

STATE OF MAINE
KENNEBEC, ss.

BOARD OF PROPERTY TAX REVIEW
DOCKET NO. 2009-031

TERRI L. BROWN,

Petitioner

v.

DECISION

TOWN OF BUCKSPORT,

Respondent

This fact-intensive appeal, arising out of somewhat unusual circumstances, presents two questions: (1) whether the Assessor for Respondent Town of Bucksport, when assessing a penalty for removal of land from tree growth, correctly determined the just value of the removed land; and (2) whether the Assessor correctly imposed on the taxpayer an additional penalty of 25% on the removal penalty that is mandated (absent a showing of cause) if the land is removed from tree growth without notice to the assessor. We answer the first question in the affirmative, and the second question in the negative.

I. BACKGROUND

These questions flow from parts of two sections of the Tree Growth Tax Law, 36 M.R.S. §§ 571-584-A. The two sections, 579 and 581, are related and have a similar consequence—the imposition of a penalty upon removal of land from tree growth—but they operate in different circumstances. Section 579 contains eight unnumbered paragraphs. It first describes the procedure by

which one applies to have land classified as tree growth. The sixth and seventh paragraphs address notice to the assessor of change of use of tree growth property and the consequence of not notifying the assessor of a change. Both in 2009, when this case arose, and now, section 579(¶¶ 6 & 7) have provided as follows:

It shall be the obligation of the owner or owners to report to the assessor any change of use or change of forest type of land subject to valuation hereunder.

If the owner or owners fail to report to the assessor a change of use as required by the foregoing paragraph, the assessor may collect such taxes as should have been paid, shall collect the penalty provided in section 581 and shall assess an additional penalty of 25% of the foregoing penalty amount. The assessor may waive the additional penalty for cause.

“[I]t is the taxpayer [who] is ultimately required to inform the Town as to change in use of the classified property or he or she risks the imposition of an additional penalty of 25%.” *Davis v. Town of Lamoine*, No. 2002-003, at 3 (Mar. 10, 2003). That is, section 579(¶ 6) demands that the tree growth landowner notify the assessor of a change of use, and section 579(¶ 7) instructs the owner what will happen if she does not so notify the assessor.

Section 579(¶ 6) neither says when the owner must inform the assessor of a change of use nor specifies that the notice be in any particular form—written or oral. The tree growth owner is commanded to notify the assessor at some point of a change of use of her land that will allow the assessor to revalue the property timely and appropriately. The purpose of the section is to permit the assessor to fulfill her responsibilities to remove the land from tree growth

and reassess it because it no longer is eligible for the benefit of reduced taxation based on specified tree growth values. This will lead to the imposition of a penalty, calculated according to section 581(3). As punishment for not notifying the assessor of a change of use, thus burdening the assessor unnecessarily, section 579(¶ 7) exposes a landowner to an enhanced penalty.¹

By comparison, section 581 addresses those circumstances in which a tree growth owner wants to remove land from tree growth. Voluntary removals are preferred administratively at least because they avoid the need to investigate changes in use. *Roderick v. Town of Crystal*, No. 97-103, at 1-2 (BPTR Nov. 14, 2000). Section 581(1) is phrased in terms of a “request,” but not to suggest that a taxpayer needs to obtain permission from the assessor to remove property from tree growth. The Board is unaware of any case so holding or any practice giving an assessor a veto power over a land owner’s desire to remove property from tree growth. Rather, a “request” emphasizes that it is the assessor, not the landowner, who is withdrawing the land from tree growth.

As with section 579, withdrawal of land from tree growth under section 581 leads to a penalty therefor pursuant to section 581(3). Three subsections are germane to a withdrawal in the circumstances presented. Section 581(1) as relevant to this case in 2009 stated in pertinent part:

¹ In the Board’s experience, this section has sometimes applied to what we have called “inadvertent or unintentional” withdrawals, *Dale Henderson Logging, Inc. v. Town of Steuben*, No. 2008-016, at 11 (BPTR Sept. 1, 2009)—that is, circumstances where a landowner neglects (even for understandable reasons) to notify the assessor of a change of use, even minor, that already has occurred. In these instances, the owner typically does not mean to lose tree growth status.

If the assessor determines that land subject to this subchapter [the Tree Growth Tax Law] no longer meets the requirements of this subchapter, the assessor must withdraw the land from taxation under this subchapter. . . . An owner of land subject to this subchapter may at any time request withdrawal of any parcel, or portion thereof, from taxation under this subchapter by certifying to the assessor that the land is no longer to be classified under this subchapter.²

A voluntary removal, under section 581, can be accomplished only “by certifying” that intention to the assessor; since 2010 the certification has to have been in writing.

