

2012 WL 10097648 (N.H.) (Appellate Brief)
Supreme Court of New Hampshire.

Appeal of the CITY OF NASIICA (Board of Tax and Land Appeals).

No. 2012-0252.
October 25, 2012.

Brief of Appellee Marijane H. Kennedy

Sylvia E. Bicwster Esquire (Bar No. 20064), Law Offices of Sylvia F. Brewster, PLLC, 420 Coun Street, Ponsmputh, New Hampshire 03801, (603) 766, 0777.

*i TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF CASES AND AUTHORITIES ii
QUESTION PRESENTED FOR REVIEW 1
STATEMENT OF THE CASE AND FACTS 1
SUMMARY OF THE ARGUMENT 3
ARGUMENT
The Board of Tax and Land Appeals properly determined that the good faith encumbrance on Appellee's actual residence should have been deducted by the Appellant in calculating the Appellee's net assets under RSA 72:39-a 3
CONCLUSION 10
CERTIFICATE OF SERVICE 10
ADDENDUM TABLE OF CONTENTS 11

*ii TABLE OF CASES AND OTHER AUTHORITIES

Cases
Appeal of Ann Miles Builder, 150 N.H. 315 (2003) 8
Appeal of Ned Wilson, 161 N.H. 659 (2011) 6
Appeal of Town of Bethlehem, 154 N.H. 314 (2006) 7
Opinion of the Justices, 115 N.H. 228 (1975) 7
Pennelli v. Town of Pelham, 148 N.H. 365 (2002) 6, 7
State v. Balukas, 155 N.H. 337 (2007) 4
State v. Pierce, 152 N.H. 790 (2005) 5
Statutes
RSA72:39-a 1, 2, 3, 4
RSA 72:39-a, I (c) 4, 5, 8
RSA72:39-b 2, 4
Ordinances
Nashua Revised Ordinances, as amended, Section 295-3 2
Nashua Revised Ordinances, as amended, Section 295-4 2
Other Authorities
Webster's Ninth Collegiate Dictionary (1991) 5

*1 QUESTION PRESENTED FOR REVIEW

Did the Board of Tax and Land Appeals properly determine that the good faith encumbrance on Appellee's actual residence should have been deducted by the Appellant in calculating the Appellee's net assets under RSA 72:39-a?

STATEMENT OF THE CASE AND FACTS

In this case, the facts are not in material dispute. Appellee Marijane Kennedy (hereinafter “Mrs. Kennedy”), a resident of the City of Nashua (hereinafter “the City”), filed an application with the City for real estate tax relief pursuant to the **elderly** exemption under [RSA 72:39-a](#) for tax year 2011. [RSA 72:39-a](#) provides relief to qualifying **elderly** taxpayers by removing the value of an applicant's actual residence from the assets attributed to them, and by enabling the applicant to deduct the value of any good faith encumbrance from all remaining assets when determining “net assets”.

The City denied Mrs. Kennedy's application on the ground that her assets exceeded the maximum amount allowed under its ordinance. Mrs. Kennedy appealed the City's denial to the Board of Land and Tax Appeals (hereinafter “the BTLA”). At hearing, the BTLA heard testimony from the supervisor of the City's assessing department, Louise Brown, that it was the practice of the City to deny as a deduction from “net assets” any mortgage indebtedness on a taxpayer's actual residence, yet to permit as a deduction any other good faith encumbrances (including any mortgage indebtedness on the taxpayer's other properties). Transcript of Louise Brown, hereinafter “T.”, at pgs. 9-10,17.

*2 Following the hearing, the BTLA found that Mrs. Kennedy had met her burden of demonstrating that she was entitled to the **elderly** exemption. The BTLA ruled that the City had erred by *not* deducting the mortgage indebtedness which encumbered Mrs. Kennedy's actual residence. The parties concur that if the deduction had been deducted from “net assets” by the City, Mrs. Kennedy would have qualified for the **elderly** exemption under [RSA 74:39-a](#).

