STATE OF MAINE
KENNEBEC, SS

STATE BOARD OF PROPERTY TAX REVIEW
DOCKET NO. 2004-002

ARTHUR FOWLER,

Petitioner

v.

TOWN OF LUBEC

Respondent

DECISION

INTRODUCTION

This matter came before the State Board of Property Tax Review (hereinafter the "Board") on appeal by Arthur Fowler from the denial of the assessors[1] to abate a tree growth penalty assessed against the property. The penalty was assessed based on Mr. Fowler's failure to file within 10 years from the year in which the property was taxed under the Tree Growth Tax Law a sworn statement from a licensed professional forester that the landowner is managing the property according to the schedules in a forest management and harvest plan prepared by the licensed forester on behalf of the owner. 36 M.R.S.A. §§ 574(1) and 574(2). A taxpayer's failure to submit an appropriate and timely certification must result in withdrawal of the property from tree growth classification and assessment of a penalty tax. 36 M.R.S.A. § 581.[2] The Board convened October 4, 2005 to consider the matter. Present on behalf of the Board were Richard C. Auger, Guy Chapman, Harry Hodson, Dorcas Zeiner, and Panel C Chairman, Charles

[1] In the Town of Lubec the Selectmen act as the assessors.

[2] Section 581 states in relevant part 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 parcel from taxation under this subchapter…"

The Legislature in 1991 substituted the word "must" for "may" in this section. (Laws 1991, c 546, § 8).

Lane, Esq. The Town was represented by Robert E. Miller, Esq. The taxpayer was represented by Dana C. Hanley, Esq.

DISCUSSION

Pursuant to 36 M.R.S.A. § 583 assessments or denials of applications for tree growth classification are subject to the abatement procedures set forth in 36 M.R.S.A. § 841. Section 841 provides that a taxpayer may file an application for an abatement of taxes within 185 days of commitment to correct any illegality, error or irregularity in assessment. Mr. Fowler timely applied for an abatement of the tax within 185 days of commitment of the supplemental assessment for a penalty. After conducting a hearing the assessors denied the request to abate the penalty. (Exhibit 12). Thereafter Mr. Fowler timely appealed to the Board.

In these proceedings before the Board the assessors are presumed correct. Chase v. Town of Machiasport 721 A.2d 636 (Me. 1994). It is the taxpayer therefore that shoulders the burden to prove that the assessment is "manifestly wrong". The Board "determine[s] the matter [before it] in the same manner as if the appeal had been taken directly from the assessors decision... to the state board." CMP v. Town of Moscow 649 A.2d 320 (Me. 1994). Here in the matter of Fowler the assessors assessed a penalty in the amount of $44,074.53 and it is that amount that is presumed correct and under appeal to the Board.

The subject property consists of 123 acres that is located on the water and identified on Map 11 Lot 5 in the Town of Lubec. (Exhibit #1). Mr. Fowler first applied for tree growth classification for the tax year 1991. The property was approved for classification by the Town of Lubec which qualified Mr. Fowler for a reduction in property taxes provided that he comport with all the provisions of the Tree Growth Tax Law. The parties stipulate that Mr. Fowler failed to submit within 10 years a certification by a licensed forester that the landowner is managing the property according to the schedules in a forest management and harvest plan prepared by the licensed forester on behalf of the owner. 36 M.R.S.A. §§ 574(1) and 574(2). Based on that failure the Town assessed a penalty against the property on January 29, 2004 for the 2003 tax year.

(Exhibit 7). The property was therefore withdrawn from the tree growth tax program in that year and, until Mr. Fowler filed a timely application for classification for a succeeding tax year, the property would remain withdrawn. Indeed the appropriate certification was not submitted to the Town until March 18, 2004 or well after the penalty had been assessed. (Exhibit 6).[3] The parties do not dispute the calculation of the penalty. What the parties do dispute is whether the property was properly withdrawn and a penalty assessed under section 581 for failure to timely file an appropriate certification under section 574-B. The question for the Board therefore rests upon its interpretation of these provisions of the Tree Growth Tax Law.

The taxpayer argues that the law should be broadly construed in favor of the taxpayer to ensure that the general intent of the Tree Growth Tax Law is accomplished i.e. to encourage property owners to "retain and improve their holdings of forest lands... and to promote better forest management... to protect this unique economic and recreational resource". 36 M.R.S.A. § 572. According to the taxpayer, for the Town to assess a penalty on the subject property because he did not make a timely filing (albeit approximately two years after he was required to do so by law), when he had voluntarily continued to manage the acreage under a forest plan during that period is unfair and inconsistent with the general purpose of the Tree Growth Tax Law despite the specific language of section 581 that requires withdrawal and the imposition of a penalty if the taxpayer does not comply with the provisions of the law. More fundamentally, the taxpayer appears to argue that even if the provisions of the Tree Growth Tax Law authorize the imposition of a penalty in this instance, those provisions are in any event unconstitutional because the Town, in carrying out those provisions, has treated Mr. Fowler unfairly because he voluntarily continued to manage the property as forest land presumably unlike others who are assessed a penalty. Finally, according to the