Section 581(2) likewise requires something in writing from a landowner who intends to remove “a portion of a parcel”: she is to “file with the assessor a plan showing the area withdrawn and the area remaining subject to taxation

² As recounted in *Hunt, Trustee, Hunt Family Irrevocable Trust v. Maine Revenue Services*, Nos. 2009-020 & -021, at 3-4 (BPTR Dec. 20, 2011), section 581(1) was amended by P.L. 2009, ch. 577, effective July 12, 2010, by enacting a new section 581(1-A) to replace the second sentence of the previous enactment (having to do with notice by the assessor to a taxpayer before she withdraws land from tree growth, which we have elided in the text because it is not at issue in the present case), and section 581(1) came to read, much as had the first and third sentences of the previous section 581(1), as follows:

If the assessor determines that land subject to this subchapter no longer meets the requirements of this subchapter, the assessor must withdraw the land from taxation under this subchapter. An owner of land subject to taxation under 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.

Thus, both the former and the present versions of section 581(1) have required a certification to the assessor that land is no longer to be enrolled in tree growth. No Maine case instructs what certification means in this context, and because neither party has at all raised the issue we do not address it.

[as tree growth].” If a plan or certification has not been provided, the assessor would treat the withdrawal as one without notice of a change of use, thereby subjecting the withdrawal to the 25% added penalty under section 579(¶ 7). The fact of timely notice (and, now, written notice) of an intent to remove land from tree growth takes away the possibility of the added penalty.

Whereas section 579(¶¶ 6 & 7) no more than imply that a change of use disqualifies land from classification as tree growth, that result is mandated by section 581(1). It dictates that the assessor must withdraw from tree growth any land no longer eligible for classification as such. Because section 579(¶¶ 6 & 7) do not explicitly say as much, section 581(1) in this respect speaks to the withdrawal of land from tree growth under both section 579 and section 581.

Next, section 581(3) establishes the rule that “[i]f land is withdrawn from taxation [under the Tree Growth Tax Law], the assessor shall impose a penalty upon the owner.” Section 581(3) is thus applicable to withdrawals under both section 579(¶¶ 6 & 7) and section 581(1), though they are of different sorts and arise in different circumstances, including that section 579(¶ 7) enforces an additional penalty (absent waiver for cause) if the landowner does not notify the assessor of a change of use.

Section 581(3) provides two alternative methods for calculating a penalty for withdrawal, to be imposed by supplemental assessment. *Id.* §§ 581(4), 713-B. Whichever method, in section 581(3)(A) or 3(B), yields the greater penalty is to be used. Both methods are centered on just value as of the time of withdrawal, for the last sentence of section 581(3) states:

For purposes of [the Tree Growth Tax Law], just value at the time of withdrawal is the assessed just value of comparable property in the municipality adjusted by the municipality's certified assessment ratio.

Petitioner Terri L. Brown does not challenge the methodology Town Assessor Carol N. Oliver used in making her calculations, but instead asserts that Oliver did not correctly determine the fair market value of the property, on which the withdrawal penalty is based, with the effect of overstating the penalty, and that Oliver should not have sought to enforce a 25% added penalty because Petitioner, through her husband, did notify Oliver of the Browns' change of use of the property.

Mrs. Brown applied for abatement of the penalties, which Oliver denied. Petitioner timely appealed to the Board. *See* 36 M.R.S. § 583. The Board convened on April 21 and 22, 2011, with Members John Hodgkins and Richard Partridge and Chairman Eric E. Wright present. Petitioner called Matthew Erickson, Esq., Town Assessor Oliver, and her husband, Donald F. Brown, Esq. as witnesses.³ The Town called Oliver, for further questioning, as its only witness. The Board received numerous documents as exhibits. Following the close of evidence, the Board deliberated and held, by votes of 3-0, that the Petitioner had not carried her burden of proving that the withdrawal penalty

³. When the case was scheduled for hearing at an earlier date, Mr. Brown, a Maine attorney, was prepared to both litigate the case for his wife and testify as a witness on material issues. The Chair of the panel noted that this apparently would violate Rule 3.7 of the Maine Rules of Professional Conduct, which generally bars an attorney from "act[ing] as advocate at a tribunal in which the lawyer is likely to be a necessary witness." The hearing was postponed.

was excessive but had proved that the Assessor's imposition of an added penalty of 25% was manifestly wrong.

