THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0061

**APPEAL OF KEITH R. MADER 2000 REVOCABLE TRUST ET AL**

RULE 10 APPEALS FROM THE N.H. BOARD OF TAX AND LAND APPEALS

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**BRIEF FOR APPELLANTS**

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(Oral argument by Attorney Cooper)

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## QUESTIONS PRESENTED

Question 1 – Was the decision by the BTLA unreasonable and unlawful in denying relief "for reasonable cause and not willful neglect" from preclusion under Tax 203.02(d) when justice required a far different result? Rule 10 Appeal ("R10A") pp. 79 – 82.

Question 2 – Was the ruling by the BTLA unreasonable and unlawful in enforcing the preclusion of these RSA 76:16-a appeals pursuant to Tax 203.02(d) when the Tax Abatement Applications to the Town of Bartlett included all the necessary information to process such a request and a N.H. attorney-at-law signed the application on behalf of his clients certifying that there was a good faith basis for the application and all the information provided was true? R10A pp. 83 - 84.

Question 3 – Did the BTLA violate the N.H. Constitution guarantee of equal protection of the law by interpreting Tax 203.02(d) to preclude attorneys-at-law from signing and certifying on behalf of their clients when clients may appoint an attorney-in-fact to do so? RSA 564-E:204(5)(c). R10A pp. 84 - 85.

## STATEMENT OF FACTS

On February 7, 2018, Randall F. Cooper, an attorney at law in the State of New Hampshire, and Of Counsel with the firm of Cooper Cargill Chant, P.A., was informed of a telephone call from James Rader, the principal of the developer, Association president, and owner at Bearfoot Creek requesting assistance with tax abatements for the completed condominium units at Bearfoot Creek. R10A p. 87.

Bearfoot Creek Condominium is a "land" condominium, in which the unit is a building area upon which the unit owner has a right to construct a residence. As of April 1, 2017, Bearfoot Creek Condominium consisted of twenty-four units, eleven unimproved units (building sites) assessed by the Town of Bartlett at $300,000 each, and thirteen improved units assessed between $1,410,000 and $2,309,800. R10A p. 17.

Attorney Cooper had past experience with tax abatements and had a general understanding of the substantive issues such as the burden to prove disproportionality by evidence that the subject properties are assessed at a higher percentage of fair market value than the percentage at which property is generally assessed in the town, and procedural issues of filing an abatement application in a timely manner. As any good lawyer he did not rely upon his recollection and immediately reviewed *RSA 76:16* to determine the last possible filing date given his pending long-planned vacation to Morocco to determine if he could represent Bearfoot Creek. R10A p. 88

Attorney Cooper contacted Mr. Rader by email (Exhibit 2, R10A p. 36), disclosing that he was leaving in two days on a trip to Morocco, but subject to that he was willing to represent the Association and its members and believed it shouldn't be a problem to file applications by March 1, 2018. R10A p.36. Attorney Cooper based upon representations made by Mr. Rader, and his initial review of material on the Town of Bartlett website, and his experience, believed, although there was a substantial increase in assessments, in order to best meet the evidentiary requirements of disproportionality that fair market value appraisals were going to be required and they would take some time. R10A pp. 88-9.

Prior to leaving on vacation and until his return to the office on February 27, 2018, Attorney Cooper had no recollection or knowledge of the tax payer signature requirement in Section H of the Abatement Application or Tax 203.02, and nor did he review the Board of Tax and Land Appeals ("BTLA") Rules or the form Abatement Application or investigate those requirements until he was formally engaged by Bearfoot Creek and returned from vacation. R10A p. 89.

As evidenced by Exhibit 3 (R10A p. 37), the attorney was not engaged by Bearfoot Creek until February 20, 2018. He returned from Morocco on the evening of February 26, 2018, and he took up the drafting of the abatement applications on February 27, 2018. It was only on February 27, 2018, after he downloaded the Abatement Application form from the BTLA's website that he looked at and focused on the Taxpayer signature requirement. At that point, Attorney Cooper realized that it was

impossible for him to complete the applications, and obtain the signatures of the 13 owners, 12 of whom were out-of-state, and 1 of whom was in Florida in time to file the applications on time. R10A p. 89.

As Attorney Cooper affirmed under oath, there was no way, whatsoever; that he would risk the substantive rights of his clients to obtain relief in order to pursue at their expense some unspecified agenda regarding the rights of attorneys. If he could have reasonable obtained their signatures in a timely manner after having discovered that requirement, he would have done so. R10A pp. 89-90.

Attorney Cooper obtained all of the factual information required for the completion of the application (all of which was of public record) and made an independent judgment of the good faith basis of the applications. Specifically, Attorney Cooper compared the 2016 and 2017 assessed values of the Taxpayers' properties (see Exhibit 4, R10A p. 43) and determined that there had been a 25% to 63% increase in assessed value, which in his opinion constituted good faith grounds to seek abatements, to be subsequently confirmed by appraisal, and which was consistent with the his obligation under Tax 203.02(b)(4) and N.H Professional Conduct Rule 3.1. R10A p. 18.

Since there appeared to be nothing within the application that required the personal knowledge of the clients, and with the additional belief that as an engaged attorney he had the right to do so, he signed and certified on behalf of the clients as their attorney. As he attested to at that time, all of the information contained in the applications was accurate

and true, and he was of the opinion that a good faith basis for abatement existed at that time. R10A p.84; Exhibit 1, R10A pp. 23-35.

Attorney Cooper also believed that fair market value real estate appraisals would be completed in a timely manner, allowing negotiation with the Town of Bartlett which would potentially avoid any appeal to the BTLA. R10A p. 90. For a number of reasons the appraisals by Yankee Appraisal were not completed until June 30, 2018 and not delivered to the Attorney Cooper until July 27-30, 2018, after the statutory deadline for the Selectmen to act on the abatement applications. R10A p. 18. Those appraisals, however, confirmed the over assessment of the Taxpayers' properties, which was an average overassessment of $567,133 per unit. (Exhibit 5, R10A, p. 44). On July 30, 2018, Attorney Cooper forwarded the completed appraisals to Town of Bartlett, pointing out the unexplained $1,000,000 Extra Features addition to each unit's assessment, when similar trail side units were only assessed $275,000. Exhibit 6, R10A, p. 45. Given the extreme difference in appraised and assessed value and the strange and unexplained $1,000,000 Extra Features Valuation for "Bearfoot Creek" added to each assessed value of an improved unit Attorney Cooper believed that a negotiated resolution would be the ultimate outcome. R10A p. 19. On October 1, 2018, the Taxpayers, after having filed their appeals with the BTLA, offered to continue discussions with the Town to seek a resolution in a similar manner if the appraisals had been obtained as expected. (Exhibit 7, R10A, p. 47). By letter dated October 10, 2018, the Board of Selectmen replied expecting to participate

in mediation. (Exhibit 8 , R10A, p. 48) . R10A pp. 19.

