasurer; Tom Brady, Coos County Commissioner; Jennifer Fish, Coos County Administrator; and Stephan W. Hamilton and Scott Dickman of the DRA. In addition, the parties presented various documents as evidence. (CCC Exhibit Nos. 1-19 and DRA Exhibit A.)

At the conclusion of the hearing, the DRA submitted "Requests for Findings of Fact and Rulings of Law" which the board has responded to in accordance with Tax 201.36: see Addendum A attached hereto.

Board's Rulings

In these appeals, CCC asks the board to "[o]rder DRA to reconsider and revise downward the 2012 Total Equalized Valuation" in each unincorporated place: these valuations were "\$54,453,216.00" for Dixville and "\$180,342,176.00" for Millsfield. (See p. 4, paragraph A and p. 2, paragraph 7 of each appeal document; and the "4/29/2013" DRA letter attached thereto.) CCC argues these amounts are too high because they value the Windpark at more than the \$113 million estimate mentioned by a DRA employee at a meeting with CCC officials held on December 18, 2007 prior to the time the Windpark was approved for development.

CCC alleges (in paragraph 12 of each appeal document) that it “asked” the “DRA to use the Commissioners’ own appraised value for the Windpark of \$113,000,000” in a March 20, 2013 letter (attached to each appeal document; emphasis added). The DRA declined to do so (for the reasons explained in its April 2, 2013 letter to CCC’s attorney, also attached to the appeal document). This denial culminated in the filing of these appeals.

CCC asserts it ‘relied upon’ the \$113 million value when it entered into the “2008 PILOT Agreement” (CCC Exhibit No. 4, a March 12, 2008 Agreement for Payments in Lieu of Taxes) with Granite Reliable Power, LLC, the owner of the Windpark. The 2008 PILOT Agreement references RSA 72:74 and specifies what this company is obligated to pay in lieu of “ad valorem real estate taxes or assessments of any kind” on the Windpark for a ten year term. (See Article II of the 2008 PILOT Agreement; and DRA Finding No. 10.) CCC contends (on page 4 of each appeal document) that allowing the DRA to use a higher appraised value for the Windpark in 2012 for purposes of equalization “is unreasonable and disproportionate” and should be remedied. (See each appeal document, p. 4, paragraph 22.d.)

The board does not agree with CCC’s interpretation of the facts presented or its conclusion that it is entitled to a remedy in these appeals. In Section A, the board will confirm its prior oral rulings on several procedural issues raised by CCC. Section B states the board’s reasons for finding CCC did not meet its burden of proof, resulting in the denial of each appeal.

A. Procedural Rulings (On CCC’s Motion to Compel and Motion for Continuance)

Just one week before the June 28, 2013 hearing, CCC filed two motions: a “Motion to Compel” the production of the DRA Windpark appraisal; and a “Motion to Continue” the hearing date. After review of these June 21 pleadings and the “Objections” filed by the DRA on June 26, the board denied both motions and orally notified the parties (on June 27) the June 28 hearing on the merits would proceed as scheduled.

An issue central to each motion is whether CCC has the right to compel the DRA to produce the Windpark appraisal. That appraisal was prepared by the DRA in 2012 based on information submitted by the Windpark as a taxpayer subject to the tax prescribed in RSA ch. 83-F (Utility Property Tax).

CCC acknowledged to the board that it was unable to obtain the Windpark's consent for disclosure of the DRA appraisal. As noted in DRA's Objection, the confidentiality of the Windpark appraisal is protected by RSA 21-J:14 and no exception applies that would allow the DRA to disclose it without the consent of the Windpark.¹ Thus, the board denied the Motion to Compel.

For related reasons, the board denied CCC's Motion to Continue the June 28 hearing. The board found no good cause existed for granting the continuance. Cf. Tax 201.26(a) (stating the "accident, mistake or misfortune" requirement for granting a continuance).

B. Rulings on the Merits of These Appeals

The board has heard prior equalization appeals under RSA 71-B:5, II(a). See, e.g., Appeals of Towns of Bow, Newington and Seabrook, 133 N.H. 194 (1990) (upholding the DRA's equalized assessed valuation determinations and allocations for public utility property

¹ The record further reflects CCC made an RSA ch. 91-A "Right to Know Law" request to obtain a copy of the appraisal. When the DRA denied this request (at a time prior to the filing of these appeals), CCC took no steps to challenge the denial by using the process prescribed in RSA 91-A:7. (Cf. paragraph 22 of each appeal document.)

and affirming the board's rulings on those issues).² In such appeals, the plaintiff/appellant (CCC here) has the burden of proving "the DRA erred in calculating the equalized valuation." (Cf. Tax 211.04; and DRA Ruling No. 1.) The parties do not dispute this burden rests with CCC. Upon review of all of the testimony and documents presented, the board finds CCC did not meet its burden of proof.