II. FACTS⁴

The subject property, located at 1442 Bucksmill Road in the Town and designated as Map 23, Lot 11 on the Town's tax maps, was entirely undeveloped, raw land of approximately 73 acres, classified as tree growth since 1982, when purchased by Brad and Bonnie Mortensen in 1998 for \$25,000. To access and live on the land and provide utilities for it required more effort than the Mortensens wanted to expend, and they did nothing to improve the land. They came close to selling the land in 2004, and it remained on the market at least from 2005-2006 forward, during which time Mr. Mortensen wanted, according to Erickson, to "unload it."

Mr. Brown looked at the land in 2007-2008 but was not yet ready to buy. He learned it was in tree growth and wondered what penalties would be effected if some or all the land was removed from the tree growth classification. Mr. Brown conducted most of the Browns' dealings on the property,⁵ including

⁴ We noted at the very outset that this appeal is somewhat unusual. For one thing, Petitioner and her husband began to change the use of land in tree growth before they owned it, presenting at least some conceptual assessment problems for the Town's Assessor, as we later discuss. Further, there remain several disputed points, or dates stated vaguely or inconsistently in the evidence. While we take note of these, many of them become insubstantial and do not deter our resolution of the case.

⁵ As will be seen, Petitioner came to be the sole owner of the property, but her husband handled almost every aspect of their dealings with the Town. This would seem to be permissible under the 36 M.R.S. § 579(¶ 8) ("For the purposes of this section, the acts of owners specified in this section may be taken by an authorized agent of an owner"), and at no point has the Town questioned the propriety of Mr. Brown's acting for his wife at the municipal level.

negotiating for it in 2008 and reaching agreement with the Mortensens that the Browns would be responsible for paying the penalty associated with withdrawing the land from tree growth. The Browns bought the land from the Mortensens in two payments, in December 2008 and February 2009 for, they asserted, \$25,000, although the real estate transfer tax declaration signed by Mrs. Brown and Bonnie Mortensen in late April 2009—after both payments—states the purchase price was \$13,000.⁶ The land was deeded to Petitioner alone for reasons apart from *ad valorem* taxation.

On January 2, 2009, Mr. Brown sent Town Assessor Oliver a handwritten memo, with attached drawings, that told her the land was “under contract,” and wrote:

I have sketched the road we plan to build and the general location for our house. We expect to use about 1 acre and about 2 acres for the building.

I am anxious to know the tax that is required to be paid. I can be reached on cell @⁷

⁶ In their testimony, the Browns could not explain the discrepancy. Mrs. Brown indicated only that she and her husband were having someone at her husband’s law office correct the form if a mistake had been made. Mr. Brown added that either the \$13,000 entry is a mistake or there was a second declaration; he did not know. He did not give the transfer tax form any thought—perhaps the reason that, as he said, the Town may have got the idea they paid less for the land than they did. Oliver never received a transfer tax declaration listing the purchase price as \$25,000, but neither did she particularly challenge the Browns’ claimed purchase price at the municipal level or before the Board.

⁷ Mr. Brown testified before the Board that he had discussed the anticipated penalties once or twice before this with Oliver; indeed, he testified that his memo of January 2nd was prompted by a previous instruction from Oliver. At first, she could not recall any such conversations, however, and did not include reference to any such conversations in a written timeline that she prepared. Nor did she see any notes in the Mortensens’ file (they were then the owners) to support there having been calls, and she was certain she had not calculated any penalties for the Browns previously. But late in her testimony Oliver conceded that Brown had called her to inquire about

Oliver later understood the undefined reference to “1 acre” to be for an access road that was eventually built. More importantly, she interpreted this memo only as a request to know what the penalty would be for withdrawing three acres from tree growth. She testified that she made a preliminary calculation and left a message for Mr. Brown about the penalty for three acres. According to Oliver, Mr. Brown called her on January 12th, unhappy or concerned about the penalty, and wanted Oliver to calculate what the penalty would be for removing one acre, two acres, and the entire parcel from tree growth. She roughly calculated penalties for one and two acres and the whole lot, and left a message for him later that same day.⁸

Also the same day, January 12th, Mr. Brown secured an entrance permit, and on January 26th, a land use permit. On February 6th Oliver learned from the Town’s Code Enforcement Officer that a “building” permit—that is, the land use permit—had been issued for the property on January 26th, and she wrote to Mr. Brown that “changing the use on any classified forestland without first notifying the assessor will increase the Tree Growth Penalty for removal of the

the penalties, and she instructed him to send her something in writing—which he did on January 2nd. This would seem, in the end, to corroborate Mr. Brown that there was some earlier communication, but it does not undermine Oliver’s testimony that she had not undertaken any calculations previously. The dispute is inconsequential.

