STATE OF MAINE KENNEBEC, ss

BOARD OF PROPERTY TAX REVIEW DOCKET NO. 2011-010

CYR FAMILY LIMITED PARTI	VERSHIP)
v.)) DECISION
TOWN OF WADE)

This matter came before the State Board of Property Tax Review (hereinafter the "Board") on appeal by Cyr Family Limited Partnership (hereinafter "Cyr") from the denial of the assessors to abate a tree growth withdrawal penalty tax assessed against the property that was imposed as a supplemental tax assessment in the tax year April 1, 2010. Pursuant to 36 M.R.S.A. § 583, assessments — here a penalty tax — or denials of applications for tree growth classification are subject to the abatement procedures set forth in 36 M.R.S.A. § 841. Section 841 provides that a taxpayer may file an application for an abatement of taxes within 185 days of commitment to correct any illegality, error or irregularity in assessment. Cyr timely filed for an abatement of the penalty tax and the assessors denied the application because they determined that Cyr had not complied with the 1 year notice requirement under section 574-B(3) of Title 36. Cyr timely appealed the assessors' denial to the Board. Thereafter the Board convened on May 17, 2012 to hear testimony and deliberate. Present on behalf of the Board were John B. Hodgkins, Richard Partridge, and Chairperson, Rebecca H. Farnum. The assessors' agent Michael MacPherson was present on behalf of the Town of Wade. Cyr was represented by Edmund Bearor, Esq.

As a preliminary matter the Board considered an objection voiced by Cyr that Michael MacPherson present the Town's case because Mr. MacPherson is a member of the Board. The Board consists of fifteen members and is divided into three Panels of five members. Mr.

¹ Tree Growth penalties are added taxes when property is withdrawn from classification. 36 M.R.S.A. § 581(4). <u>Dubois v. City of Saco</u>, 645 A.2d 1125, 1127(Me. 1994).

MacPherson serves on the Board as the engineer member on Panel B. ² Mr. MacPherson also serves as assessors' agent for various towns in the northern part of the state. Cyr argued that the Town should engage someone other than Mr. MacPherson given his membership on the Board. Although Cyr does not question that the evidence can be weighed fairly, it argues that an appearance of a conflict could be avoided.

The Board has heard a number of appeals wherein the assessors' agent has presented the case for the town including presenting witnesses, giving testimony and cross examining witnesses. In response to the objection Mr. MacPherson stated that although the selectmen in small towns such as Wade act as the assessors, it is the assessors' agent who performs the work for the assessors and represents the town in contested matters which is what he was hired to do for the Town of Wade. Although Cyr argued otherwise, the Board concluded that the "rule of necessity" which is generally defined as "[a] rule requiring a judge or other official to hear a case, despite bias or conflict of interest, when disqualification would result in the lack of any competent court or tribunal." is applicable in this circumstance. Black's Law Dictionary 1069 (7th edition 2000). The Law Court specifically addressed this rule in Northeast Occupational Exchange, Inc. v. Bureau of Rehabilitation, 473 A.2d 406 (Me. 1984), concluding that "[a] tribunal should act despite the presence of reasons for disqualification where no competent alternate body is available to hear the appeal." Here, as in Northeast, there is no other Board that is authorized to hear these appeals. Moreover, because Mr. MacPherson is assigned to a different Panel of the Board, none of the Panel members has met him and each Panel member indicated that he/she is able to render a fair and impartial decision in this matter. For these reasons the Board proceeded to hear the appeal.

² Section 271 (1) of Title 36 establishes the organization of the Board and provides as follows:

Organization; meetings. The State Board of Property Tax Review, as established by Title 5, section 12004-B, subsection 6, shall consist of 15 members appointed by the Governor for terms of 3 years, except for initial appointments which shall be 1/3 of the membership for 2 years and 1/3 of the membership for 3 years. Vacancies on the board shall be filled for the remainder of the unexpired term. The membership shall be equally divided among attorneys, real estate brokers, retired assessors and public members. The board shall annually elect a chair and secretary. The secretary need not be chosen from the members of the board.