The sole DRA determination challenged by CCC is the valuation of the Windpark. The Windpark owns property in the unincorporated places of Dixville and Millsfield and in the Town of Dummer, all within Coos County. (See DRA Finding No. 8.) Dummer has not appealed the DRA's equalized valuation (or otherwise questioned the Windpark value).

As noted above, CCC, on behalf of Dixville and Millsfield, alleges it "relied upon" a lower estimate of the value of the Windpark (\$113 million) mentioned at a non-public "educational session" held in Lancaster, New Hampshire on December 18, 2007 and the DRA should be bound by this value in the 2012 equalized valuations. According to CCC, a DRA employee (Scott Dickman) responsible for utility valuations mentioned this value at the educational session with Coos County officials. Three commissioners (Burnham Judd, Paul Grenier and Thomas Brady), the County Administrator (Suzanne Collins) and an elected representative (Fred King) attended this meeting, as did Guy Petell, another DRA employee.

² In those appeals, the supreme court quoted the DRA's statutory responsibilities ("duty") under RSA 21-J:3, XIII to:

Equalize annually the valuation of the property in the several towns, cities and unincorporated places in the state by adding to or deducting from the aggregate valuation of the property as assessed in towns, cities and unincorporated places such sums as will bring such valuations to the true and market value of the property
...

Id. at 195-96. The supreme court explained "[t]he equalized assessed valuation found by the DRA for each municipality is used to determine the proportion of county taxes that each municipality must pay under RSA 29:11." Id. at 196. The supreme court found the municipalities had not met their burden of proving the DRA's determinations were "clearly unreasonable or unlawful," noting that the board's findings: "shall be deemed to be prima facie lawful and reasonable" and the board's decision "shall not be set aside or vacated except for errors of law, unless the [supreme] court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable. [Quoting from RSA 541:13.]" Id. at 199.

Ms. Collins prepared minutes of that December 18, 2007 meeting, presented as Taxpayer Exhibit No. 1.

At the hearing, the board heard testimony from Mr. King, who is now the Coos County Treasurer, Commissioner Brady and Mr. Dickman regarding what they recalled about the meeting. (Ms. Collins, the former CCC administrator who drafted the minutes, was not called as a witness.)

Upon review of the meeting minutes and this testimony, the board finds what occurred and what was said at that 2007 meeting does not support CCC's theory that DRA is obligated to reduce the equalized values computed for Dixville and Millsfield in 2012. Consequently, CCC has not met its burden of proving the 2012 equalized valuations are "unreasonable and disproportionate" and must be set aside for the following reasons.

First, a fair reading of the minutes at face value indicates no "representation" by the DRA on which CCC could reasonably rely that the value of the Windpark would be fixed at \$113 million for all intents and purposes and for any period of time. At the time of this meeting (December, 2007), the Windpark had not yet been approved for construction, let alone built and operated. It defies logic to conclude that an estimate of value stated by one DRA employee in response to an invitation to attend an educational session should bind this state agency in discharging its statutory obligations to equalize the Windpark property in 2012 in accordance with RSA 21-J:3, XIII. (See DRA Ruling No. 1.) In addition, of course, the DRA had an obligation to assess the Windpark at its market value under RSA ch. 83-F for purposes of the utility property tax.

Second, the minutes indicate Ms. Collins did an analysis of her own ("prepared a worksheet") which estimated a higher value ("\$150 million") for the Windpark. CCC could have used her number when it negotiated the PILOT Agreement with the Windpark.

Alternatively, or in addition, as noted by the DRA at the hearing, CCC could have obtained an appraisal or done further work to ascertain an appropriate value for the Windpark. At the time of this meeting and thereafter, CCC had counsel of its own (Attorney Frizzell) who was able to advise CCC of the legal ramifications that might flow from entering into the 2008 PILOT Agreement.

As the DRA further noted, statutory responsibility for appraising the Windpark for property tax purposes rests with CCC (on behalf of Dixville and Millsfield), not the DRA. (See DRA Ruling Nos. 7-11.) The fact that CCC decided to use the number mentioned by Mr. Dickman (apparently using some rough formula for estimating value based on anticipated energy output) without doing additional investigation and without CCC obtaining an appraisal of its own is not something for which the DRA should have any legal responsibility. In this regard, the board notes one paragraph from Ms. Collins' minutes confirms the limited input given by the DRA at the December 18, 2007 meeting and its guidance that care should be exercised: "Guy Petell cautioned the Commissioners that the equalized value of each unincorporated place where the wind park [sic] is located will go up a lot and this will have the effect of raising the county tax in those places." (CCC Exhibit No. 1, unnumbered p. 3.)