## STATEMENT OF THE CASE

The Taxpayers filed RSA 76:16-a Appeals with the BTLA on August 27, 2018. Order, R10A 65. Each of those appeals raised two issues; the first being a substantial difference between the fair market value of each unit as established by appraisal as adjusted by the equalization ratio and the Town's assessed value. In the second issue, the Taxpayers questioned a $1,000,000 Extra Features Valuation:

> "The Town in completing its mandated assessment update for all properties, included in all assessed valuations for each completed unit at Bearfoot Creek an Extra Features Valuation of $1,000,000 for "Bearfoot Creek". This Extra Features Valuation is disproportionate as compared to the $272,000 Extra Feature Valuation for "Mtnside at Attitash" for the abutting trail side condominium units at Mountainside at Attitash and there is no rational basis for such an Extra Features Valuation, particularly when the undeveloped unit sites at Bearfoot Creek are assessed for $300,000."

R10A p. 82.

By letter dated October 10, 2018, the Clerk for the BTLA requested written proof that each taxpayer signed the abatement applications filed with the Town in compliance with Tax 203.02(b)(4). R10A p. 14. Since the applications had been signed and certified by Attorney Cooper, the Motion to Allow Exception for Taxpayer Signature Pursuant Tax 203.02(d) or In the Alternative Rule that Tax 203.02(d) Does Not Apply to an Appeal Signed by a New Hampshire Attorney At Law dated October 24, 2018 was filed with

the BTLA. R10A p. 16. Attached and incorporated in that motion were nine (9) exhibits. R10A pp. 23-61. The Town of Bartlett objected on November 13, 2018. R10A p.62. The BTLA issued its adverse decision on December 3, 2018. R10A p. 63.

A Motion for Rehearing with Affidavit and Exhibit dated December 17, 2018 was filed in a timely manner. R10A p. 63. The BTLA Order denying the Motion for Rehearing was issued on January 10, 2018. R10A p. 93. This Rule 10 appeal followed.

## SUMMARY OF ARGUMENT

In this property tax abatement matter involving thirteen similarly situated tax abatement requests, counsel for the Appellant taxpayers executed the original abatement applications himself having insufficient time to include the signatures of the thirteen individual applicants. Doing so was a violation of a BTLA Rule, which requires the applicants' signature, and precludes appeal unless "it was due to reasonable cause and not willful neglect." Tax 203.02(d) (emphasis added). The circumstances of this matter, where counsel was on a pre-planned out-of-the-country vacation in the month leading up to the application deadline, a lack of contemporaneous knowledge of the BTLA rule, and the fact that this involved 13 separate taxpayers (12 out of state), dictate that it was unjust and unreasonable to preclude the Taxpayers' appellate rights.

Alternatively and additionally, the BTLA Rule, Tax 203.02(d) as it seeks to preclude the attestation of a licensed attorney at law to the good faith of a property tax abatement application, is a unlawful and ultra vires exercise of the BTLA's rule making function as it invades the attorney-client relationship and the special authority allowed licensed attorneys-at-law in the State of New Hampshire.

Finally, if such rule is upheld, on these circumstances and in this case, such Rule, as applied, violates the Appellants' rights to the equal protection guarantee of the N.H. Constitution, subjecting such Appellants to disparate treatment based upon their use of an attorney-at-law.

## ARGUMENT

### I. THE BOARD OF TAX AND LAND APPEALS ERRED BY FAILING TO GRANT AN EXCEPTION TO TAX 203.02(d) PRECLUSION WHEN THE UNCONTROVERTED EVIDENCE ESTABLISHES THAT SUCH A RESULT WAS UNJUST AND UNREASONABLE.

The standard for review of BTLA decisions is statutory. See RSA 541:1; RSA 71–B:12. The BTLA's findings of fact are deemed prima facie lawful and reasonable. This Court will not set aside or vacate a BTLA decision "except for errors of law, unless [it is ] satisfied, by a clear preponderance of the evidence before [the Court], that such order is unjust or unreasonable." RSA 541:13; Appeal of Town of Charlestown, 166 N.H. 498, 499 (2014).

The BTLA's rule, Tax 203.02(d) provides:

> The taxpayer shall sign the abatement application. An attorney or agent shall not sign the abatement application for the taxpayer. An attorney or agent may, however, sign the abatement application along with the taxpayer to indicate the attorney's or agent's representation. The lack of the taxpayer's signature and certification shall preclude an RSA 76:16-a appeal to the board unless it was due to reasonable cause and not willful neglect. Appeal of Wilson, 161 NH 659 (2011)

Id. This Court in Wilson upheld the preclusive effect of this rule respect to actions by nonattorney representative/agent. 161 N.H. 659, 663-4 (2011). In Henderson Holdings at Sugar Hill, LLC v. Town of Sugar Hill, this Court, however, made it clear that the failure of the taxpayer to sign the application was not a jurisdictional issue to be interpreted strictly

mandating automatic dismissal:

> The fact that the Town lawfully denied the application for lack of signature and certification does not preclude the superior court from reviewing that decision if, in its discretion and pursuant to applicable legal or equitable principles, the circumstances warrant such review. Just as the BTLA may, according to its own rules, review unsigned or uncertified applications if the taxpayer can show reasonable cause and not willful neglect, see N.H. Admin. Rules, Tax 203.02(d), the superior court may also examine the record to determine whether, in its sound judgment, the taxpayer is entitled to consideration on the merits of its application.

164 N.H. 36, 40 (2012)

There is no doubt that the applications in these cases were signed and certified, not by the actual taxpayers, but by their attorney, over each name, as their attorney and on their behalf. R10A, pp. 23-35. Discussed in Section II below is whether in fact that signature and certification was sufficient in itself.

Upon the issue being raised by the BTLA Clerk, the Appellants, again by and through their attorney, filed a Motion to Allow Exception for Taxpayer Signature Pursuant Tax 203.02(d) or In the Alternative Rule that Tax 203.02(d) Does Not Apply To An Appeal Signed By A New Hampshire Attorney At Law. The attorney when signing and filing that Motion "shall not knowingly make a false statement of fact or law to a tribunal...." N.H. R. Prof. 3.3(a)(1); Tax 201.19. The signing of the motion constituted a certification that the facts in the document were true to the best of the signer's knowledge formed after reasonable inquiry, and that no pertinent facts have been excluded and subject to criminal prosecution for perjury.

Tax 201.16; RSA 674:1-3.

Included with the Motion were nine exhibits. R10A p. 16 - 61. The uncontroverted facts as outlined in that Motion and its Exhibits were as follows:

- On February 7, 2018, Attorney Cooper was informed that the Bearfoot Creek owners were interested in engaging him to seek tax abatements from the Town of Bartlett. Motion ¶6, R10A p. 17.

- Attorney Cooper told them he would be willing to do so, but he would be leaving in two days on vacation to Morocco, and would not return until February 26, 2018. Motion ¶8, R10A p. 17-18.

- On that same date, Attorney Cooper forwarded a representation agreement to the Association, which was accepted on February 20, 2018. Motion ¶9, R10A p. 18.

- Upon return on February 26, 2018, Attorney Cooper completed the applications, and due the exigencies of time signed on the Appellants' behalf as their attorney certifying that there was a good faith basis for the application, and that the facts as stated were true. Motion ¶12, R10A p. 18.

No hearing was held by the BTLA on its own motion in order to hear testimony to determine the credibility of the witnesses and the evidence. Tax 201.18(f).

