



State of Vermont  
Department of Taxes  
133 State Street  
Montpelier, VT 05633-1401

Agency of Administration

January 24, 2011

[REDACTED]

FORMAL RULING 2011-02

Dear [REDACTED]:

You requested a ruling from the Department regarding the tax implications of a proposed property lease swap between the Town of [REDACTED] (the "Town") and the [REDACTED] School District (the "School District"). Specifically, you asked whether after the contemplated lease swap the affected properties would be exempt from the State's nonresidential education tax. We requested additional information from you regarding the transaction by letter dated [REDACTED]. We did not receive a response to that letter. This ruling, therefore, relies solely upon and is limited to the information conveyed in your letter dated [REDACTED], and information contained in the [REDACTED] Selectboard minutes and the Town Manager's newsletter located on the Town's website.

Facts

The properties in question are the Town's existing police facility and eight acres of land owned by the School District.<sup>1</sup> The School District property will be leased to the Town to be used for town purposes and the Town property will be leased to the School District to be used for school purposes. You have represented that the lease term is for a period of 99 years. Neither party will pay rent.

<sup>1</sup> Your letter states that both properties are currently exempt from the State's nonresidential education tax as "property owned by a municipality which is located within that municipality and which is used for municipal purposes" pursuant to 32 V.S.A. § 5401(10)(F). This ruling takes no position with respect to the current tax status of the subject properties. However, it should be noted that the tax exempt status of municipal property has historically derived and continues to derive from its use as a "public use" under 32 V.S.A. § 3802(4). See *Styles v. Village of Newport*, 76 Vt. 154 (1904). Property owned by a school also derives its exemption, if any, from 32 V.S.A. § 3802(4) but under the "lands owned or leased by colleges, academies or other public schools" clause. The Vermont Supreme Court has further clarified that provision to require that the property not only be owned by a school, but also must be used for an educational purpose. *Burr and Burton Seminary v. Town of Manchester*, 172 Vt. 433 (2001) (finding noneducational use of property, including no use at all, does not qualify for exemption). As you note in your letter, the enactment of § 5401(10)(F) was not intended to substantively change existing exemption law.



Specifically, the Town will lease approximately eight acres of unimproved land from the School District for the purpose of constructing a new law enforcement facility. It appears that two acres will be used for the facility and associated grounds including a parking lot and driveway/roadway; an additional four acres will be used for environmental mitigation; and use of the remaining two acres is undisclosed or reserved for future use or no use at all.<sup>2</sup> The new facility will support law enforcement functions provided by full-time police officers and 10 civilian personnel. The facility will also house a 24-hour dispatch center for police, fire and rescue services for the towns of [REDACTED]. The site is located on forested land bordered by [REDACTED] to the northwest and [REDACTED] to the southeast. The proposed building is a [REDACTED] structure on a concrete slab. The Town is considering either a pre-engineered steel frame with brick facing or wood framed construction. The project includes site work and the construction of water, sewer and storm systems.

The School District will lease the Town's existing police facility for the purpose of housing the School District's administrative offices. The existing police facility is located at [REDACTED], next to the new Town offices, and will be refit to meet the School District's needs. The School District's offices are currently located at [REDACTED]. Upon relocation of the School District's offices, the [REDACTED] will then move into the previous School District office space at [REDACTED] from its current rental space at [REDACTED].

This ruling is based on the assumption that the proposed lease is, in fact, for at least 99 years and would be found by a court to be "in perpetuity" or "substantially in perpetuity" in compliance with 32 V.S.A. § 3610.<sup>3</sup> This ruling is further based on the assumption that the swapped properties are of roughly equivalent value as determined by an independent appraiser.

### Ruling

Under 32 V.S.A. § 3610(e), a lease "in perpetuity" or "substantially in perpetuity" shall be listed in the grand list as real estate against the lessee. A perpetual lease may be exempt from taxation if expressly provided by the original grant of the subject land by the State of Vermont or if the property would be exempt under chapter 125 of Title 32 if the lessee were the owner of the land. 32 V.S.A. § 3610(d). We will review each portion of the proposed lease swap under this framework:

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<sup>2</sup> Footnote 1 of your letter indicates that four acres will be used for the facility and associated grounds and four acres will be used for wetlands mitigation. However, the [REDACTED] Selectboard minutes for July 27, 2010, and the Town Manager's newsletter, [REDACTED] state that the project, including the facility, the parking lot, and the driveway/roadway, will only encompass two of the eight acres; four acres will be used for "sand plain" mitigation; and two acres will be left over for "any future needs the schools may have." We sought clarification from you regarding the use of each portion of the property by letter dated [REDACTED]. We did not receive any clarification.