Third, even if the board were to assume the educational session with the DRA influenced CCC to enter into a 10-year PILOT Agreement,³ CCC has cited no legal authority to support, let alone establish, it is entitled to a remedy in these appeals. CCC has not even alleged the elements necessary to state a claim of promissory estoppel. Nothing in the minutes of the December, 2007 meeting or anything that occurred thereafter indicates an express or implied promise by the DRA that the Windpark would be valued at any fixed and unchanging amount (such as \$113 million) for any purpose or any length of time.

³ The board notes the 10-year term was five years longer than required by the statute. (See RSA 72:74, VI and VII.)

Fourth, the board finds no basis for concluding the DRA erred in estimating a different market value for the Windpark in tax year 2012 pursuant to the DRA's RSA ch. 83-F responsibilities and then using that value to calculate the "2012 Total Equalized Valuation" for Dixville and Millsfield. If the DRA had not done so, it would have been derelict in its statutory duties under RSA 21-J:3, XIII. As the supreme court has noted:

A taxpayer is disproportionately taxed if it is assessed at a greater proportion of its property's true value than are other taxpayers. Bemis etc. Bag Co. v. Claremont, 98 N.H. 446, 450-51, 102 A.2d 512, 516 (1954). Here, all municipalities are required by statute to be assessed at "true and market value." RSA 21-J:3, XIII. . . .

The Board correctly stated:

"The DRA may equalize properties in any way such that the result enables public taxes to be apportioned among the towns, cities, and municipalities in an equal and just manner. . . . To comply with RSA 21-J:3, XIII, the DRA's total equalized valuation for the [Towns] must merely represent, pursuant to accepted appraisal standards, 'the true and market value' of the property within the Town."

Appeals of Towns of Bow, Newington and Seabrook, 133 N.H. at 199 and 201. DRA's statutory obligation is to value the Windpark at its "full and true value" in each tax year for purposes of assessing the utility property tax. (See RSA 83-F:3 and F:2.) To value the Windpark for anything less than its market value in 2012 would increase, rather than reduce, disproportionality within Coos County.

Fifth, CCC has presented no evidence that would allow a fact finder to determine what the market value of the Windpark actually was in 2012. Without such evidence, there is no basis for finding the DRA erred or that the equalized valuations should be reduced to some unspecified amount.

Sixth, there was conflicting evidence presented regarding whether any taxpayer in either Dixville or Millsfield has yet suffered any actual harm or been "aggrieved" (cf. RSA 76:16) as a result of the DRA's equalized valuations. The board heard testimony that Dixville has only one

taxpayer (The Balsams Grand Resort Hotel, now in the process of renovation) and that Millsfield has only about twenty-five (25) property owners (not all of whom presently pay taxes). The testimony of CCC's witnesses (King and Fish) indicated their belief that at some point in the future (not necessarily in 2013) the tax liability of Dixville and Millsfield property owners would rise "exponentially" as a result of the DRA equalized values.

On cross-examination, however, these CCC witnesses admitted no calculations had yet been performed to document how or when any property owner's tax burden would change as a result of the DRA's 2012 equalized valuation. Indeed, the board learned in the course of the hearing that some property owners in these unincorporated places do not receive any assessments on their property at the present time and that a financial cushion exists within CCC's budget to absorb any anticipated impact of the DRA's equalized valuation. (See DRA Finding No. 13.)

The board is mindful of the impact of the annual equalized valuation process conducted by the DRA on municipalities. The outcome of this process is very much a "zero sum game," so to speak, because lowering the valuation in one municipality (presumably a positive impact) will invariably have offsetting negative impacts on others. To keep the playing field level for all municipalities, the DRA is charged with the responsibility under RSA 21-J:3, XIII to use the one yardstick prescribed by the legislature: "true" market value. No evidence was presented that would allow the board to find the DRA did not do so in this instance. (See Appeals of Towns of Bow, Newington and Seabrook, cited and quoted above.)