The BTLA issued its adverse decision on December 3, 2018. R10A p. 63. On Page 7 of the decision (R10A p. 70), the BTLA stated:

> The board further finds the Motion is bereft of supporting facts that would warrant a finding, pursuant to Tax 203.02(d), that "[t]he lack of the taxpayer's signature and certification ... Was due to reasonable cause and not willful neglect. Appeal of Wilson, 161

NH 659 (2011)." The Motion's conclusory statements (see pp. 2-4 and 7) are not persuasive on this issue and do not satisfy the requisite burden of proof. (FN 5. For example, no specific reasons are stated in the Motion as to why the signatures and certifications could not have been obtained by the March 1 filing deadline (four business days after Attorney Cooper's return to a law office having other attorneys and support staff). The record presented indicates one attorney made a conscious decision not to obtain the Taxpayers' signatures and certifications prior to filing abatement applications on their behalves. In any event, his anticipated vacation plans do not constitute reasonable cause for making an "exception"to this requirement in the statute and the board's rules.

The Appellants filed a Motion for Rehearing. R10A p. 73. Included as exhibits were an Affidavit by Attorney Cooper R10A p. 87. Within that Affidavit, the following facts were affirmed in order to clarify some of the concerns raised by the BTLA:

- Prior to leaving on vacation and until his return to the office on February 27, 2018, the attorney had no recollection or knowledge of the tax payer signature requirement in Section H of the Abatement Application or Tax 203.02, and nor did he review the BTLA Rules or the form Abatement Application or investigate those requirements until he was engaged by Bearfoot Creek and returned from vacation. Affidavit ¶6, R10A p. 89.

- The attorney returned on the evening of February 26, 2017 and took up the drafting of the abatement applications on February 27, 2018. Affidavit ¶7, R10A p. 89.

- It was only on that date that he looked at and focused on the taxpayer signature requirement, and realized that it was impossible for him to complete the applications, and obtain the signatures of the 13 owners, 12 of whom were out-of-state, and 1 of whom was

in Florida in time to file the applications on time. Affidavit ¶8, R10A p. 89.

- "I may be many things, but I am not stupid. There is no way, whatsoever, that I would risk the substantive rights of my clients to obtain relief in order to pursue at their expense some agenda regarding the rights of attorneys. If I could have reasonable obtained their signatures in a timely manner after having discovered that requirement, I would have done so. " Affidavit ¶9, R10A pp. 89-90.

The BTLA denied the Motion for Rehearing by Order dated January 10, 2019; the BTLA's relevant findings were encapsulated in its order as follows:

> "The board finds the Motion fails to satisfy the "good reason" requirement for granting a motion and finds the Motion has no merit.... Moreover, an attorney's failure to review, understand, and/or comply with these requirements does not constitute "reasonable cause and not willful neglect," as plainly held in prior decisions. The Motion (p.6) quotes from the Affidavit to the effect that the attorney, in the relevant time period, "had no recollection or knowledge" of the taxpayer signature and certification requirement... basically because, by his own admission, he made no effort to ascertain or "investigate" them until "Feburary 27th...." Such arguable negligence... by an attorney does not excuse non-compliance or satisfy the relevant standards cited in the Decision.

R10A p. 93-94.

The BTLA found that reasonable cause did not exist, and found willful neglect by taxpayers' attorney by ruling the taxpayers' attorney had a duty as of February 7, 2018 to investigate signature requirement and it was arguable negligence to not do so until his return from vacation. The

issue for this Court is whether the taxpayers provided clear evidence that the lack of actual taxpayer signatures on the applications was "due to reasonable cause and not willful neglect."

A. The Lack of the Signatures and Certifications by the Thirteen Taxpayers was Reasonably Caused by the Delay in the Attorney's Return to the Country.

Uncontroverted evidence before the BTLA is normally sufficient to meet its burden of proof. See, New Hampshire College v. Town of Hooksett, BTLA Docket Nr. 0214-80 (8/14/91); 1981 WL 12157. Certainly the law in New Hampshire is the trier of fact is not required to believe uncontroverted evidence, but usually such issues arise in the context of weighing the testimony and relative credibility of witnesses. Brent v. Paquette, 312 N.H. 415, 418-9 (1989). In the case at hand, however, there was no hearing in which credibility could be at issue, and, nor did either of the decisions by the BTLA suggest that it found that the statements by the attorney were not credible. Instead, the BTLA found that the attorney's failure to investigate the signature requirements in sufficient time irrespective of his vacation was determinative on both the issue of reasonable cause and willful neglect. As such the clients/taxpayers lost their right of appeal. It is significant that the BTLA did not find that the actions of the taxpayers themselves in waiting for their attorney to return from vacation was unreasonable and thus an insufficient reason to grant relief, but instead it was the "arguable negligence... by an attorney" that was the unreasonable cause.

This focus by the BTLA on the actions of the attorney was not misplaced, for the BTLA correctly attributes the attorney's acts to the taxpayers as the taxpayers' agent. See, Paras v. City of Portsmouth, 115 N.H. 63, 67 (1975). Without unduly forecasting the argument in Issue II below, it is paradoxical for the BTLA to attribute the acts of the attorney to the clients in order to deny the clients relief from a rule that does not allow the attribution of the acts of the attorney on behalf of the client. Certainly this inconsistency is questionable in the context of a statutory scheme intending abatement procedures to be "free from technical and formal obstructions. It should be construed liberally, in advancement of the rule of remedial justice which it lays down." Arlington Mills v. Town of Salem, 83 N.H. 148, 154 (1927); GGP Steeplegate, Inc. v. City of Concord, 150 N.H. 683, 687 (2004).

The BTLA apparently, without legal basis, determined that the attorney had a legal obligation to investigate the signature requirement immediately and sufficiently in advance of the filing date in order to obtain the signatures. What the BTLA failed to consider was that the attorney had no legal obligation or duty to investigate that signature requirement until it was too late to reasonably obtain the signatures of the tax payers. From the outset, the attorney's engagement was conditioned upon his return from that vacation. The discussions that took place on February 7, 2018, established the conditions of that representation: the intervening event of the planned vacation to Morocco and the requirement of an executed representation agreement. R10A p. 36-42. A representation

agreement was sent and accepted on February 20, 2018. By its terms, "Neither representation nor any work on Client's behalf can or will commence until the Firm has received both an executed version of this Agreement...." Exhibit 3, ¶2, R10A p. 38

The Restatement of Law – The Law Governing Lawyers (3rd) provides in Section 14:

> A relationship of client and lawyer arises when:
> (1) a person manifests to a lawyer a person's intent that the lawyer provide legal services; and ...
> (a) the lawyer manifests to the person consent to do so....

REST 3d LGOVL §14. In this case, while the lawyer manifested a consent to do so, it was upon condition of the intervening vacation and upon execution of a representation agreement.

> "Lawyers generally are as free as other persons to decide with whom to deal, subject to generally applicable statutes such as those prohibiting certain kinds of discrimination. A lawyer, for example, may decline to undertake a representation that the lawyer finds inconvenient or repugnant.... A lawyer's consent may be conditioned on the ... negotiation of a fee arrangement." (emphasis added).

Id. Comments (b) and (e). The attorney reasonably and lawfully conditioned his consent to representation to a time of convenience, upon return from his vacation, and upon receipt of the representation/fee arrangement.