[3] The certification was included in Mr. Fowler's application for tree growth classification that was timely filed on March 18, 2004 for the April 1, 2004 tax year. Because the Town had withdrawn the property from the tree growth classification program and had assessed a penalty in the tax year 2003, Mr. Fowler was required to submit an application for tree growth classification on or before April 1, 2004 if he wanted the Town to consider classifying his property for the 2004 tax year. 36 M.R.S.A. §579. The Town approved the application for the tax year 2004 and so Mr. Fowler's property was not assessed at it fair market value for that tax year. In any event the forester's certification dated March 18, 2004 was not timely with regard to Mr. Fowler's statutory obligation to file within 10 years from the time the property was originally classified in 1991.

taxpayer, the imposition of a penalty is equivalent to a taking of property which would require the Town to notify him when certification is required before a penalty is imposed. Consequently the statute is unconstitutional as it does not provide adequate due process upon what the taxpayer claims is taking of his property.

With regard to Mr. Fowler's claim that the statute itself is unconstitutional, the Board notes that because it is an administrative body acting under the authority of the executive branch of government it lacks authority to entertain substantive constitutional challenges to the law under which it operates. That is to say that based on the constitutional notion of separation of powers this administrative body acting under the executive branch of our state government cannot declare laws passed by the legislature under which it operates unconstitutional. Therefore the Board is unable to rule on both Mr. Fowler's assertion that he has been treated unfairly under the law as passed by the legislature and his assertion that the statute does not provide within its text adequate due process for what he claims to be a taking of his property. The Board notes that even though it takes the position that it is without authority to rule on Mr. Fowler's constitutional claims as presented, the assessment of a penalty tax is not equivalent to taking of one's property.[4] Moreover it is not contested that Mr. Fowler has availed himself of all the process due him under those provisions of Title 36 that allow taxpayers to apply to the assessors for abatement of a penalty tax and appeal a denial of such application to this Board that hears the matter "de novo" or rather all over again.

The Board next turns to the interpretation of those sections 574-B(1) and (3) and section 581 of Title 36 as applied to the undisputed facts. The provisions of section 574-B(1) and B(3) provides in relevant part as follows:

> A parcel of land used primarily for growth of trees to be harvested for commercial use shall be taxed according to this subchapter, provided that the landowner complies with the following requirements:
>
> **1. Forest management and harvest plan.** A forest management and harvest plan has been prepared for the parcel and

[4] In support of his takings argument Mr. Fowler cites McNaughton v. Kelsey, 698 A.2d 1049 (Me. 1997) which involved a foreclosure action and not the imposition of a tax.

updated every 10 years. The landowner shall file a sworn statement with the municipal assessor in a municipality or the State Tax Assessor for parcels in the unorganized territory that a management plan has been prepared for the parcel. ...

3. Transfer of ownership. When land taxed under this subchapter is transferred to a new owner, within one year of the date of transfer, the new landowner must file with the municipal assessor or the State Tax Assessor for land in the unorganized territory one of the following:

A. A sworn statement indicating that a new forest management harvest plan has been prepared; or

B. A statement from a licensed professional forester that the land is being managed in accordance with the plan prepared for the previous owner. ...

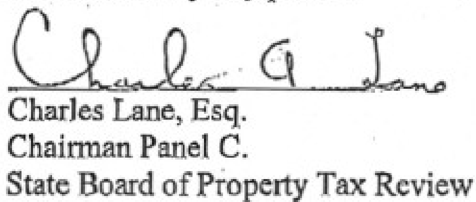
Pursuant to the statutory rules of construction, " 'shall' and 'must' are terms of equal weight that indicate a mandatory duty, action or requirement". 1 M.R.S.A. § 71(9-A). If a landowner fails to timely file an appropriate certification then the property must be withdrawn from tree growth classification and a penalty assessed. 36 M.R.S.A. § 581. The Board has previously determined based on the mandatory language of section 574 that a taxpayer's failure to make a timely filing under section 574 due to pressing personal concerns as suggested here by Mr. Fowler does not absolve him or her from paying a withdrawal penalty. Samuel I. and Minna A. Pachowsky v. Town of Clinton, SBPTR Docket No. 2001-005 decided February 19, 2002. Although the Board empathizes with Mr. Fowler, his failure to file that which is required by section 574-B(1) and (3), does not absolve him from paying a withdrawal penalty in the amount of $44,074.53.

CONCLUSION

Based on the foregoing the Board finds that Mr. Fowler has failed to meet his burden to prove that the tree growth penalty assessed against his property is manifestly wrong. The Board votes 3-2 to deny the appeal.

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

Dated: 12/21/05



Charles Lane, Esq.
Chairman Panel C.
State Board of Property Tax Review