At the June 28 hearing, CCC renewed its argument that production of the DRA Windpark appraisal should be compelled and that CCC was entitled to question the DRA employee who prepared this appraisal (Scott Dickman) regarding its content and conclusion. The only authority cited by CCC is a February 2, 2013 Order issued by the Grafton County Superior Court in tax abatement appeals (Docket Nos. 11-CV-375, 377, 378 and 379) filed by New Hampshire Electric

Cooperative, Inc. (See Taxpayer Exhibit No. 17.) The board finds that Order is not helpful to CCC's position in that the taxpayer in those appeals (an electric coop) waived any claim to confidentiality of the DRA appraisal and sought to introduce it as evidence.⁴

C. Summary

In summary, the board finds CCC did not meet its burden of proof in these equalization appeals and they are therefore denied. As stated in RSA 71-B:5, II(a), the Decision by the board is "final," subject to appeal to the supreme court. The statutory timeline for any such appeal is "within 20 days after the date the [D]ecision is mailed by the board to the municipality."

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Michele E. LeBrun, Chair

Albert F. Shamash, Member

⁴ In those circumstances, the superior court concluded Mr. Dickman could be deposed regarding his RSA ch. 83-F appraisals (by the municipalities defending their own assessments), but could not be compelled "to produce his 'work papers'." (Id. at pp. 7-8.) In marked contrast, the Windpark has not waived its claims of confidentiality to the DRA Windpark appraisal and therefore the board finds no basis for compelling either the production of that appraisal or to compel Mr. Dickman to testify regarding it. The board therefore sustained the DRA's objections to this line of questioning by CCC's attorneys.

Addendum A

The “Requests” received from the parties 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 board’s responses, “neither granted nor denied” generally means one of the following:

- a. the request contained multiple findings; or
- 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.

See Tax 201.36(b): “Requests for findings and rulings shall consist of separately numbered paragraphs with only one finding or ruling per paragraph. Requests that contain multiple findings or rulings shall be marked "neither granted nor denied."

Department of Revenue Administration’s Requests for Findings of Fact and Rulings of Law

I. FINDINGS OF FACT

1. The Petitioners are the unincorporated places of Dixville, New Hampshire (“Dixville”) and Millsfield, New Hampshire (“Millsfield”) (collectively referred to as “Petitioners”). The Board of Commissioners for Coos County brings these appeals on their behalf as their Governing Body (“Commissioners”). See Petitioners’ Appeals, ¶¶ 2.

Neither granted nor denied.

2. On April 29, 2013, the Department notified Dixville of its 2012 total equalized valuation. Dixville’s 2012 total equalized valuation including utility valuation and railroad monies reimbursement is \$54,453,216. Dixville’s 2012 total equalized valuation not including utility valuation and railroad monies reimbursement is \$8,254,416. See Dixville’s Appeal, Exhibit 1.

Neither granted nor denied.

3. On April 29, 2013, the Department notified Millsfield of its 2012 total equalized valuation. Millsfield's 2012 total equalized valuation including utility valuation and railroad monies reimbursement is \$180,342,176. Millsfield's 2012 total equalized valuation not including utility valuation and railroad monies reimbursement is \$8,914,316. See Millsfield's Appeal, Exhibit 1.

Neither granted nor denied.

4. Equalization is the annual process by which the Department makes adjustments to each community's locally assessed values. These adjustments are made in order to compensate for the difference between unadjusted locally assessed value and market value. Typically, it begins with a full understanding of the sum of locally assessed value. The adjustment is calculated by understanding the ratio between assessments and selling prices. The sum of locally assessed value is then divided by the ratio to reveal a total market value estimate of each jurisdiction. See Testimony of Stephan W. Hamilton.

Neither granted nor denied.

5. A utility property located in the Petitioners' jurisdictions is a renewable generation facility known as the Granite Reliable Windpark ("Windpark"), which went into production in 2012 and which the Department appraised and valued at \$228,935,438 ("2012 Appraisal") for RSA 83-F purposes. The 2012 Appraisal is the first time that the Department has appraised and valued the Windpark. See Testimony of Stephan W. Hamilton.

Neither granted nor denied.

6. In their annual MS-1 Reports to the Department to report the appraised value of all property in their communities, both Petitioners reported a value of zero for the Windpark, as the Petitioners did not appraise and value the Windpark. See Testimony of Stephan W. Hamilton.

Granted.

7. The Petitioners have failed to properly inventory and appraise all of the property within their respective unincorporated places, especially the Windpark. Therefore, when equalizing the locally assessed values in the Petitioners' communities, the Department used its appraised value for the Windpark that it had determined for RSA 83-F purposes. See Testimony of Stephan W. Hamilton.

Neither granted nor denied.

8. The Windpark is also located in the Town of Dummer ("Dummer"), which is not part of this appeal. See Testimony of Stephan W. Hamilton.

Granted.