While the BTLA could have found that it was unreasonable for the taxpayers to have waited for the attorney to have returned from vacation,

the BTLA did not make that finding in denying the motion, but relied completely upon the actions/inactions of the attorney. The reasoning is incongruous and the request for relief was reasonable under these circumstances so long it was not caused by willful neglect.

B. The Failure of the Attorney to become Aware of the Taxpayer Signature Requirements prior to his Return was Not Willful Neglect.

The BTLA found that the "attorney's failure to review, understand, and/or comply with [the taxpayer signature] requirements does not constitute 'reasonable cause and not willful neglect.'" R10A p. 94. There are, however, no facts to allow the BTLA to make a finding that actions or inactions of the attorney rose to the level of "willful neglect".

In 2010, the BTLA in 66 Dracut Road v. Town of Hudson established its standard for "willful neglect" referring to Black's Law Dictionary (6th ed. 1990) as well as their important recollection of the underlying facts in Wilson, supra. .

> Black's Law Dictionary at 1600 (6th ed. 1990) defines "willful neglect" as ""[t]he intentional disregard of a plain or manifest duty, in the performance of which the public ... has an interest. Willful neglect suggest the intentional, conscious, or known negligence - the knowing or intentional mistake. Black's at 810, defines "intent" as "a state of mind in which the person seeks to accomplish a given result through a course of action." Black's at 810, defines "intentionally" as doing "something purposely, and not accidently. Black's at 472 defines "disregard" as "[t]o treat as unworthy of

> regard or notice; to take no notice of, to leave out of consideration to ignore, to overlook; to fail to observe.
>
> The board finds that facts here are easily distinguishable from those in Wilson. In Wilson, the taxpayer's representative disagreed with the board's rule that a taxpayer sign the abatement application and knowingly and purposely chose to ignore the board's rule...

BTLA Docket Nr. 24921-09PT (12/30/2010); 2010 WL 5647104.

There were no facts upon which the BTLA could find that the attorney, by awaiting until his return from vacation and being actually hired to research the form and requirements of the application, constituted an intentional disregard of a plain or manifest duty. The attorney certainly thought and had good reason based upon the language of the representation agreement and the email communications, to believe that he had no obligation to look into anything further until his return from vacation. Even if this Court should disagree and determine the attorney had a legal duty on February 7, 2019 to investigate those requirements, under these facts, there is no evidence that the attorney knowingly and purposely chose to ignore such a duty or actually knew of and ignored the board's rule. To the contrary the affidavit affirms the opposite. Affidavit ¶9, R10A pp. 89-90.

As the members of the BTLA documented in the 66 Dracut Road, supra, "[i]n Wilson, the taxpayer's representative disagreed with the board's rule that a taxpayer sign the abatement application and knowingly and purposely chose to ignore the board's rule...." There is no evidence

that the attorney in this case intended to knowingly and purposely ignored the rule to prove a point. Just the opposite as he testified by affidavit.

As such, the BTLA denial of relief from the preclusive effect of Tax 203.02(d) was both unjust and unreasonable by a clear preponderance of the evidence.

## II. THE SIGNATURE OF THE APPELLANTS' ATTORNEY AT LAW ON THEIR BEHALF ON THE ABATEMENT APPLICATIONS CERTIFYING THAT THE FACTS WERE TRUE AND A GOOD FAITH BASIS EXISTED FOR THE TAX ABATEMENT WAS LEGALLY BINDING AND SUFFICIENT.

RSA 311:1 provides that "[a] party in any cause or proceeding may appear, plead, prosecute or defend in his or her proper person, that is, pro se, or may be represented by any citizen of good character." On the other hand, "[n]o person shall be permitted commonly to practice as an attorney in court unless he has been admitted by the court and taken the oath prescribed in RSA 311:6." RSA 311:7. This Court has made it clear that "the legislature, when it enacted RSA 311:1 and its predecessors, did not intend to give nonlawyers free rein to practice law in circumvention of other statutory restrictions and of the powers delegated to this court to regulate the practice of law in the courts of this State." Bilodeau v. Antal, 123 N.H. 39, 44 (1983). Specifically, this Court has determined certain minimum qualifications to be met prior to be allowed to practice law. Sup.Ct.Rule 42. .

N.H. tax abatement appeals, however, have historically sounded in equity, with the essential question being "as justice requires." RSA 76-16-a(I); Ansara v. City of Nashua, 118 N.H. 879, 880 (1978); Edes v. Boardman, 58 N.H. 580, 585-6 (1879). "[A]s justice requires" confers broad discretion and equitable powers to abate taxes, with the limitation that only those taxes will be abated that the tax payer ought not to pay. Porter v. Sanbornton, 150 N.H. 363, 368 (2003). The statutory tax abatement appeal procedure is remedial in nature, with the only issue being whether the taxpayer is paying more than his share of the common tax burden. LSP Ass'n v. Town of Gilford, 142 N.H. 369, 373-4 (1997).

For over a century, the statutory scheme proscribing the tax abatement procedures were intended to be "free from technical and formal obstructions. It should be construed liberally, in advancement of the rule of remedial justice which it lays down." Arlington Mills, 83 N.H. at 154; GGP Steeplegate, 150 N.H. at 687. And in that regard, the legislature opened real estate tax abatement to nonlawyers, giving nonlawyers free rein to practice tax abatement law, with little or no limitation, including any requirement of good character. RSA 71-B:7-a. (e.g. "**Nonattorneys may commonly represent taxpayers** in RSA 76:16, RSA 76:16-a, and RSA 83-F appeals before municipalities and the board." Emphasis added). The BTLA was given authority to deny representation by an individual it deems to be improper, inappropriate, or unable to adequately represent the interests of taxpayers. Id.

The BTLA adopted Tax Part 207 (Tax Rules 207.1 – 207.15) in order to ensure individuals who would "commonly represent" taxpayers acted appropriately and adequately. The BTLA established minimal standards of conduct which, however, were only applicable to those commonly appearing, i.e. representing 4 or more taxpayers a year. Tax 207.02(a)(2) and Tax 203. The BTLA made no requirement of good character, and there was no review of such nonattorneys for "character and fitness", which is a requirement to practice law. The only consequence of a "commonly represent" nonlawyer failing to meet those standards of conduct was an after-the-fact suspension or revocation of the right to handle tax abatement matters. Tax 207.06. With respect to a nonattorney representing 3 or less taxpayers a year, Tax 207 does not apply and there is no regulation or consequence for poor behavior. As such, the BTLA was aware when drafting its rules of the pitfalls created by legislative mandate allowing free rein for nonlawyers to in essence practice tax abatement law.

A. <u>The Abatement Applications were Specifically Signed by the Appellants' Attorney on behalf of the Clients Making the Certification Required by RSA 76:16, III(g).</u>

The rule at issue in this case states:

> The taxpayer shall sign the abatement application. An attorney or agent shall not sign the abatement application for the taxpayer. An attorney or agent may, however, sign the abatement application along with the taxpayer to indicate the attorney's or agent's representation. The lack of the taxpayer's signature and

> certification shall preclude an RSA 76:16-a appeal to the board unless it was due to reasonable cause and not willful neglect. Appeal of Wilson, 161 NH 659 (2011).