⁸ Mr. Brown by contrast testified that after the January 2nd memo there was no contact with Oliver until he received a letter from her dated February 6, 2009. That letter from her does not, however, say anything about the amounts of the penalties as she had calculated them, and it appears Mr. Brown by then knew she had done that work. These events necessarily occurred between January 2nd and February 6th, as Oliver said.

land by 25%," adding that she hoped "this friendly notice will keep you from being penalized more than necessary"⁹

Mr. Brown spoke to Oliver upon receiving her letter, prompting him to respond on February 9th at, he said, her invitation, by writing, "I have begun building . . . I failed to notify the Bucksport Assessor that I was beginning construction." He also professed contrition: "I apologize for my error and hope that I can avoid a 25% penalty." On February 12th, upon learning from Mr. Brown that he had begun building,¹⁰ Oliver told him that she would hold off on assessing a withdrawal penalty, for a change of use, until the land was transferred to his wife and him—an event Mr. Brown testified he told Oliver would not occur for some months even though he had the land under contract. Oliver's thinking was that it would be unfair to assess the penalty to the Mortensens when, although they remained the owners of record but were not in possession of the land (having moved to Utah), they were not responsible for the change of use.

Mr. Brown recalled before the Board that the property was transferred in two deeds (the second merely for a right of way) sometime in March or April. In

⁹ Mr. Brown argued when testifying that Oliver essentially promised that if he wrote her a letter he could avoid the penalty. The import of Oliver's testimony was obviously to the contrary.

¹⁰ Mr. Brown by contrast asserted in his testimony that he had made a mistake when he wrote that he had begun building, when what he was actually referring to was accessing and clearing the house site. He clarified that he corrected himself by telling Oliver (or meaning to tell her) that he *would be* building, and that he began actual building at the end of February or in the first two weeks of March with the foundation being put in. He thereby acknowledged that he had begun changing the use of the property.

fact, as Oliver learned from Mrs. Brown on April 30th, when she called Oliver from the registry of deeds, the deeds for the property were transferred on February 26th, but were not recorded until April 30th.¹¹ Oliver received a tree growth application, dated March 10th, from Mrs. Brown on March 19th—before she knew Mrs. Brown was the sole owner.¹² Because she did not know Mrs. Brown then owned the land and because the application did not include a required map of hardwood, softwood, or mixed forest,¹³ Oliver returned the application as being incomplete.

Oliver confirmed the change of use of the property by visiting the land in February and on or just before April 1st to investigate the change of use that she had learned of. By the latter date, construction of the Brown's residence

¹¹ We use the date stated on one deed in evidence from the Mortensens to Petitioner as the date of transfer, although Oliver stated it to be February 27th at one point and February 28th at another. Her misstatement might have been induced by the transfer tax declaration in evidence incorrectly stating the transfer to be February 27th. Similarly, she stated the date of recording of the deed either as April 29th or as April 30th.

¹² The application, handwritten by a forester, Eugene Mahar, listed five acres as being removed from tree growth—two for roadways and three for a building area. While Mr. Brown complained that he was penalized by Oliver for removing the two roadway acres from tree growth when those had never been in tree growth, in fact Oliver assessed only three acres with a withdrawal penalty. This was consistent with Mr. Brown's intention, and Oliver recognized that .83 acres used for a road had not been in tree growth.

¹³ 36 M.R.S. § 579(¶ 1) outlines what an application for valuation as tree growth, called a "schedule," must consist of, including "showing the location of each forest type," and, as noted previously, section 581(2) requires a landowner removing a portion of property from tree growth, as occurred here, to "file with the assessor a plan showing the area withdrawn and the area remaining subject to taxation [as tree growth]."

was well under way. Finally, Mrs. Brown resubmitted the application,¹⁴ calling for the removal of three acres from tree growth. In May, after Oliver discovered that the deeds passed ownership to Mrs. Brown and the transfer of the land had been recorded, she recalculated the penalty.

Oliver's view was, and the Town's position remains, that the Browns had never requested the removal of three acres, or any acreage, from tree growth.¹⁵ Oliver calculated the withdrawal penalty by valuing the subject property according to the Town's Land Schedule 15, the product of a town-wide revaluation conducted by Oliver in 2008. The land schedule, created by Oliver, resulted from her study of sales of comparable parcels over the course of the preceding three years, as tested against current sales.

¹⁴ The record made before the Board never established the date of the resubmission; Mr. Brown affirmatively testified he did not know when it was submitted for the second time, and Oliver never said. In any event, Oliver accepted it, which apparently was substantially the same as the first application, as a proper and sufficient application because she then knew Mrs. Brown had become the true owner.