BACKGROUND

The subject property is identified on Map 8 Lots 5, 13 and 14 in the Town of Wade's property tax records and is comprised of 316 acres. The property apparently had been enrolled in the Tree Growth Program as of April 1, 2000. Thereafter Cyr purchased the property in November 2001 and the property has been taxed under the Tree Growth Program all these years. See, Town Ex. #4 (deed) and Town Ex. #8 (tax card). In February 2010, the Town determined that the required filing under section 574-B of Title 36 was absent from its files. Section 574-B requires, among other things, that the owner of classified property file every 10 years a statement from a forester that the property is being managed in accordance with the forest management and harvest plan associated with the property (36 M.R.S.A. § 574-B (1) and (2)) and that new owners of classified property have 1 year from the date of the transfer to make a similar filing. 36 M.R.S.A. § 574-B (3). Failure to do either can result in withdrawal provided the Town, after having discovered noncompliance with either of these sub-sections to section 574-B provides the taxpayer - here Cyr – with a 60 day notice to make the filing and become compliant. If the taxpayer does so then the Town cannot withdraw the property from classification. Section 574-B(3) provides as follows:

- 3. Transfer of ownership. When land taxed under this subchapter [Tree growth tax Law] is transferred to a new owner, within one year of the date of transfer, the new landowner must file with the municipal assessor or the State Tax Assessor for land in the unorganized territory one of the following:
- A. A sworn statement indicating that a new forest management and harvest plan has been prepared; or
- B. A statement from a licensed professional forester that the land is being managed in accordance with the plan prepared for the previous landowner.

Having determined that the required filing under section 574-B(3) was absent from its files, the Town, by correspondence dated February 16, 2010, issued a 60 day notice to Cyr pursuant to the 36 M.R.S.A. § 581(1) which has since been amended, but as of February 2010 provided in the first paragraph as follows:

If the assessor determines that land subject to this subchapter no longer meets the requirements of the subchapter [i.e. Tree Growth Tax Law], the assessor must withdraw the land from taxation under this subchapter. Before withdrawing a parcel from taxation under this subchapter, if the sole reason the land does not meet the requirement of this subchapter is that the owner failed to file a sworn statement required under 574-B, the assessor shall provide the owner with written notice by regular mail of the deadline to file the sworn statement and permit the owner at least 60 days to respond to that notice. An owner of land subject to this subchapter may at any time request withdrawal of that land from taxation under this subchapter by certifying in writing to the assessor that the land is no longer to be classified under this subchapter.

Mr. MacPherson drafted the 60 day notice that was printed on his office letterhead and sent to Cyr. ³ He testified that the intent of the notice was to inform Cyr that within 60 days it must file with the Town the appropriate statement - or a copy - of compliance executed within the 1 year period after Cyr purchased the property approximately 8 years ago. That notice (Town Ex. #12) was dated February 16, 2010 and stated in its first paragraph as follows:

"One of our responsibilities as the assessor's agent for the town of Wade is to review the current Tree Growth Program applications and the accompanying Forest Management and Harvest Plan. We have reviewed your February 1st 2000 application for the parcel noted above and found that your application is problematic. The application we have on file is under Business Press Inc. Our tax records show that the property was passed to Cyr Family Limited in November of 2001. Maine state records show that the property was passed to Cyr Family Limited Property in November 2001. Maine state law states that if this land is sold, and the new owner wishes to adopt the existing Forest Management and Harvest Plan, the new owner has one year to file a new application under category 2 of the application process. This new application requires that a licensed Forester recertifies continued adherence to the existing Forest Management Plan for our review. The plan will be returned to you after review. If a new application has not been forwarded to the town office, you have until the 19th of April to provide the new certified application and the new and updated Forest Management and Harvest Plan. After 19 April 2010, we would be required by state law to remove the parcel from the tree

³ The notice was apparently signed by an assistant to Mr. MacPherson – Amanda L. Pooler.

growth program and apply the applicable penalties for the removal. You may download the Tree growth application here: [URL provided]. Bulletin #19 on the Tree growth Tax Law may also be downloaded at the same URL..."

As a result of this notice Cyr produced an unsigned and undated copy of a Tree Growth Application form issued by Maine Revenue Services which is used for initial applications and also the 10 and 1 year statements of compliance under section 574-B(1),(2) and (3). Although the forester filled in his name and his licensed professional forester number as required under part 2 of the form in connection with a statement of compliance for new owners, the copy did not show a date and signature of the owner. Petitioner Ex.D. As a result the Town assessed a penalty tax in the amount of \$20,799.20.