Tax 203.02(d).

The BTLA relied upon this Court's decisions in Wilson supra. and Henderson Holdings, supra. to deny the underlying motion quoting extensively from both decisions. R10A pp. 65-67. At first blush, the decision in Wilson would appear to be conclusive. 161. N.H. at 662 (e.g. "Viewing the statutory scheme as a whole, we conclude that Rule 203.02(d) is a reasonable rule for carrying out the BTLA's functions..."). Contrary to the BTLA's belief, neither of these cases are directly on point, and are significantly distinguishable.

First, this Court in Wilson in addressing the statutory scheme noted:

> While under RSA 76:16, IV the "[f]ailure to use the form" described in RSA 76:16,III "shall not affect the right to seek tax relief," the information required by RSA 76:16, III, including the taxpayer's signature and certification that the information is true, affects the right to seek tax relief. To construe the statutory scheme otherwise would allow a taxpayer to apply for a tax abatement **without providing either a town or the BTLA with the necessary information to process such a request and without certifying that the information provided is true.** This would render the statute a virtual nullity, which we will not do. (Emphasis added.)

161 N.H. at 663-4. As emphasized above, the significance of the taxpayer's signature certifying that all of the required information as provided in the application was true.

The importance of the substance of the "certification" as compared to the form of "who or what signed" was reemphasize by this Court:

> RSA 76:16, III(g) requires the taxpayer to certify that he or she has a good faith basis for applying for an abatement and that the facts in the application are true. **Neither Lutter's signature nor the signed agent authorization form complied with this requirement.** (Emphasis added).

161. N.H. at 665. Without stating it directly it would appear, that if Lutter's [the agent] signature had included the certification, or if the signed agent authorization included authority to sign and certify, then Wilson may very well have had a different result.

The uncontested facts establish in this case that when the attorney returned from vacation, he fully completed the applications providing all of the information required and signed each application on behalf of each client, with his signature appearing above the typed name of each client as follows "[client name] by his/her/its attorney, Randall F. Cooper". R10A pp. 23-35. Even in those instances, when multiple taxpayers were involved, the attorney signed multiple times on behalf of each individual. R10A pp. 25, 29, 31, 33 and 35. In each and every such instance, the attorney, on behalf of the client, "certifies (certify) under penalties of RSA ch. 641 the application has a good faith basis and the facts as stated are true to the best of my/our knowledge." R10A pp. 23-35.

In the cases at hand the attorney signed on behalf of the clients and provided the proper certifications on each application. At least with

respect to the "substantive" issue, all the required information was provided and was certified as being true, and the applications included certifications of a good faith basis as well. This in itself should and could be significant enough of a distinguishing factor to require a different result.

B. The Attorney at Law had the Authority to Act for his Clients including the Right to Sign Applications on behalf of the Clients.

Notwithstanding, this Court in Wilson held "the information required by RSA 76:16, III, including the taxpayer's signature... affects the right to seek tax relief. There remains a doubt, however, given the "taxpayer's signature" reference, that a proper certification by a non-taxpayer would be sufficient. That is not quite what legislature prescribed to be included in the form.

> "A place for the applicant's signature with a certification by the person applying that the application has a good faith basis and the facts in the application are true."

RSA 76:16, III(g). The use of the word "applicant" would appear to leave open whether or not the signature must be only that of only the taxpayer his/her/itself.

In both Wilson, supra. and Henderson Holdings, supra. , this Court specifically limited its holdings to the "agent" portion of the Rule 203.02(d), e.g. "The taxpayer shall sign the abatement application. An attorney or agent shall not sign the abatement application for the

taxpayer. “

This distinction is particularly needed given the poor use of the word “agent” by BTLA. The BTLA defines “agent” as “a taxpayer’s or condemnee’s representative who is not an attorney.” Tax 102.03. The definition of “agent” includes all nonattorney representatives, both “commonly” (four taxpayers or more per year) or the occasional. On the other hand only those who “commonly” appear are obligated by the BTLA to comply with Tax 207 in order to continue to commonly appear.

The BTLA considers the actions or inactions of both attorneys and “agents”, as defined by the BTLA, as binding on the represented party. Tax 201.07. The BTLA requires such a nonattorney in his/her/its appearance to state that he/she/it has the party’s authority to appear and act on the party’s behalf and state that a copy was sent to the taxpayer. Tax 201.08(b). There is no means of protecting either the municipality or the taxpayer from the unauthorized application for a tax abatement by such a nonlawyer, short of the signature of the taxpayer. The BTLA in its regulations does not address how and what creates and defines the relationship between the “agent” and the “taxpayer”, the scope of the authorization and/or limitation with respect to the nonattorney representative. It only requires the “agent” not the “taxpayer” to certify the extent of the relationship. The term “agent” has significance in the law, as discussed below. The BTLA does itself and the public a disservice when it shortened “nonattorney representative” to “agent” which raises other connotations.

There are many and significant differences between a nonattorney tax representative and an attorney at law. Among those is the creation of an "agency" relationship. An agency relationship, or lack thereof, does not turn solely upon the parties' belief that they have or have not created one. VanDeMark v. McDonald's Corp., 153 N.H. 753, 756 (2006).

> "Rather, the necessary factual elements to establish agency involve: (1) authorization from the principal that the agent shall act for him or her; (2) the agent's consent to so act; and (3) the understanding that the principal is to exert some control over the agent's actions."

Id. at 760-61. Other than the statement by the nonattorney representative in the appearance, there is no other factual evidence to meet any of the VanDeMark requirements or to govern issues that should arise between the so-called "agent" and the taxpayer. Supra.

On the other hand, there are many areas of regulation and responsibility of attorneys at law established both by statute and common law. First, in addition to RSA 311:1, the attorney at law have a specific statutory right to appear in tax appeals. RSA 76:16-a,III e.g. ("The applicant and the town or city shall be entitled to appear by counsel, may present evidence to the board of tax and land appeals and may subpoena witnesses.") As noted above, this Court through its admission procedure takes steps to ensure lawyers are of good character and fitness, and are sufficiently educated to assist the public. Sup.Ct. Rule 42 and Sup.Ct.Rule 42B. The obligations and liabilities of attorneys are a matter of common law in the State of New Hampshire. See, Moore v. Grau, 171 N.H. 190, 196 (2018) (e.g. "As the foregoing implies, an action for legal malpractice is a

claim ... for liability unique to and arising out of the rendition of professional services.") . Furthermore, this Court by its adoption of the Rules of Professional Conduct, and Sup.Ct.Rule 37 and Sup.Ct.Rule 37A, holds its attorneys to standards keeping with the profession:

> The right to practice law in this State is predicated upon the assumption that the holder is fit to be entrusted with professional matters and to aid in the administration of justice as an attorney and as an officer of the court. The conduct of every recipient of that right shall be at all times in conformity with the standards imposed upon members of the bar as conditions for the right to practice law.
>
> Acts or omissions by an attorney individually or in concert with any other person or persons which violate the standards of professional responsibility that have been and any that may be from time to time hereafter approved or adopted by this court, shall constitute misconduct and shall be grounds for discipline whether or not the act or omission occurred in the course of an attorney-client relationship.

