

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Rockingham Superior Court
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NOTICE OF DECISION

**Mark Stevens Gearreald, ESQ
Town of Hampton
100 Winnacunnet Road
Hampton NH 03842**

ORIGINAL
N.H.P.U.C. Case No. <u>DW12-085</u>
Exhibit No. <u>22</u>
Witness <u>Panel 2</u>
DO NOT REMOVE FROM FILE

Aquarion Water Company of New Hampshire, Inc. v Town of Hampton Tax

Case Name: **Assessor, et al**
Case Number: **218-2012-CV-01166**

Enclosed please find a copy of the court's order of April 29, 2013 relative to:

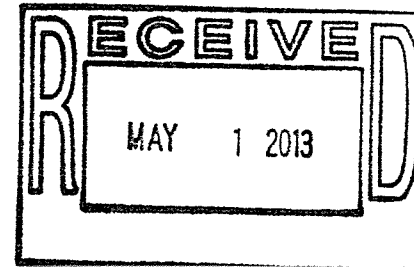
Order on Respondents' Motion for Reconsideration and Clarification

April 30, 2013

(396)

C: John J. Ryan, ESQ

Raymond W. Taylor
Clerk of Court



The State of New Hampshire

ROCKINGHAM COUNTY

SUPERIOR COURT

Aquarion Water Company of New Hampshire, Inc.

v.

Town of Hampton Tax Assessor, Town of Hampton Tax Collector,
and Town of Hampton

Docket No.: 218-2012-CV-01166

ORDER ON RESPONDENTS' MOTION FOR

RECONSIDERATION AND CLARIFICATION

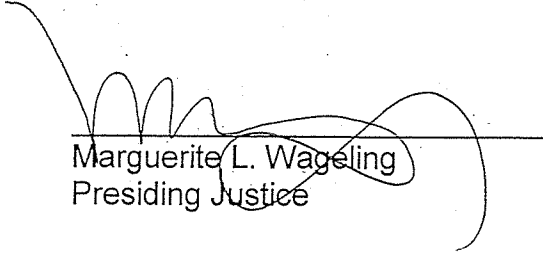
Petitioner, Aquarion Water Company of New Hampshire, Inc. ("Aquarion"), a water utility company providing water service in the Town of Hampton, originally brought a three-count petition for declaratory relief and abatement of real estate taxes under RSA 76:17 against Respondents, the Town of Hampton Tax Assessor, the Town of Hampton Tax Collector, and the Town of Hampton (hereinafter collectively referred to as "the Town"). The Court issued an order, dated February 12, 2013, wherein it found the tax was illegally imposed. The Court also ordered that the Town had thirty (30) days to "amend its pleadings or to present evidence showing an agreement or any kind of amendment to an agreement allowing it to impose a tax on Aquarion." (Order, pp.8-9.) On March 25, 2013, the Town filed a pleading entitled Amended Respondents' Answers, Special Pleas, Brief Statements and Affirmative Defenses and attached thereto an "Amendment to Consents" dated March 18, 2013, signed by the Board of Selectmen for the Town. The Amendment to Consents informs the public that the Town amended its consent given to Aquarion and now imposes upon it an obligation pursuant

to RSA 72:23 to "pay both current and potential real and personal property taxes for the use and occupation of the Town highways or rights of way or public grounds . . ."

(Amend. to Consent.)

At issue at this time is Respondents' Motion for Reconsideration and Clarification. A hearing was held on April 9, 2013 where all parties were present, along with counsel. The Town explained to the Court that Aquarion's request for Declaratory Judgment affected not only the Town's right to levy taxes against Aquarion in 2011 and 2012, but also its right to do so in the future. The Town asked for clarification on the declaratory judgment ruling. The parties agreed, and the Court now makes clear that Court's February 12, 2013 Order to applies to tax years 2011 and 2012. The Town also asked for the Court to clarify that the Amendment to Consent satisfies its obligation under RSA 72:23 thereby allowing it to levy a tax on Aquarion in 2013 and in the future. Aquarion responded, stating that it would have no objection if the Court found the Town could levy taxes on Aquarion pursuant to RSA 72:23, effective in tax year 2013. The Court so orders.

April 29, 2013
Date


Marguerite L. Wageling
Presiding Justice

The State of New Hampshire

ROCKINGHAM COUNTY

SUPERIOR COURT

Aquarion Water Company of New Hampshire, Inc.

v.