<sup>3</sup> We have not reviewed the lease agreement and, therefore, cannot make this determination. We requested a copy of the lease agreement by letter dated [REDACTED] but did not receive a copy to review.

(1) Eight acres of land owned by the School District:

Based upon your representations, we understand that this land will be leased to the Town for 99 years and, therefore, during the lease term the lease should be listed to the Town as real estate. To be treated as tax exempt, the property must be analyzed as if the lessee, the Town, were the owner of the land. The Town, therefore, must use the property for a "public use" consistent with 32 V.S.A. § 3802(4) and must satisfy the public use test established by the Vermont Supreme Court in *American Museum of Fly Fishing, Inc. v. Town of Manchester*, 151 Vt. 103 (1989) (the "Fly Fishing" test). The *Fly Fishing* test requires:

- (1) the property must be dedicated unconditionally to public use;
- (2) the primary use must directly benefit an indefinite class of persons who are part of the public, and must also confer a benefit on society as a result of the benefit conferred on the persons directly served; and
- (3) the property must be owned and operated on a not-for-profit basis.

151 Vt. at 110.

As noted above, there appears to be some inconsistency in the amount of land that will actually be used for the project. See n.2, *supra*. That portion of the land that will be primarily used for the law enforcement facility, parking lot, driveway/roadway, and related water, sewer and storm systems appears to satisfy the *Fly Fishing* test and would qualify for exemption: the property appears to be unconditionally dedicated to a public use; the property will benefit an indefinite class of persons—the citizens and visitors of [REDACTED] and beyond—and as a result will benefit society; and will be owned and operated on a not-for-profit basis.<sup>4</sup>

(2) Existing police facility owned by the Town:

We understand that this property will be leased to the School District for 99 years and, therefore, during the lease term the lease should be listed to the School District as real estate. To be treated as tax exempt, the property must be analyzed as if the lessee, the School District, were the owner of the property. The School District, therefore, must use the property for an educational purpose consistent with 32 V.S.A. § 3802(4) and Vermont Supreme Court precedent. 32 V.S.A. § 3802(4) (providing exemption for "lands owned or leased by colleges, academies or other public schools" but "shall not be construed as exempting lands or buildings rented for general commercial purposes"); *Burr and Burton Seminary v. Town of Manchester*, 172 Vt. 433, 439 (2001) ("the school must use its property for an educational purpose, in addition to own it, in order to claim the exemption"). If the primary use of the property by the School District is for an educational use, which would include its administrative offices, the property will qualify for exemption.

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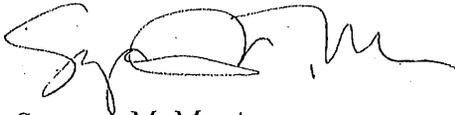
<sup>4</sup> Your letter does not address the ownership of the new law enforcement facility to be constructed. We assume that the building will become part of the real estate on which it is constructed and will revert to the School District after the lease term. However, because no information was provided regarding the arrangement between the parties and the parties' intent, this ruling takes no position with respect to the new facility that will be constructed on the leased land.

Because this ruling determines that the subject properties are exempt from taxation, as set forth herein, this ruling does not address the accuracy or the validity of your arguments in support of exemption set forth in your October 27 letter.

This ruling is issued solely to your firm and is limited to the facts presented as affected by current statutes and regulations. Other taxpayers may refer to this ruling to determine the Department's general approach, but the Department will not be bound by this ruling in the case of any other taxpayer or in the case of any change in the relevant statute or regulations.

3 V.S.A. § 808 provides that this ruling will have the same status as an agency decision or order in a contested case. You have the right to appeal this ruling within (30) days.

Sincerely,



Suzanne M. Monte  
Assistant Attorney General and  
Attorney for the Department

Approved this 26 day of January, 2011



Mary N. Peterson  
Commissioner of Taxes