Sup.Ct. Rule 37(1)(c). There are no such professional responsibility or ethical requirements for nonattorney representatives or "agents".

As incorporated by Tax Rule 201.09, N.H. Rules of Professional Conduct Rule 3.1 requires all claims to have a basis in law and fact, N.H. Rules of Professional Conduct Rule 3.3 requires candor to the tribunal prohibiting all false statements of law and fact, and N.H. Rules of Professional Conduct Rule 3.4 requires fairness to opposing party and counsel. Furthermore, to the extent, an RSA 76:16 consideration of an abatement application by the Board of Selectmen is a nonadjudicative proceeding, N.H. Rule of Professional Conduct Rule 3.9 applies all of the

applicable portions of Rules 3.3 and 3.4 to such a nonadjudicative proceeding. It is of particular significance that every N.H. lawyer upon his admission to the practice of law "solemnly swear[s] or affirm[s] that you will do no falsehood...." RSA 311:6[1].

There is no doubt that the BTLA in undertaking its "hear and determine" power and authority, including questions of taxation, is acting in a judicial capacity. RSA 71-B:5(II); Appeal of City of Keene, 141 N.H. 797, 800 (1997). And the BTLA has "original concurrent jurisdiction with the superior court to determine questions relating to taxation de novo." In re Land Acquisition, LLC, 145 N.H. 492, 494 (2000). N.H. attorneys are permitted and allowed to submit pleadings and initiate lawsuits on behalf of clients with only the signature of the attorney, which constitutes a certification that he or she has read the filing; that to the best of his or her knowledge, information and belief there is a good ground to support it; and that it is not interposed for delay. N.H. Supr. Ct. Rule 7(e).

It is settled law in the State of New Hampshire that the judicial branch of government retains ultimate authority to regulate the practice of law. Petition of N.H. Bar Ass'n, 110 N.H. 356, 357 (1970) ("The power and authority of the supreme court to supervise and regulate the practice of law has been recognized and acknowledged from an early date by custom, practice, judicial decision and statute.") "Attorneys are officers of the court.... Consequently regulating the practice of law is a core function

[1] Some senior members of the NH Bar when acting as a witness have noted that being sworn in was unnecessary since he or she took that oath on the date of their admission to the N.H. Bar.

of the judicial branch." In re Petition of New Hampshire Bar Ass'n, 151 N.H. 112, 116-17 (2004). "When the actions of one branch of government defeat or materially impair the inherent functions of another branch, such actions are not constitutionally acceptable." Id.

As noted above, the BTLA when considering the merits of the request for relief, the BTLA attributed the attorney's acts to the taxpayers as the taxpayers' agent. See, Paras, 115 N.H. at 67. And unlike the unknown or unspecified authority of nonattorney representatives, lawyers truly are the agents of their clients given the special relationship that exists.

> The liberal rule of New Hampshire in enforcing agreements of counsel is grounded upon our recognition of the special relationship that exists between counsel and their clients. Justice Oliver Wendell Holmes, then a member of the Massachusetts Supreme Judicial Court, spoke of this relationship as one "of the unity of person between attorney and client" in a case involving an oral settlement made by counsel in open court.

Halstead v. Murray, 130 N.H. 560, 566-7 (1988). These known and enforceable rights and obligations between attorneys and their clients arising out of this special relationship are far different from the uncontrolled environment of nonattorney tax representatives that the legislature politically imposed on tax proceedings. It is no wonder, that the BTLA wanted to confirm as early as possible that the information and good faith proceeding was certified to by the taxpayer, when represented by a nonattorney representative. But to extend such an exclusion to matters which are generally within the authorized practice of law (the

right of attorney to act and sign on behalf clients in all proceedings) is an unauthorized excursion by the BTLA into matters within the purview of this Court in regulating attorneys as officers of this Court.

Leaving aside the general authority of attorneys at law, the actual and specific authority of the attorney was confirmed in the representation agreement executed on February 20, 2018. R10A pp. 37-42. In Section 1, the scope of representation included representing the Association and its members, through the abatement process including "applying for abatement with the Town of Bartlett...." R10A p. 37. Albeit, after the fact, each of the individual taxpayers confirmed the common engagement via the Association, including the authorization of the attorney to execute all documents on his/her/its behalf. Rule10A pp. 49-61. Both generally, due to the special relationship between attorneys and clients, and specifically as allowed by the representation agreement, the attorney was authorized to sign and certify the abatement applications on behalf of the appellants.

## III. THE APPELLANTS ARE BEING DENIED THE EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE N.H. CONSTITUTION WHEN THEIR ABATEMENT APPLICATIONS SIGNED UPON THEIR BEHALF BY THEIR ATTORNEY AT LAW RESULT IN A DISMISSAL OF THEIR APPEALS.

### A. Tax 203.02(d) By Treating Differently Those Persons Engaging an Attorney at Law to Sign and Certify an Abatement Applications on their Behalf from those Persons Appointing

an Attorney in Fact pursuant to RSA 564-E:204(5)(c) to do so is Subject to Intermediate Scrutiny under the N.H. Constitution.

As discussed above, Tax 203.02(d) does not permit an attorney-at-law to sign on behalf of the client to initiate the tax abatement application with the municipality, irrespective of the terms of the relationship between the attorney and client, and the authorization the attorney obtained. As a result, as occurred in this case, the BTLA will dismiss the appeal unless the applicant can establish reasonable cause and not willful neglect. On the other hand, attorneys-in-fact, with a power of attorney granting only general authority with respect to real property, are authorized to "manage or conserve an interest in real property... including... paying, assessing, compromising, contesting taxes or assessments or applying for and receiving refunds in connection with them....: RSA 564-E:204, 5, C. A classification exists between similarly situated persons: applicants for tax abatement by attorneys at law, and those applicants for tax abatement represented by attorneys in fact. These similarly situated classes are treated differently: the former must sign the tax abatement application themselves irrespective of distance, convenience or authority to allow the attorney at law to sign application; and, the latter whose attorney in fact can handle all of the abatement issues on behalf of the principal.

The equal protection guarantee is essentially direction that all persons similarly situated should be treated alike. Part I, Article 14, N.H.

Const.; Lennartz v. Oak Point Associates, P.A., 167 N.H. 459, 462 (2015). Such a difference in classification must reasonable promote some proper object of public welfare or interest. Id. The possible review standards are commonly known as strict scrutiny, intermediate scrutiny and the rational basis test. Id. Classifications involving important substantive rights are subject to intermediate scrutiny. In re Sandra H., 150 N.H. 634, 638 (2004). In order to provide some substantive distinction between intermediate scrutiny and the rational basis test, this Court held in 2007:

> [T]hat intermediate scrutiny under the State Constitution requires that the challenged legislation be substantially related to an important governmental objective. The burden to demonstrate that the challenged legislation meets this test rests with the government.... To meet this burden, the government may not rely upon justifications that are hypothesized or invented post hoc in response to litigation, nor upon overbroad generalizations.

Community Resources for Justice, Inc. v. City of Manchester, 154 N.H. 748, 762 (2007).