Town of Hampton Tax Assessor, Town of Hampton Tax Collector,
and Town of Hampton

Docket No.: 218-2012-CV-01166

ORDER ON PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Petitioner, Aquarion Water Company of New Hampshire, Inc. ("Aquarion"), a water utility company providing water service in the Town of Hampton, originally brought a three-count petition for abatement of real estate taxes under RSA 76:17 against Respondents, the Town of Hampton Tax Assessor, the Town of Hampton Tax Collector, and the Town of Hampton (hereinafter collectively referred to as "the Town").

Aquarion claimed that it was entitled to a complete abatement of real estate taxes imposed by the Town against Aquarion's water lines because the taxes were illegal and without the required statutory authority (Count I). In the alternative, Aquarion requested an abatement of taxes reflecting the actual mileage of water pipes it used within the Town's roads and rights of way (Count II). Additionally, Aquarion requested temporary and permanent injunctive relief to prevent the Town from asserting or filing a tax lien against the real estate Aquarion owned, with respect to the right of way tax (Count III). The Town objected.

On September 26, 2012, the Court (Wageling, J.) denied Aquarion's request for temporary injunctive relief (Count III) and allowed the Town to file a tax lien against

Aquarion. The Court did not, however, address the legality of the tax and whether Aquarion must, in fact, pay the tax. Aquarion has since paid the tax bill for \$63,512.63 and has filed this Motion for Partial Summary Judgment (Count I). The Town objects. After a thorough review of the parties' arguments and the applicable law, the Court finds and rules as follows.

Background

By way of brief background, Aquarion is a utility company that provides water service in the Town. Aquarion uses the water distribution lines located within the Town's public roads and has been doing so for over 100 years. Aquarion has never been taxed for the use of these rights of way. On April 4, 2011, the Town of Hampton Board of Selectmen ("the Board") voted to approve public right of way assessments. This essentially gave the Town the ability to tax the water lines that Aquarion uses within the Town's roads and rights of way.

On November 1, 2011, the Town issued real estate tax bills for Aquarion's "utility" property. This was a tax on the actual water distribution lines—not a "right of way" tax. On December 12, 2011, the Board voted to issue a Supplemental Warrant for 2011 to include Aquarion among four other users of the public roadways. This Supplemental Warrant taxed Aquarion for the presence of its water lines in the Town's rights of way. Essentially, the Town required Aquarion to pay property taxes on the land it had been allowed to use and occupy for decades. Subsequently, on December 14, 2011, the Town issued Aquarion a tax bill entitled "Rights of Way Tax" for \$63,512.63. The right of way tax assessment was based upon the Town's calculations that Aquarion was a user within a 10 foot portion of the subsurface of the roadways. Aquarion initially paid

this bill in full on January 9, 2012 via an automated clearing house (ACH) payment to the Town's bank account, but unilaterally reversed the payment the following day. The Town learned of the payment, but did not learn of the reversal until February 2012.

As stated above, Aquarion filed a tax abatement application with the Town, which was denied, did not pay the tax, and subsequently brought a petition for abatement in this Court. Following this Court's Order denying Aquarion's request for temporary injunctive relief, Aquarion paid the bill on October 3, 2012.

Aquarion now moves for partial summary judgment, arguing that under RSA 72:23, the Town does not have the legal authority to impose a real estate tax on the portion of the Town's roads used by Aquarion in connection with the water lines. Specifically, Aquarion claims that the Town has no such authority because there is no agreement by Aquarion to be assessed any real estate taxes, as required under RSA 72:23, I. The Town objects and contends that the liability issues in this case are not yet ripe for review and that further discovery is necessary to determine the type of permission Aquarion has to use the Town's rights of way. Additionally, the Town argues that Aquarion's Motion is grounded on the assumption that the RSA 72:23, I requirement—that certain language as to payment of taxes appear in agreements entered into after 1979 between a Town and a utility company—applies to the water pipes in the Town's rights of way, and that this has not yet been determined by the New Hampshire Supreme Court. Further, the Town argues there is a genuine dispute of fact as to whether any "agreement" predates the 1979 year requirement in the statute.