9. As part of its valuation of utility property for purposes of the utility property tax, the Department also apportions the utility property's value amongst the communities within which it is located. The Department apportioned the value of the Windpark as follows: Dixville (\$46,107,655), Millsfield (\$171,381,281), and Dummer (\$11,446,502). See Testimony of Stephan W. Hamilton.

Neither granted nor denied.

10. In 2008, the Petitioners, but not Dummer, entered into payment in lieu of taxes ("PILOT") agreements with the Windpark, pursuant to RSA 72:74, where Dixville would receive \$104,990 and Millsfield would receive \$390,010 (for a total payment of \$495,000) per year. See Exhibit A (MS-5 Report for Dixville dated June 5, 2013) and Exhibit B (MS-5 Report for Millsfield dated June 5, 2013).

Granted.

11. On December 19, 2012, the Commissioners signed a warrant for a total of \$334,365.60 to seek to assess and collect the Land Use Change Tax ("LUCT") from the Windpark. On January 18, 2013, the Commissioners collected the LUCT on behalf of the Petitioners. See Testimony of Stephan W. Hamilton.

Neither granted nor denied.

12. The revenue received from the LUCT was attributed to Dixville in the amount of \$71,369 and Millsfield in the amount of \$262,825. However, the Petitioners did not report this LUCT revenue on their MS-5 Reports. See Exhibits A and B (Acct #3210, p. 5) and Testimony of Stephan W. Hamilton.

Neither granted nor denied.

13. A review of the Petitioners' MS-5 Reports and the amount of LUCT revenue received from the Windpark that the Petitioners failed to report on their MS-5 Reports reveals that the Petitioners possess significant unreserved retained fund balances and can anticipate total revenue sufficient to meet the county apportionment obligation. See Testimony of Stephan W. Hamilton.

Granted.

II. RULINGS OF LAW

1. The Petitioners shall have the burden to prove the DRA erred in calculating the equalized valuation. See Tax 211.04.

Granted.

2. The DRA shall Equalize annually by May 1 the valuation of the property as assessed in several towns, cities, and unincorporated places in the state including the value of property exempt pursuant to RSA 72:37, 72:37-b, 72:39-a, 72:62, 72:66, and 72:70, and property which is the subject of a payment in lieu of taxes under 72:74 by adding to or deducting from the aggregate valuation of the property in towns, cities, and unincorporated places such sums as will bring such valuations to the true and market value of the property...

See RSA 21-J:3, XIII.

Granted.

3. “The owner of a renewable generation facility and the governing body of the municipality in which the facility is located may, after a duly noticed public hearing, enter into a voluntary agreement to make payment in lieu of taxes.” See RSA 72:74, I.

Granted.

4. The Windpark is a renewable generation facility that entered into a PILOT agreement with both Dixville and Millsfield. See RSA 72:73 and 72:74.

Granted.

5. RSA 21-J:3, XIII provides that the DRA shall equalize “property which is the subject of a payment in lieu of taxes under 72:74” at its “true and market value.”

Granted.

6. For 2012, the DRA properly equalized the valuation of the property as assessed in Dixville and Millsfield in accordance with its statutory obligation, pursuant to RSA 21-J:3, XIII.

Granted.

7. “The selectman of each town shall annually make a list of all the polls and shall take an inventory of all the estate liable to be taxed in such town as of April 1.” See RSA 74:1.

Granted.

8. “At the time of making the list of polls and the inventory of estate liable to be taxed the selectman shall also make an inventory of all lands, buildings and structures which, but for the tax exemption laws of the state, would be taxable as real estate...” See RSA 74:2.

Granted.

9. “Upon the return of such inventory, the selectman shall assess a tax against the person or corporation in accordance with their appraisal of the property therein mentioned, unless they shall be of the opinion that it does not contain a full and true statement of the property for which such person or corporation is taxable.” See RSA 74:11.

Granted.

10. Despite RSA 74:11, the Petitioners did not appraise the Windpark.

Granted.

11. Without an appraisal of all property inventoried to challenge, the Petitioners have failed to meet their burden of proof in proving that the Department erred in its total equalized value for both Dixville and Millsfield and the Petitioners’ appeals should be DISMISSED. See Tax 211.04.

Neither granted nor denied.

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Philip R. Waystack, Esq. and Jonathan S. Frizzell, Esq., Waystack Frizzell Trial Lawyers, P.O. Box 137, Colebrook, NH 03576, counsel for the Coos County Commissioners on behalf of Dixville and Millsfield, Appellants; and Kathryn E. Skouteris, Esq., 109 Pleasant Street, P.O. Box 457, Concord, NH 03301, counsel for DRA.

Date: 7/17/13

Anne M. Stelmach, Clerk