Donna Turner, a member of the three-member Board of Selectmen for the Town of Wade was called to testify for Cyr in support of Cyr's position that the required 1 year filing after it purchased the property was timely filed but had likely been misplaced by the Town. The selectmen also act as assessors for the Town of Wade. Ms. Turner became a selectman in 2010 after the penalty was assessed to Cyr. Prior to 2010 she served as tax collector/treasurer from 1987 to 2009 except for the years 1999, 2000 and 2001. According to Ms. Turner, during the time that she acted as tax collector/ treasurer all Town records were received and filed by her at her home where she maintains an office for a company that she owns with her husband. The records, including Tree Growth filings, were maintained in a plastic tub in her office behind her desk. She did not keep a list or inventory of Tree Growth filings as she received them, but rather placed all the filings in a file that was given to the assessors' agent for his review during one week in the spring of each year. She testified that except for hunting and fishing license applications and birth and death certificates which are maintained by the Town Clerk, she accepted all Town filings at her home office and then in 2010 at an office rented by the Town while the current Town office was being built. During the period 1987 to 2009 the Town had three addresses under which it received filings; an RFD #, a P.O. Box number; and a Presque Isle mailing address used by Ms. Turner for her personal business. Ms. Turner went on to testify that after the assessors' agent had reviewed the Tree Growth filings/applications and the Town acted on them, she would do the "pricing" and enter the information in the data base. The assessors' agent – until 2004 – would update the information on the tax card. In 2004 Ms. Turner updated

the information on the tax card in addition to the data base. Ms. Turner explained that prior to Mr. MacPherson acting as the assessors' agent since 2009, Ms. Lona La Francis served in that capacity in 2002 and Mr. Randy Tarr served as assessors' agent from 2003 to 2009. There was no assessors' agent from 2001 until Ms. LaFrancis. Ms. Turner described Mr. Tarr as competent in performing his duties as assessors' agent during the period when Cyr was required to file the required statement within 1 year from purchasing the property. She admitted that she had discovered that she had misfiled some items over the years. In any event the Cyr tax card for the subject property shows that it has been taxed as classified property under Cyr since Cyr acquired the property. Town Ex. #8.

Mr. Scott Cyr, a partner of the Cyr Family Limited Partnership, also testified. Mr. Cyr is the son of Gilbert Cyr, who is also a partner and who primarily managed the Cyr property over the years. Gilbert Cyr began purchasing timberland in Aroostook County in the mid 1960's and engaged Eric Holden, a licensed forester, to prepare plans and file applications with the appropriate Town office. Neither Mr. Gilbert nor Mr. Holden testified. Mr. Gilbert is in his mid - 80's and cannot travel. According to Scott Cyr, Mr. Holden would prepare a forest management and harvest plan for his father together with the appropriate Tree growth application - here for the 1 year filing requirement - and hand deliver a copy and an original to his father. His father would keep a copy and sign the original application. Mr. Holden would then file the signed original application with the Town. Scott Cyr testified that after the 60 day notice was received, or at least after he became aware of it, he thereafter in December 2010 searched for and discovered an unsigned, undated copy of an application for the subject property in his father's files and it was provided to the Town. Petitioner's Ex. D. The front page had been filled in and the back page at part 2 had been filled in with the forester's name and license number. The application was undated and unsigned and the box beside the forester's name had not been checked. According to Scott Cyr, Mr. Holden charged the partnership \$150.00 for the work performed in connection with the required filing within 1 year from the date of purchase of the property. Petitioner Ex. F.

Mr. MacPherson testified that because the box beside the forester's name had not been checked and because the application was undated and unsigned it was not accepted and the Town proceeded to withdraw the property from classification and assess a penalty tax. Chairman

Farnum asked Mr. MacPherson if Cyr had prepared, dated and signed a new application within the 60 day period would he have refused it as unacceptable. Mr. MacPherson responded that in order not to discriminate among taxpayers he would have accepted it because he had accepted a new application from another Tree Growth property owner to whom a 60 notice had been sent because the owner could not find the original filing. Testimony did not reveal whether the new application was filed within the 60 day period. In any event, according to Mr. MacPherson, the intent of the notice was to inform Cyr that within 60 days the partnership must file with the Town the appropriate statement of compliance under section 574-B(3) and that the statement must have been executed within the 1 year period after Cyr purchased the property approximately 8 years ago.⁴