¹⁵ After the fact—that is, after Mrs. Brown had applied for an abatement of the penalty assessment—Mr. Brown sought to correct his letter of February 9th in which he had acknowledged that he had not notified Oliver that he had begun construction. He posited (1) that he had indeed notified her of a change of use at least as of his January 2, 2009, memo, if not before in conversations with her; (2) that she also knew of the change of use based on her learning of his having been granted a land use permit on January 26th; and (3) that their application for tree growth classification, received on March 19th, again put her on notice of a change of use.

The Board in *Damian v. Town of Newcastle*, No. 93-01, at 3 (BPTR Apr. 19, 1994), implicitly rejected an argument like Mr. Brown's second argument above. Here, Mr. Brown's obtaining the land use permit is of limited use because it was not something initiated by him to alert Oliver of a change of use, and it is the *owner's* obligation to inform the assessor of a change of use. 36 M.R.S. § 579(¶ 6). In the present case, however, Oliver herself attached significance to the land permit as a basis for concluding the Browns had changed the use of the land, so that having a withdrawal penalty assessed against them was warranted.

Pursuant to Land Schedule 15, Oliver assigned non-tree growth values for each parcel in the Town at \$22,500 for an undeveloped one acre as a base lot (and \$45,000 for a developed base lot)¹⁶; \$5625 for the second acre as a front acre at with no road frontage; and \$1800 for the third acre as a rear acre. As required by 36 M.R.S. § 581(3), Oliver took into account the Town's assessment ratio—here, 100%—and applied the stated values for purposes of determining the difference between just value and the value of three acres in tree growth as determined annually by Maine Revenue Services based on data collected by the Maine Bureau of Forestry, *see* 36 M.R.S. § 576, by which she could assess the penalty for withdrawal, effective April 1, 2009.¹⁷ Oliver assessed Petitioner a penalty of \$5918.40 and the 25% added penalty, of \$1119.45, for a total of \$7037.85 for three acres having been removed from tree growth.

To support her conclusion that Land Schedule 15 legitimately reflects the fair market value of the three dozen categories of land that she had assessed throughout the Town, including those pertinent to her imposition of the penalty on Petitioner's withdrawn three acres, Oliver produced records of two properties that she believed were comparable to the subject property. One, of

¹⁶ Oliver originally had discounted the \$22,500 value by 10% when estimating the penalties at Mr. Brown's request because there then was no improved road giving access to the house site, but she eliminated the discount when finally making the supplemental assessment after road construction.

¹⁷ In this case, Oliver applied the alternative in section 581(3)(B), by which, for properties in tree growth for 20 or more years, as here, the penalty is 20% of the difference between the tree growth value of the property and its just value at the time of withdrawal. *See* Maine Revenue Services, Bulletin No. 19 at § 11(E).

75 acres, sold on June 3, 2008, for \$63,000, or \$840 per acre. The other, of 59.57 acres, sold on February 13, 2009, for \$56,000, or \$960 per acre. Both, despite being accessible only by abandoned roads, unlike the subject property, sold for well above what the Browns paid for their land. Therefore, Oliver testified that the Browns' purchase was not in keeping with other sales and that it did not make sense to her that the Browns' land would sell for the price it did.¹⁸

Petitioner, by contrast, insists that the withdrawal penalty should have been based on her and her husband's purchase price, \$25,000, or approximately \$342 per acre. This approach rests on the principle that fair market value may be derived from the owner's opinion of value and rejects the validity of the Town's method of assessing property on a town-wide basis. Oliver disputed Petitioner's approach because she understood section 581(3) of the Tree Growth Tax Law to define just value as being derived from the assessed value of comparable property in the Town at the time of withdrawal of the subject property. She also found no cause for waiving the 25% additional penalty.

III. GOVERNING LAW

In *Brackett v. Town of Bristol*, Nos. 2007-010 & -011, at 12 (Nov. 21, 2008), another current use case (involving working waterfront), we summarized

¹⁸ Oliver cast off a third property as not truly comparable because it was an intra-family sale of different kind of land, wetlands, and not of arm's length. We note that, even as to that sale at presumably less than true value, the price, \$25,000 for 53 acres, was nearly a third higher than the sale by the Mortensens to the Browns.

the pertinent rules for approaching abatement cases:

- (1) In abatement appeals before the Board, a challenged assessment is presumed correct;
- (2) The taxpayer has the burden to prove the assessment is manifestly wrong;
- (3) This may be done by demonstrating either that the subject property was substantially overvalued; that there was unjust discrimination; or that the assessment was fraudulent, dishonest, or illegal;
- (4) In a claim of overvaluation, “manifestly wrong” has been defined to mean that the judgment of the assessors was irrational or so unreasonable in light of the circumstances that the property is substantially overvalued and an injustice results;
- (5) To prove the assessors were manifestly wrong, the taxpayer must do more than simply impeach the assessors or otherwise demonstrate flaws in their methodology or conclusions; and
- (6) Rather, the taxpayer must further demonstrate affirmatively how the flaws would have resulted in overvaluation, by offering credible evidence of value against which the assessment may be compared.