In her application to the City, Mrs. Kennedy listed her assets and noted, in a comment at the bottom of the page, that her list included a “42,000 equity loan” which she “disputed as an asset”. Addendum of Appellee at pg. 13. At that time and at all times relevant to this appeal, the City adopted the **elderly** exemption protocol as established by state law. Nashua Revised Ordinances, as amended, Section 295-3; [RSA 72:39-a](#); [RSA 72:39-b](#). Addendum of Appellant, hereinafter “Appellate's A.” at pgs. 10, 12,13,14. The City set the maximum limits for an **elderly** taxpayer's “net income” and “net assets” as prescribed by statute. Nashua Revised Ordinances, as amended, Section 295-4. Mrs. Kennedy's “net income” fell within the qualifying limit. Her “net assets”, however, when aggregated by the City with the amount of the equity loan, exceeded the \$125,000 maximum limit established by the City.

There is no dispute that Mrs. Kennedy would have been granted the exemption if the City had excluded the \$42,000 equity loan encumbering her actual residence in its computation of her “net assets”. Mrs. Kennedy's eligibility for the exemption was otherwise established. The only issue in this appeal is whether, in light of the plain language of the statute designed to preserve home ownership, and the underlying legislative policy to provide real estate tax relief to the **elderly** taxpayers of this state with limited incomes and assets, it was proper for the City *3 to have included the value of Mrs. Kennedy's equity loan to disqualify her, and to reject her application. Both Mrs. Kennedy and the BTLA think not.

SUMMARY OF THE ARGUMENT

The plain meaning of the **elderly** exemption statute establishes that all good faith encumbrances, including any encumbrance on an **elderly** taxpayer's actual residence, must be deducted from the taxpayer's net assets in determining eligibility under [RSA 79:24-a](#). The legislature did not intend to exclude both the residence and any good faith encumbrance on the residence from the calculation. Construing the net asset provision of the statute so that *all* good faith encumbrances shall be deducted from net assets is consistent with the purpose of the statute. The City's method of calculating a taxpayer's net assets, which does not deduct good faith encumbrances on the taxpayer's actual residence, is illogical and unreasonable. Deducting all good faith encumbrances including encumbrances on the taxpayer's actual residence is more logical and more consistent with the legislature's intent to protect the state's **elderly** taxpayers from excessive taxation.

ARGUMENT

THE BOARD OF TAX AND LAND APPEALS PROPERLY DETERMINED THAT THE GOOD FAITH ENCUMBRANCE ON APPELLEE'S ACTUAL RESIDENCE SHOULD HAVE BEEN DEDUCTED BY THE APPELLANT IN CALCULATING THE APPELLEE'S NET ASSETS UNDER [RSA 72:39-a](#).

1. *The plain meaning of the statute establishes that a good faith encumbrance on a taxpayer's actual residence should be deducted in a net asset calculation under [RSA 72:39-a](#).*

*4 This case requires a straightforward examination and interpretation of the **elderly** taxpayer exemption statute, RSA 72:39-a, which sets forth the requirements for an exemption. In interpreting a statute, this Court first looks to the language of the statute itself and, if possible, construes that language according to its plain and ordinary meaning. *State v Balukas*, 155 N.H. 377, 378 (2007). [RSA 72:39-a](#), 1(c) requires the taxpayer seeking the exemption to own:

....net assets not in excess of the amount determined by the city or town for the purposes of [RSA 72:39-b](#), excluding the value of the persons' actual residence and the land upon which it is located up to the greater of 2 acres or the minimum single family residential lot size specified in the local zoning ordinance.... "Net assets" means the value of all assets, tangible and intangible, minus the value of any good faith encumbrances. "Residence" means the housing unit, and related structures such as an unattached garage or woodshed, which is the person's principle home, and which the person in good faith regards as home to the exclusion of any other dwelling places where the person may temporarily live. "Residence" shall exclude attached dwelling units and unattached structures used or intended for commercial or other nonresidential purposes.