DISCUSSION

The Board notes that recently in the matter of McClure vs. the Town of Lubec No. 2010-013 (BPTR June 8, 2012) the Board was required to interpret the meaning of the 60 day notice provision set forth in section 581(1) of Title 36 that was in effect at the time of that appeal - as it is here in the matter of Cyr - in connection with an owner's obligation under section 574-B(1) and(2) to file evidence of compliance with a forest management and harvest plan every ten years. Although here the issue involves a new owner's obligation to file evidence of compliance with a forest management and harvest plan within 1 year of purchase of classified property under section 574-B(3), the Board notes that section 581(1) in effect at the time refers to section 574-B in its entirely which would include both the 10 year reporting/filing requirement and the 1 year reporting/filing requirement. Thus the Board's interpretation of section 581(1) as set forth in McClure is applicable here.

In <u>McClure</u> the Board concluded that that the wording of the 60 day notice provision in section 581(1) is unambiguous because it clearly states that the municipality may not withdraw property from Tree growth classification if the sole reason is noncompliance with section 574-B

⁴ Scott Cyr testified that the Cyr Partnership had properly and timely filed all other applications in the various towns in which it owned classified property. In response the Town submitted a number of Cyr applications to refute that testimony. The Board gave no weight to this testimony given the many nuances in connection with how municipalities provide notice to the taxpayer for either the 10 year or the 1 year reporting requirement and/or when the reporting period is considered triggered under section 574-B for the 10 year reporting period.

unless certain steps are taken by the municipality. In particular the municipality must provide notice to the taxpayer that he/she has 60 days to make whatever filing is necessary under section 574-B to keep the parcel in the Tree Growth program. Furthermore the wording of section 581(1) makes no reference to deadlines such that taxpayers who have been provided notice have a 60 day period within which to comply with the reporting provisions of section 574-B having been found not to have been in compliance by the municipality. Accordingly the appropriate statement may be signed and dated within the 60 day period for the taxpayer to become compliant and prevent withdrawal of the property from the program. Section 581(1) thus establishes a grace period within which a taxpayer may become compliant. This interpretation is consistent with sections 572 and 584-A of Title 36 that encourage the continued classification of land in order to preserve that type of forest land in the state. Specifically section 572 entitled "Purpose" states that "[i]t has for many years been declared the policy of the State of Maine... to tax all forest lands according to their productivity and thereby encourage their operation on a sustained yield basis..." In connection with the construction of the Tree Growth Tax Law provisions the Legislature has specifically directed under section 584-A entitled "Construction" that "[t]his subchapter [Tree Growth Tax Law] shall be broadly construed to achieve its purpose..."

Given this interpretation the Board turns to the wording of the notice and finds that the February 16, 2010 notice does not clearly state that the taxpayer may date and sign the required filing within the 60 day period. Indeed Mr. MacPherson testified that he intended the notice to inform the taxpayer to file either the original or copy of what had been filed within 1 year of transfer of the property to Cyr more than 8 years ago. As has been noted, Mr. MacPherson went on to testify that despite the intent of the notice, he would have accepted - as he did for another taxpayer that had been sent a similar notice - a new filing dated and signed within the 60 day period because he would not want to treat such similarly situated taxpayer differently. In any event the notice did not clearly state that a new filing would be accepted as was done for another taxpayer, nor was Cyr otherwise informed that such a filing would be accepted. The Board is concerned with the clarity of the notice especially since the property had by both parties been taxed under Tree Growth for 8 years. Thus, unless the notice is crystal clear it would be reasonable to be confused as to what must be filed within 60 days of the notice. Under section 581(1) in effect at the time, a new filing, signed and dated within 60 days of the notice would

have precluded the withdrawal and an assessment for a penalty and that was not made clear to Cyr in the February 16, 2010 notice. Because that was not made clear to Cyr in the February 16, 2010 notice, the Board, by unanimous vote, grants an abatement of the penalty.

Any party wishing to appeal this decision must file a petition for review in the Superior Court within thirty (30) days of receipt of this decision pursuant to the provisions of 5 M.R.S.A. §§ 11001-11008. If this decision is not appealed it will become binding on the parties at the end of the thirty day period.

Dated:

Rebecca H. Farnum, Esq.

Chairman Panel A

State Board of Property tax Review