An abatement is the proper remedy for an overvaluation of property. *Capodilupo v. Town of Bristol*, 1999 ME 96, ¶ 4, 730 A.2d 1257, 1258.

We may add, for present purposes, that a challenge to valuation in a tree growth case is by definition an abatement case, 36 M.R.S. § 583, as we have noted many times, *e.g.*, *Prentiss & Carlisle Management Co., Inc. v. Town of Merrill and Town of Smyrna*, Nos. 2010-007 & -006, at 2 (BPTR Aug. 4, 2011); *Keyank National Ass’n v. Town of Phippsburg*, No. 2006-002, at 7 (BPTR Dec. 11, 2006), and this includes abatements of withdrawal penalties, which are based on fair market value at the time of withdrawal of the land from tree growth. *E.g.*, *Dale Henderson Logging, Inc. v. Town of Steuben*, No. 2008-016, at 8 (BPTR Sept. 1, 2009).

We have also often noted that the Law Court has said that fair market value is the equivalent of true or just value. *E.g.*, *Prentiss & Carlisle Management Co.*, Nos. 2010-007 & -006, at 3 n.2; *Harold MacQuinn, Inc. v. Town of Hancock*, No. 2009-014, at 16 (BPTR May 23, 2011). Fair market value is the price that a willing seller would pay a willing buyer at a fair public sale. *E.g.*, *Town of Sanford v. J & N Sanford Trust*, 1997 ME 97, ¶ 13, 694 A.2d 456, 459; *Frank v. Assessors of Skowhegan*, 329 A.2d 167, 173 (Me. 1974). By 36 M.R.S. § 581(3), quoted on p. 6 above, the assessor is to determine just value, with reference to the value of comparable properties, at the time land is withdrawn from tree growth, in order to calculate withdrawal penalties.

IV. DISCUSSION

Petitioner does not assert that she and her husband did not change the use of the property, nor could she. *Smith v. Town of Livermore Falls*, No. 2010-008, at 2-3, 6 n.3 (BPTR Sept. 29, 2010) (Order on Jurisdiction) (building of new house and road); *cf. Curtis v. Town of Sherman*, No. 2004-005, at 2 (BPTR Jan. 19, 2005) (Order on Jurisdiction) (placement of a temporary small camp on sills); *Damian v. Town of Newcastle*, No. 93-01, at 1-2 (BPTR Apr. 19, 1994) (land owners conceded building of hunting camp required withdrawal). That is, she does not claim that no withdrawal penalty is in order. Rather, Petitioner, supported by her husband, challenge both (A) the amount of the recapture penalty imposed by Oliver for their removing three acres from tree growth, and

and (B) the 25% added penalty imposed by Oliver for changing the use of the property without first notifying her.

A. The recapture penalty.

As has the Town here, we have characterized the withdrawal penalty as a means to recapture revenue lost when land is in tree growth and taxed at lower, current use values. *Elisofan v. Town of Vinalhaven*, No. 91-65, at 3 (BPTR Sept. 17, 1992). We deal in this case with a legislatively mandated methodology for determining the penalty to be assessed at the time property is withdrawn from tree growth. The Tree Growth Tax Law requires that land taken out of the tree growth program is to be valued according to fair market value. 36 M.R.S. § 576-A (“Areas other than forest land within any parcel of forest land shall be valued on the basis of fair market value”). The imposition of penalties on property withdrawn from the tree growth program is made with reference to “the assessed just value of comparable property.” *Id.* § 581(3). That is, a municipality is not only entitled to rely on an array of assessments conducted on a town-wide basis if such a study has been made, but would be remiss not to do so.

Petitioner’s contention that the recapture penalty was too high is essentially an argument that Oliver overvalued the removed three acres. That is, she attacks Oliver’s determination of the just value of the three acres at the time of withdrawal and the calculation of the penalty based on that value according to the methodology provided to her by the Legislature. But by relying on section 581(3), Oliver followed the law as she was sworn to do. As

Mr. Partridge observed during deliberations, land value schedules are not appraisals, and cannot be; but in their own right they bring values from the market that an assessor may rely on in calculating the penalties in this area of the law.

Petitioner would have us rely solely on her opinion of value based on a cost per acre basis. While an owner, by virtue of ownership alone, is generally entitled to offer an opinion of value, *see Harold MacQuinn*, No. 2009-014, at 19 (discussing Maine law), the “owner’s opinion of value of [her] property is only as good as the witness’ qualifications and the logic of [her] opinion,” *ibid.*, and we have “reject[ed] any assertion that an owner’s opinion evidence of value, *by itself, always* constitutes credible evidence of value.” *Id.* at 23.