The tax abatement statutes are remedial in nature, and "provide the exclusive remedy available to a taxpayer dissatisfied with an assessment made against his property." LSP Ass'n, 142 N.H at 374. This exclusive right to apply for an abatement, and then to appeal that decision to either the BTLA or the Superior Court is an important substantive right to protect of a right established by the N.H. Constitution.

> Taxes ... must, under our Constitution, be both proportional and reasonable.... Taxes must be not merely proportional, but in due proportion, so that each individual's just share, and no more, shall fall upon him.... What each is bound to contribute being a debt of

> constitutional origin and obligation, no part of the share of one can be constitutionally exacted of another. And as any one's payment of less than his share leaves more than their shares to be paid by his neighbors, his non-payment of his full share is a violation of their constitutional right.

Rollins v. City of Dover, 93 N.H. 448, 449-50 (1945). "Consequently, in petitions for abatement, justice requires, upon equitable principles, such an order that the plaintiff shall pay, as nearly as may be, precisely his share of the tax burden." 93 N.H. at 450.

### B. The BTLA Cannot meet Its Burden under Intermediate Scrutiny to Establish that that the Differring Treatment is Substanitally Related to an Important Government Interest.

Since the exclusive remedy to seek abatement of taxes is subject to intermediate scrutiny, the issue is whether that difference in treatment by the BTLA of taxpayers represented by attorneys-in-fact and taxpayers represented by attorneys-at-law is substantially related to an important government interest. The burden is on the BTLA to (1) identify the important government objective for the classification, and (2) establish how the classification, i.e. the difference in treatment, is substantially related to achieving that objective. Community Resources, 154 N.H. at 761-62. That requirement was specifically raised by the Taxpayers in Paragraph 13 (c) of the Motion for Rehearing. RA10 p. 85.

It is the understanding of counsel, that Solicitor General has declined to participate in this appeal on behalf of the BTLA, and

reconfirmed that decision by email dated May 16, 2019. Presuming that remains unchanged, the only submission in support of this burden is by the BTLA when it tangentially addresses the issue in one paragraph of its January 10, 2019 decision denying the Motion for Rehearing. The BTLA noted: (1) there is no evidence that any of the Taxpayers had engaged any "attorney-in-fact"; (2) the representation agreement only engaged the attorney to "render professional services"; and, (3) the representation agreement does not satisfy the specific requirements for a valid power of attorney. R10A pp 82-3. In the best possible light, the BTLA's response is that attorneys at law in rendering "professional services" are in some manner not providing as sufficient service or protections as a properly appointed "attorney in fact".

There may be some government interest, albeit it not articulated, in determining that those representing taxpayers in initiating tax abatement procedures are actually authorized to do so, and the taxpayer has some protections such the duties and liabilities as prescribed for attorneys in fact. RSA 564-E: 114 and RSA 564-E:116. As discussed above, there is a substantial difference in the statues, rules and enforcement of those rules in tax abatement proceedings between nonattorney representatives and attorneys at law, particularly when the legislature for apparent political reasons allowed nonlawyers to commonly represent taxpayers in abatement matters. It is possible to understand that with respect to nonattorney representatives, there is certainly no means of ensuring that application for abatement when signed by the nonattorney

representative is actually authorized before actually initiating the abatement process  Nor are there protections for the taxpayer or recourse by the municipality for extraneous abatement applications.

That is absolutely incorrect with respect to attorneys at law.  In many respects, if not all, the duties imposed on an attorney-in-fact pursuant to RSA 564-E:114 are duties that are undertaken by attorneys at law in rendering professional services pursuant to both common civil law, fiduciary law, and the N.H. Rules of Professional Conduct.  For as this Court articulated in <u>In re Wehringer's Case:</u>

> "[T]he relationship of the lawyer to the client and the court is one of fiduciary underpinnings.... The relationship of the lawyer to the client and the court is not determined by the rules governing the activities of the market place, but is determined by the higher standards provided in the Code and Rules....  A lawyer, because he or she is a member of a learned profession governed by a code of conduct reflecting human experience, may not be permitted to have ethical conduct measured against a lesser standard than that which this court has recently applied to others. The affairs of fiduciaries are viewed by this court against a narrow gauge.

130 N.H. 707, 720-21 (1988).  Thus even without the formality of an executed power of attorney, the relationship and liability of attorney at law with his or her client is at least a similar if not higher standard than that of an attorney at fact.  And the liability of attorney's is certainly equal to or greater than that of an attorney in fact.  RSA 564-E:117 states that "[a]n agent that violates this chapter **may** be held liable, and an agent that knowingly, willfully, or recklessly violates this chapter **shall** be

liable....” (Emphasis added). Attorneys are subject to civil liability for failing to exercise reasonable professional care, skill and knowledge in providing legal services to a client. Cabone v. Tierney, 151 N.H. 521, 527 (2004). Attorneys are also subject to discipline, including disbarment, for violating the Rules of Professional Conduct. Sup.Ct. Rule 37. Lastly, even municipalities have a remedy if an attorney at law is misbehaving in their opinion by being able to bring a grievance within that Attorney Discipline System. Id.

It is difficult at best to determine what if any is the government’s objective in this classification no less its importance, and it is impossible to determine how the classification advances that objective one iota.

## CONCLUSION

For the reasons articulated above, the taxpayers/appellants request this Court to reverse the decision of the BTLA and allow their RSA 76:16-a Appeals filed with the BTLA on August 27, 2018 to proceed on the merits.

Respectfully Submitted,
The Appellants,

By its Attorneys,
COOPER CARGILL CHANT, P.A.

Dated: June 17, 2019 By: 

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Appellants request that Randall F. Cooper be allowed fifteen minutes for oral argument.

I hereby certify that on June 17, 2019 that a copy of the foregoing was forwarded to opposing counsel via the Supreme Court's electronic filing system.

I hereby further certify, pursuant to Supreme Court Rule 16(3)(i), that the appealed decision is in writing and is appended to this brief.

I hereby further certify that this brief complies with Supreme Court6 Rule 16(11) word limit as required by Supreme Court Rule 26(7).

Dated: June 17, 2019 By: 

Randall F. Cooper
N.H. Bar No. 501

# State of New Hampshire

## Board of Tax and Land Appeals



Governor Hugh J. Gallen
State Office Park
Johnson Hall
107 Pleasant Street
Concord, New Hampshire
03301-3834

**In re: 13 Town of Bartlett Appeals**
**(see attached docket list)**

**ORDER**

The "Taxpayers'" attorney filed a 14-page Motion For Rehearing ("Motion"), along with a 5-page Affidavit (Exhibit A to the Motion), on December 17, 2018 with respect to the December 3, 2018 Decision dismissing each of these 13 tax year 2017 appeals;[1] the Motion (p. 1) contends the "[D]ecision was unlawful and/or unreasonable." The "Town" filed an objection to the Motion on December 21, 2018 stating there are no "grounds for a rehearing." The suspension Order issued on December 24, 2018 is hereby dissolved and the Motion is denied.

The board finds the Motion fails to satisfy the "good reason" requirement for granting such a motion and therefore finds the Motion has no merit. (See RSA 541:3 and Tax 201.37, both cited in the Motion). Nothing in the Motion or the Affidavit[2] warrants either a "rehearing" or a reconsideration of the Decision.