(Emphasis added.) With regard to the language of the first sentence above, the BTLA observed:

The legislature could have prescribed in [RSA 72:39-a](#), I (c) that both the residence and any good faith encumbrance on the residence should be excluded in determining eligibility, but no such statement appears in the statute and the board cannot add such words to change the meaning of the statute when there is no basis for doing so.

Appellate's A. at pg. 18.

The first sentence above contains no reference to any encumbrance; it refers only to the value of the residence. The sentence contains no words modifying the word "value". The legislature could have added language to modify or further describe the word "value": it did not. As further observed by the BTLA in its decision:

*5 There is also no basis for interpreting the phrase "value of the person's actual residence" to mean, in effect, "market value less any good faith encumbrances on the residence". If that is what the legislature meant, surely different words would have been employed, such as *equity* value of the residence.

Id.

Thus, the meaning of the word "value" in the first sentence of [RSA 79:39-a](#), I (c) should not be presumed to mean any particular type of value but rather should be given its ordinary effect. Presumably, the legislature intended to exclude the value of the taxpayer's actual residence because such an exclusion might permit more **elderly** taxpayers to avoid excessive taxation and remain in their homes. Beyond that, the legislature's intent cannot be ascertained. *See State v. Pierce*, 152 N.H.790, 791 (2005).

In a similar vein, the above language defining the term "net assets" should be given its plain meaning; namely, that the *net* asset calculation under the statute is derived by excluding the value of *any* good faith encumbrance. As observed by the BTLA,

the meaning which it assigned to the term “net assets” is supported by the dictionary definition of the adjective “net” which signifies something free from all charges and deductions, distinguishable from a “gross” amount. Appellate's A. at pg. 17, citing Webster's Ninth New Collegiate Dictionary (1991). The BTLA also noted:

Nowhere does the statute distinguish good faith encumbrances on the residence from other good faith encumbrances; instead, the statute requires the deduction of the value of any good faith encumbrance on all assets, whether the encumbrances secure the residence (through mortgages) or some other asset {through auto loans, for example).

Id. at pg. 18.

*6 In construing the statute, the BTLA properly ascribed the ordinary meaning to the words used, and recognized but did not consider what the legislature might have said, or add language that the legislature did not see fit to include. See *Appeal of Ned Wilson* 161 N.H. 659, 662 (2011).

II. The formal legislative history of the statute should not be considered.

As acknowledged by the City in its brief, the legislative history regarding the statute is unclear and “no formal legislative history clarifies the net asset calculation”. Appellant's Brief at pg. 6. Even so, in this case reliance upon legislative history is inapposite because the plain meaning of the statute is clear. The seminal case regarding the **elderly** tax exemption is *Pennelli v. Town of Pelham*, 148 N.H. 365 (2002). In *Pennelli*, this Court construed the meaning and the scope of the net assets provision and refused to consider the town of Pelham's reliance upon the legislative history of the statute. This Court concluded that “RSA 72:39-a, I (c)... is clear on its face...and the plain language of the statute speaks for itself”. *Id.* at 368-369. Thus, the formal legislative history of the statute should not be considered in this case.

III. The plain meaning of the statute as it was construed by the BTLA is consistent with the purpose of the **elderly tax exemption.**