In this case there are reasons to regard Petitioner’s opinion of value with skepticism. First, Petitioner had little association with the property and, from all the record shows, minimal knowledge about it. Second, 11 years after the Mortensens bought the property for \$25,000, the Browns paid the very same amount.¹⁹ Third, this came after the property had been for sale for several years, during which time Mr. Mortensen wanted to “unload it.” Fourth, the Mortensens had moved to Utah and certainly had no further plans for the property. These facts in the aggregate indicate the Mortensens were willing to accept any plausible offer just to be rid of the property—even less than they

¹⁹ We have noted there is evidence from the transfer tax declaration, not otherwise explained or rebutted by evidence independent of the Browns’ testimony, that the Browns paid only \$13,000. While we accept that the purchase price was \$25,000, even this means the property did not appreciate in value in the 11-year interval between 1998 and 2009.

might reasonably have held out for—and that the Browns got the benefit of something less than a true arm's length transaction. Finally, this conclusion is confirmed by the sales prices of the comparable properties brought to our attention.

A landowner cannot establish that an assessment is manifestly wrong in the absence of evidence that a withdrawal penalty is excessive. *Pierce v. Maine Revenue Services*, No. 2006-007, at 10 (BPTR Feb. 13, 2007); *Zorn v. Town of Lubec*, No. 2004-007, at 4 (BPTR Sept. 21, 2005). Oliver correctly determined the fair market value of the land when withdrawn; Petitioner has not challenged her penalty calculations that then followed. Thus, because Petitioner has not carried her burden to present credible evidence of value she has not proved that Oliver's assessment of the three acres removed from tree growth by her and her husband was manifestly wrong.

B. The 25% added penalty.

Oliver's imposition of an added penalty of 25% conflates concepts from sections 579(¶¶ 6 & 7), change of use, and 581(1), voluntary withdrawal. Moreover, her approach has required something, a certified writing *now* prescribed in section 581(1) or a drawn plan in section 581(2), that section 579(¶ 7) has not demanded. But as we said earlier, sections 579 and 581 are related because a change of use under the former section necessarily leads to a withdrawal of property from tree growth under the latter section. Oliver was correct to understand that if a tree growth owner fails to notify her of a change of use that has occurred, she is to withdraw the land from tree growth. But

her insistence that the notice of change of use, pursuant to section 579(¶¶ 6 & 7), had to be in writing was incorrect.

It is not surprising that section 579 does not demand any written notice of change of use to the assessor. If it did, it would largely duplicate what is now required for the assessor to withdraw tree growth land pursuant to section 581. Ultimately, the 25% added penalty imposed via section 579 is concerned with the assessor being able to revalue land that no longer can be enrolled as tree growth because the owner has changed the use and failed to notify her of the change. See *Smith*, No. 2010-008, at 2; *Curtis*, No. 2004-005, at 2; *Davis*, No. 2002-003, at 4; *Damian*, No. 93-01, at 4-5; *Hornberger v. Town of Bremen*, No. 86-02, at 2 (Dec. 1, 1987) (removal of trees).

Oliver testified that the Browns did not notify her of a change of use despite Mr. Brown's written communications. But a written notice of a change of use in tree growth land has never been a requirement of section 579. A written notice of an intent to remove land from tree growth now is required by section 581(1)—although, we note, it was not in 2009—but section 581(1) cannot have been the source of Oliver's imposing the added 25% penalty. Rather, the Town steadfastly contends that the Browns did not notify Oliver of a change of use of the property pursuant to section 579(¶¶ 6 & 7) because the Browns only sought to know what penalties might attach *if* they withdrew a portion of the land from tree growth. We disagree.

During deliberations, the members of the panel members emphasized different aspects of the evidence. In Mr. Hodgkins' opinion, Mr. Browns' memo

of January 2nd was just an inquiry about penalties, but he gave sufficient notice of a change of use to Oliver in his February 9th letter. Mr. Partridge viewed the February 9th letter as corroborative of the January 2nd memo, which he described as the Browns' "first shot" at giving notice. Mr. Wright found it unnecessary to rely on one to the exclusion of the other. These communications were followed by Mrs. Brown's filing an application for classification of the land as tree growth, which clearly stated that acreage was being removed. Thus, all the panel members agreed that the Browns had put Oliver on notice of a change of use and that her levying the 25% added penalty was manifestly wrong.