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[1] The Decision was issued in response to an October 25, 2018 Taxpayer motion entitled: "Motion to Allow Exception for Taxpayer Signature Pursuant [to] Tax 203.02(d) or in the Alternative Rule That Tax 203.02(d) Does Not Apply to an Appeal Signed by a New Hampshire Attorney at Law." While that pleading is certainly "part of the record," the board does not agree with various characterizations of the Decision in the Motion (see, e.g., pp. 2-3). Shortly after issuance of the Decision, the board granted a request from the Taxpayers to consolidate these 13 appeals for purposes of any possible rehearing motion or appeal. (See December 13, 2018 Order.)

[2] See Affidavit, pp. 1 and 2, where the attorney recites his "retired from the full time practice of law" status as well as his "past experience with tax abatements . . . and procedural issues of filing an abatement application in a timely manner." His professional status and experience, however, have no bearing on the issues resolved in the Decision. In other words, the taxpayer signature and certification requirements are the same whether an abatement application is filed by a taxpayer, a non-attorney representative under RSA 71-B:7-a (see Decision, p. 6) or an experienced or inexperienced attorney.

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As further discussed in the Decision (see pp. 2-7), the Motion errs in its repeated assertions that signature and certification by an "attorney at law" on an RSA 76:16 tax abatement application can substitute for the taxpayer signature and certification requirements plainly stated in this statute. These requirements were confirmed in two recent supreme court decisions: Appeal of Wilson, 161 N.H. 659 (2011); and Henderson Holdings of Sugar Hill, LLC v. Town of Sugar Hill, 164 N.H. 36 (2012). The plain meaning of the statute and the board's rules [see Tax 203.02(b)(4) and (d)], combined with the extensive analysis in those decisions, belie the argument in the Motion (p. 7) that these specific signature and certification requirements "plac[e] form over substance."

Moreover, an attorney's failure to review, understand and/or comply with these requirements does not constitute "reasonable cause and not willful neglect," as plainly held in prior decisions.[3] The Motion ( p. 6) quotes from the Affidavit to the effect that the attorney, in the relevant time period, "had no recollection or knowledge" of the taxpayer signature and certification requirements (stated in the statute and the board's rules) basically because, by his own admission, he had made no effort to ascertain or "investigate" them until "February 27th [when] he realized the need for the signatures of each of the Taxpayers." Such 'arguable' negligence (id.) by an attorney does not excuse non-compliance or satisfy the relevant standards cited in the Decision. In this respect, the Motion (p. 11), citing Paras, 115 N.H. at 67,

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[3] See, e.g., Arlington American Sample Book Company v. Board of Taxation, 116 N.H. 575, 576 (1976) (affirming dismissal of appeal where taxpayer instructed attorney to file an appeal and "appeal was prepared in proper form. . . with the intention that it be filed" in a timely manner, but attorney delayed in filing the appeal; dismissal proper even if delay "is due solely to oversight or omission by the taxpayer's counsel [citing Paras v. City of Portsmouth, 115 N.H, 63, 66-67 (1975)]"; cf. Appeal of City of Concord, 161 N.H. 169, 172 (2010) (citing Arlington and further noting "the plain language" of the tax abatement statutes "admits of no exceptions").

acknowledges that "[i]n tax abatement proceedings," a taxpayer "is bound by the acts of his attorney, including acts of omission or neglect." (See Paras and the further authorities cited therein.) Further, the burden of proof on factual questions regarding 'reasonable cause/not willful neglect' "lies with" the Taxpayers, cf. Appeal of Steele Hill Development, 121 N.H. 881, 885 (1981), a burden they have not satisfied.

The additional facts presented in the Motion, such as the statement that 12 of the 13 Taxpayers "were out of state" (see Affidavit, p. 3), do not satisfy this burden or otherwise excuse non-compliance. All are property owners in New Hampshire and nothing in the record reflects any attempt by the Taxpayers' attorney to contact any of them regarding the signature and certification requirements or to satisfy these requirements via alternative means (such as through an electronic submittal) prior to the March 1 statutory deadline for the abatement application. Again, RSA 76:16, III(g) is clear on its face that what is required is "the applicant's signature [and] certification," not the signature and certification of the representative who may have filed the abatement application on his or her behalf, whether or not the representative is an attorney at law. (See Decision, pp. 5-6.)

Nor is there merit in the reference in the Motion (p. 12) to one provision ["RSA 564-E:204(5)(c)"] of the Uniform Power of Attorney Act (codified in RSA ch. 564-E). There is no basis to conclude any of the Taxpayers retained anyone to act as their "attorney in fact": the record simply demonstrates the attorney was hired to "render professional services" (as set forth in the "scope of representation" provisions in the "Representation Agreement" signed well

before the March 1, 2018 filing deadline for the abatement application[4]). The Representation Agreement does not satisfy the specific requirements for a valid power of attorney under the Uniform Power of Attorney Act and the Motion does not contend otherwise. (See RSA 564-E:105, RSA 564-E:106 and RSA 564-E:113.)

In summary, and for all of these reasons, the Motion is denied.

Pursuant to RSA 541:6, any appeal of the Decision must be by petition to the supreme court filed within thirty (30) days of the date on this Order, with a copy provided to the board in accordance with Supreme Court Rule 10(7).

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Michele E. LeBrun, Chair

Albert F. Shamash, Member

Theresa M. Walker, Member

**CERTIFICATION**

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Randall F. Cooper, Esq., Cooper Cargill & Chant, P.A., 2935 White Mountain Highway, North Conway, NH 03860, Taxpayers' attorney; Town of Bartlett, Selectmen's Office, 56 Town Hall Road, Intervale, NH 03845; and Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258, Contracted Assessing Firm.

Dated: January 10, 2019

Anne M. Stelmach, Clerk

[4] See Motion, p. 5; it is by no means clear why the attorney had no apparent difficulty getting the Representation Agreement signed and "accepted" by "February 20, 2018," in advance of the March 1 filing deadline, but not the abatement applications he intended to file on behalf of each Taxpayer. His prior motion to excuse non-compliance with the taxpayer signature and certification requirements (see fn. 1) does not mention his clients' unavailability to sign the abatement application for any reason, including the alleged out-of-state location of all but one of them.

| Docket #: | Case Name: |
|---|---|
| 29009-17PT | Keith R. Mader 2000 Revocable Trust v. Bartlett |
| 29010-17PT | Bearfoot Creek, LLC v. Bartlett |
| 29011-17PT | McInnis, Robert & Marie v. Bartlett |
| 29013-17PT | Slalom Realty Trust v. Bartlett |
| 29014-17PT | JR Realty Trust v. Bartlett |
| 29015-17PT | McPhearson, Carol v. Bartlett |
| 29016-17PT | Blair, Bryce & Kathi v. Bartlett |
| 29018-17PT | Eileen A. Figueroa Rev. Tr. v. Bartlett |
| 29019-17PT | Joseph A. & Mary F. Carlucci Living Tr v. Bartlett |
| 29020-17PT | Gallagher, Mark J. & Paula J. v. Bartlett |
| 29021-17PT | TJF Trust v. Bartlett |
| 29022-17PT | Redondi, Christopher & Amy v. Bartlett |
| 29023-17PT | Engeocom Bartlett, LLC v. Bartlett |