Analysis

"Summary judgment shall be rendered forthwith if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” RSA 491:8-a, III (1997). “An issue of fact is ‘material’ for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law.” VanDeMark v. McDonald’s Corp., 153 N.H. 753, 756 (2006). In considering a motion for summary judgment, the Court must “construe the pleadings, discovery and affidavits in the light most favorable to the non-moving party to determine whether the proponent [of the motion] has established the absence of a dispute over any material fact and the right to judgment as a matter of law.” Porter v. Coco, 154 N.H. 353, 356 (2006) (quotation and citation omitted); see also VanDeMark, 153 N.H. at 756. “The party objecting to a motion for summary judgment may not rest upon mere allegations or denials of his . . . pleadings, but his . . . response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue [of material fact] for trial.” Panciocco v. Lawyers Title Ins. Corp., 147 N.H. 610, 613 (2002) (quotation omitted).

In a series of New Hampshire Supreme Court decisions known as the “Rochester” cases, see N.E. Tel. & Tel. Co. v. City of Rochester, 144 N.H. 118 (1999) (“Rochester I”); Verizon New England, Inc. v. City of Rochester, 151 N.H. 263 (2004) (“Rochester II”); Verizon New England, Inc. v. City of Rochester, 156 N.H. 624 (2007) (“Rochester III”), the Court dealt specifically with a Town’s ability under RSA 72:23 to require a company to pay real estate taxes on land that the company used pursuant to a license.

RSA 72:23, entitled "Real Estate and Personal Property Tax Exemption," provides that certain properties are exempt from real estate taxation, including lands owned by a municipality (such as a right of way), unless that land is used or occupied by someone other than the Town under "a lease [or] other agreement."

Specifically, RSA 72:23, I(b) states:

All leases and other agreements, the terms of which provide for the use or occupation by others of real or personal property owned by the state or a city, town, school district, or village district, entered into after July 1, 1979, shall provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property no later than the due date. This subparagraph shall not apply to leases of state-owned railroad properties which are subject to railroad taxes under the provisions of RSA 82 or which provide revenue to the state, a portion of which is distributed to cities and towns pursuant to RSA 228:69, I(a). All such leases and agreements shall include a provision that "failure of the lessee to pay the duly assessed personal and real estate taxes when due shall be cause to terminate said lease or agreement by the lessor." All such leases and agreements entered into on or after January 1, 1994, shall clearly state the lessee's obligations regarding the payment of both current and potential real and personal property taxes, and shall also state whether the lessee has an obligation to pay real and personal property taxes on structures or improvements added by the lessee.

The statute is unambiguous. See Rochester II, 151 N.H. at 266. Thus, according to its plain language, the statute provides that when lands owned by a municipality are used by someone other than the Town under some sort of agreement, the party using the land can be taxed for its use, as long as the "agreement" between the Town and the "other user" clearly outlines the payment of properly assessed taxes. See RSA 72:23, I(b).

In many cases, Towns have sought to amend the agreements or licenses they have with the utility companies so that the agreements include a requirement to pay a tax on the land the companies are allowed to use. See Rochester I, 144 N.H. at 120. Specifically, the Rochester cases dealt with a telephone company's actual written

licenses with the Town of Rochester to use poles, wires, cables and other similar equipment on city-maintained highways. Id. at 119. The licenses, in their original format, did not provide for the payment of properly assessed taxes. Id. Thus, in order to tax the land the telephone company used, and not the actual poles themselves, under RSA 72:23, I(b), the Town needed to amend the pole licenses. Id. Although the telephone company argued that RSA 72:23 was inapplicable because its licenses were neither a "lease" nor the product of an "agreement," the Court gave the term "agreement" its "plain and ordinary meaning," and determined that the licenses were, in fact, "agreements." Id. at 121 (defining "agreement" as a "harmonious understanding," or "the act of agreeing or coming to a mutual arrangement"). The Court stated that "the statutory scheme that permitted the [telephone company] to request pole licenses, [i.e., RSA 231:159 - :182,] represent[ed] the legislature's conditional willingness to allow the use of public property for telecommunications purposes." Id. Further, the Court held:

The [telephone company], in obtaining pole licenses from [the Town], presumably assumed the status of licensee aware of and willing to accept the conditions imposed by the [Town] and the legislature. In this sense, the parties' licensor/licensee relationship is predicated on a mutual understanding and arrangement. The [telephone company's] licenses thus represent agreements, in the usual sense of the term, to occupy and use public property. The terms of RSA 72:23, I(b) are applicable to the [telephone company's] pole licenses.