The evident purpose of the exemption is to protect **elderly** homeowners from the loss of their homes by reason of taxation beyond their means. *Opinion of the Justices*, 115 N.H. 228, 232 (1975). In *Pennelli*, this Court established that the net assets provision, RSA 72:39-a, 1 (c), explains how to calculate an individual applicant's net assets, and it does not define the scope of the statute. In this case, the City argues without authority that the statute creates “a *7 formula to determine the value of taxpayer's assets available to pay the property taxes” and that the net assets calculation is “not intended to benefit a taxpayer by using the amount of a mortgage on their residence to reduce the value of their net assets”. Appellate's Brief at pg. 7. Clearly, this is an argument as to the *scope* of the net assets provision, an approach that was expressly rejected by this Court in *Pennelli*. Furthermore, this argument rests upon the false assumption that the legislature was primarily concerned with the availability of taxpayer assets to pay property taxes. Nothing in the statute supports such an argument. The legislature could have been equally concerned with the taxpayer's ability to pay his or her mortgage (which, after all, remains to be paid regardless of whether the taxpayer is deemed eligible for the exemption). The statute is silent on the subject of the availability of taxpayer assets and the uses to which they should be put. Moreover, nothing in the statute suggests that a taxpayer should have to sell or mortgage or liquidate assets in order to pay property obligations. The purpose of the legislature in enacting the statute was the protection of **elderly** taxpayers from the financial hardship of excessive taxation. It is evident that the net asset calculation was devised to aid in furnishing a snapshot, so to speak, of the taxpayer's financial circumstances, an approach which is more consistent with the overall purpose of the statute than the overly narrow interpretation offered by the City in its brief. The BTLA's decision in this case was consistent with the legislature's intent to protect **elderly** taxpayers who have limited financial resources and who might otherwise fall prey to an escalating real estate tax burden. Review of the BTLA's interpretation of the **elderly** tax exemption is *de novo*. See *Appeal of Town of Bethlehem*, 154 N.H. 314, 318 (2006). This Court is the final arbiter of the intent

of the *8 legislature as expressed in the words of the statute considered as a whole. *Appeal of Ann Miles Builder*, 150 N.H. 315, 318 (2003).

The City argues that Mrs. Kennedy's good faith encumbrance on her actual residence should be excluded in calculating her net assets because her actual residence is excluded and the encumbrance should, so to speak, follow the asset. Appellate's Brief at pg. 7. This argument misapprehends the plain meaning of the statute which, in effect, sets forth a two tiered analysis. The first tier of the analysis involves the first sentence of RSA 72:39-a, I, (c) in which the value of the taxpayer's actual residence is excluded, creating a pool of assets to be considered - an "adjusted" pool, so to speak. The second tier of the analysis involves the "net assets" language, in which the "adjusted pool" of assets created by the first sentence is further reduced by all good faith encumbrances, without regard to the type of asset or the type of encumbrance. If the legislature had wanted to limit the type of encumbrance which could be deducted from the "adjusted" pool of assets, it would have done so. It did not.

IV. *The City's approach to calculating an elderly taxpayer's net assets is illogical, unfair and unequal as applied.*

As concluded by the BTLA, allowing the deduction of any good faith encumbrance to determine net assets is more logical and reasonable than the City's argument that a mortgage or other good faith encumbrance on the taxpayer's residence should be ignored. Appellate's A. at pg. 19. In its decision, the BTLA considered a hypothetical:

...For example, a taxpayer who has reported assets of \$120,000 with no mortgage on her residence is certainly better off financially (in terms of having resources to pay property taxes) than a taxpayer who has reported assets of \$145,000 and a \$40,000 *9 mortgage encumbrance on her residence. Yet, under the City's approach, the first taxpayer would qualify for the elderly exemption and the second would not, even though the net assets of the first taxpayer are higher by \$15,000, even if the residences have the same value (footnote omitted). *The Board finds such an approach to be illogical and less reasonable, given the recognized purpose of the elderly exemption statute.* (emphasis added).

Id.

The illogic of the City's approach is even more apparent when one considers that some taxpayers could be "underwater" with their mortgages; in other words, some taxpayers could have mortgages that actually exceed the value of their residences. As established at the hearing, the City does deduct good faith encumbrances on other assets such as boats and loans and second homes. T. at pgs.16, 17. Yet elderly taxpayers whose net income is so low as to make them ineligible for conventional loan financing, and who mortgage their residences to finance necessary expenditures, could be denied the exemption while other elderly taxpayers, with greater resources and better credit, could be granted the exemption. The City's approach to calculating net assets is unfair and unequal as applied; the legislature cannot have intended such an anomalous result.

*10 CONCLUSION

For the foregoing reasons, the BTLA properly determined that the mortgage on Mrs. Kennedy's residence should not be included in calculating her net assets. The decision of the BTLA should be affirmed.