The conclusion that Oliver was on notice is perhaps best borne out by the fact that, in response to one or both of Mr. Brown's notices to her, she twice visited the property to investigate a change of use. She plainly did so in large part because of the information the Browns provided her.²⁰ Her error lay in requiring a writing to put her on notice of a change of use and, at the same time, treating the writings she had received as altogether inadequate to that task. She thus considered the matter as one in which she had not received any

²⁰ True, Oliver might have investigated a change of use based solely on the Code Enforcement Officer's having told her of the issuance of the land use permit. The Browns cannot rely on that as evidence of *their* having notified Oliver of a change of use. See p. 12 n.15 above. Whatever might be the significance of such a discovery of a change of use by an assessor in some other case, it has little here. The information from the Code Enforcement Officer was not the only thing that alerted Oliver to a change of use.

notice of a change of use. As this was in error, it follows that she erred in imposing the 25% added penalty.²¹

That the Browns communicated in writing only solidifies proof of the notice they gave of their change of use; it was not required to be in that form. Nor do the writings transpose the case into section 581(1), now requiring written notice, for if it did no 25% penalty could even have been considered. Mr. Brown's first written communication to Oliver came on the verge of the Browns' effecting their plans to build, and the second came after, all agree, construction had begun. The communications evidenced a change of use, imminent or actual. The Browns addressed their communications to the proper person, Oliver, the Town Assessor, to let her know what very soon *would be* happening and, after a time, what *was* happening.

V. CONCLUSION

Oliver took the position that the penalties should be imposed on the Browns even though Mrs. Brown held title to the subject property for only a part of the time between Mr. Brown's first memo to her, on January 2, 2009, and her commitment of the supplemental assessments on May 11th. Because the Browns had agreed with the Mortensens that they (who were for all intents

²¹ The Browns have not argued that Oliver should have waived the penalty for cause. Further, our decision nullifies the added penalty—not for cause, but due to legal error—thus removing the issue of cause from the case. We therefore have no reason to address what constitutes cause for waiving the 25% penalty under section 579(¶ 7) other than to note, as we have held previously, that forgetfulness and life's normal activities do not prove cause. *Davis v. Town of Lamoine*, No. 2002-003, at 4 (BPTR Mar. 10, 2003). The determination of cause appears to be a matter within the assessor's discretion, but the circumstances in which the discretion should be exercised are not set forth.

and purposes in possession of the property throughout the relevant time), not the Mortensens (who had move to Utah), should be assessed any penalties, we have no occasion to decide the propriety of Oliver's decision.²² We observed during deliberations that Oliver's approach sought to be practical. In this, she adhered to the command that "taxation must be practical. It must bring results." *Sears, Roebuck & Co. v. Inhabitants of City of Presque Isle*, 150 Me. 181, 184, 107 A.2d 475, 477 (1954). That she waited to commit the penalties makes no difference. Her aim was to attain "[p]ractical justice." *Kittery Electric Light Co. v. Assessors of Town of Kittery*, 219 A.2d 728, 741 (Me. 1966).

The information sheets filed by the parties tell us that the Browns have not paid the change of use and withdrawal penalties. In a tree growth appeal, nonpayment of taxes does not require suspension of the appeal, *Hunt, Trustee, Hunt Family Irrevocable Trust*, Nos. 2009-020, -021, at 6; *Curtis*, No. 2004-005, at 3 & n.1, following the repeal of former 36 M.R.S. § 582-A by P.L. 1997, ch. 668, § 19. Accordingly, the Browns are due to pay the Town the withdrawal penalty of \$5918.40; they do not owe the 25% added change of use penalty of \$1119.45.

²²For comments on who may be taxed, see 36 M.R.S. § 553; *Alpha Rho Zeta v. Inhabitants of City of Waterville*, 477 A.2d 1131, 1136 (Me. 1984); *Seaborne v. Look*, 464 A.2d 221, 222 (Me. 1983); *Sprague Energy Corp. v. Town of Bucksport*, No. 2003-003, at 6 n.3 (BPTR May 17, 2005); *Rangeley Lake Resort Development Co., LLC v. Town of Rangeley*, No. 2003-019, at 13 (BPTR Feb. 7, 2005); *Gregory v. MMC Realty Corp. & Maine Medical Center*, No. 2000-001, at 50-52 (BPTR Nov. 14, 2000).

VI. APPEAL RIGHTS

Either party may appeal this Decision by filing a petition for review in the Superior Court within 30 days of receipt of this Decision pursuant to 5 M.R.S. §§ 11001-11008. If the Decision is not appealed, it shall become binding on the parties at the end of the 30-day period.

Date: *January 30, 2012*

Eric E. Wright
Eric E. Wright
Chair, Panel B
State Board of Property Tax Review