Id.

In this case, Aquarion has maintained its water lines within the Town's roadways for over 100 years, beginning well before 1979. Both parties agree that there is no known formal written license or lease with respect to Aquarion's use of the roadways or Aquarion's right to use the water lines in the Town's rights of way. However, it is clear that Aquarion's use of the water pipes in the Town's rights of way is pursuant to consent

under RSA 231:184. Applying the plain and ordinary meaning of the term “agreement,” this statutory scheme that allows Aquarion to use the water pipes with the Town’s consent must be considered an “agreement” between the Town and Aquarion. There is a “harmonious understanding” between the two entities. Rochester I, 144 N.H. at 120. However, there is no evidence that this “agreement” provides for the payment of properly assessed taxes. In fact, while the Town has always assessed real estate taxes against the water distribution pipes themselves through separate tax bills under RSA 72:7 (and is allowed to do so), the Town had never taxed Aquarion for using the rights of way until 2011. Thus, in order to also tax Aquarion’s use of the rights of way, the Town first needed to “amend” the “agreement.” Again, there is no evidence to show that this has been done.

The Town argues that RSA 72:23, I(b) only applies to leases entered into after July 1, 1979 as to one provision and after January 1, 1994, as to another provision, and that because there is no evidence as to when the “agreements” were entered into between Aquarion and the Town, the statute is inapplicable. The Court disagrees and determines that while there may, in fact, be “agreements” from before 1979, these “agreements” have been continued and are currently ongoing. Thus, they need to be amended prior to any valid assessment of taxes.

Additionally, the Town argues that the New Hampshire Supreme Court has only applied the requirements of RSA 72:23, I(b) to written licenses that are for the poles and wires of telegraph, television, telephone, electric light and electric power companies under RSA 231:161, and has not applied the requirement to water or other utility company “agreements.” While this may be true, in Rochester II, the New Hampshire

Supreme Court held that:

According to the plain language of the statute, leases and other agreements which permit the use or occupation of public property must provide for the payment of properly assessed real estate taxes. The statute does not include an exemption for private companies that use or occupy public property to provide a public service. Therefore, we conclude that, irrespective of the type of service to be provided, the legislature intended for leases and other agreements that permit the use or occupation of public property to include a provision requiring payment of properly assessed real estate taxes.

151 N.H. at 266–67. Thus, it is clear that the requirement is to be applied to all types of services. Id.

Further, the Court notes that RSA 72:23, I(b) specifically states that the subparagraph “does not apply to leases of state-owned railroad properties which are subject to railroad taxes under the provisions of RSA 82 or which provide revenue to the state, a portion of which is distributed to cities and towns pursuant to RSA 228:69, I(a).” The legislature specifically highlighted an entity whose lease was not to be subject to taxation. This Court will not put additional words in the legislature’s mouth by exempting any other party. Remington Invs. v. Howard, 150 N.H. 653, 654 (2004).

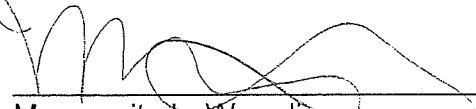
Based upon the information currently available to the Court, it is clear that the Town has taken no action to amend Aquarion’s agreement and has not provided any notice to Aquarion or held any kind of public hearing regarding the imposition of the right of way tax. As such, the stated evidence does not give the Town the authority to impose the right of way tax. Thus, the Court is inclined to **GRANT** Aquarion’s Motion for Partial Summary Judgment. However, the Court gives the Town thirty (30) days from the issuance of this order to amend its pleadings or to present evidence showing an agreement or any kind of amendment to an agreement allowing it to impose a tax on

Aquarion. The Court is aware of the Town's argument that the summary judgment motion is premature as discovery is ongoing. This matter has been pending since August 2, 2012. The Town has had ample time to investigate its records and learn of the existence of an agreement. In the interim, Aquarion must comply immediately with discovery requests relating to any "agreement" it has or has had in the past with the Town relative to the placement or retention of pipes within the Town's right of way.

Failure to present further evidence will result in the automatic GRANTING of the Motion for Partial Summary Judgment without further pleadings or hearing.

So Ordered.

Feb 12, 2013
Date


Marguerite L. Wageling
Presiding Justice