Bill as Introduced

2003 SESSION

03-0488
09/01

HOUSE BILL ***413-LOCAL***

AN ACT relative to awarding attorneys' fees and costs in abatement and certain appeals proceedings when the taxpayer prevails.

SPONSORS: Rep. Mooney, Hills 58; Rep. Derby, Carr 7

COMMITTEE: Municipal and County Government

ANALYSIS

This bill allows the selectmen, the board of tax and land appeals, and the superior court to award reasonable costs and attorneys' fees when the taxpayer prevails in abatement proceedings. The bill also allows reasonable costs and attorneys' fees to be assessed against the state when a taxpayer prevails in an appeal for redetermination or reconsideration of an assessment or demand for payment by the department of revenue administration.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

03-0488
09/01

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Three

AN ACT relative to awarding attorneys' fees and costs in abatement and certain appeals proceedings when the taxpayer prevails.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Section; Attorneys' Fees and Costs. Amend RSA 76 by inserting after section 17-d the following new section:

76:17-e Attorneys' Fees and Costs. In any abatement proceeding under this chapter, the selectmen, board of tax and land appeals, or superior court may award reasonable costs and attorneys' fees to any taxpayer who prevails.

2 Department of Revenue Administration; Appeals for Redetermination or Reconsideration. Amend RSA 21-J:28-b, VI to read as follows:

VI. The board or court may grant such relief as may be just and equitable and may order the state treasurer to pay the taxpayer the amount of relief granted with interest at the rate established under RSA 21-J:28. [~~Upon all appeals which are denied, costs and attorney's fees may be taxed against the taxpayer at the discretion of the board or court; but the board or court may not tax costs against the state.~~] ***The board or court may award reasonable costs and attorneys' fees to the prevailing party.***

3 Effective Date. This act shall take effect January 1, 2004.

Amendments

Municipal and County Government
March 18, 2003
2003-0828h
09/04

Amendment to HB 413-LOCAL

Amend the title of the bill by replacing it with the following:

AN ACT relative to certain appeals proceedings when the taxpayer prevails.

Amend the bill by replacing all after the enacting clause with the following:

1 Department of Revenue Administration; Appeals for Redetermination or Reconsideration. Amend RSA 21-J:28-b, VI to read as follows:

VI. The board or court may grant such relief as may be just and equitable and may order the state treasurer to pay the taxpayer the amount of relief granted with interest at the rate established under RSA 21-J:28. [~~Upon all appeals which are denied, costs and attorney's fees may be taxed against the taxpayer at the discretion of the board or court; but the board or court may not tax costs against the state.~~] ***The board or court may award reasonable costs and attorney's fees to the prevailing party, provided the prevailing party shows substantially unjustified action.***

2 Board of Tax and Land Appeals; Attorney's Fees. Amend RSA 71-B:9 to read as follows:

71-B:9 Administration of Oaths, Subpoenas, etc.; Fees. The board shall have authority to administer oaths and to compel the attendance of witnesses to proceedings before it. The board shall have the power to subpoena and subpoena duces tecum. Witnesses compelled to appear shall be paid the same fee and mileage that are paid to witnesses in the superior court of the state. A subpoena or subpoena duces tecum of the board may be served by any person designated in the subpoena or subpoena duces tecum to serve it. Any testimony given by a person duly sworn shall be subject to the pains and penalties of perjury. All applications or petitions to the board for which no filing fee has been otherwise specified by statute shall be accompanied by a $65 filing fee. Costs ***and attorney's fees*** may be taxed as in the superior court.

3 Effective Date. This act shall take effect January 1, 2004.

2003-0828h

AMENDED ANALYSIS

This bill allows reasonable costs and attorney's fees to be assessed against the state when a taxpayer prevails in an appeal for redetermination or reconsideration of an assessment or demand for payment by the department of revenue administration, provided the taxpayer shows substantially unjustified action.

Hearing Minutes

HOUSE COMMITTEE ON MUNICIPAL AND COUNTY GOVERNMENT

PUBLIC HEARING ON HB 413-L

BILL TITLE: relative to awarding attorneys' fees and costs in abatement and certain appeals proceedings when the taxpayer prevails.

DATE: March 7, 2003

LOB ROOM: 301 **Time Public Hearing Called to Order:** 11:15 AM

Time Adjourned: 12:12 PM

(please circle if present)

Committee Members: Reps. Patten, Brundige, Lockwood, Twombly, Boyce, Dumaine, Stohl, Noyes, Buhlman, Doyle, C. Dunne, Dupuis, Gillick, Gould, M. Pappas, N. Johnson, M. Cooney, Davidson, Osborne, Schmidt and Theberge.

Bill Sponsors: Rep. Mooney, Hills 58; Rep. Derby, Carr 7

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

***Rep. Derby, Dist 7**

This allows the board of selectmen, BTLA or courts to make discretionary awards of attorneys' fees when the taxpayer prevails. The process is expensive and time consuming. The awards would be given at whatever time the decision went in favor of the taxpayer.

Scott Harris, Manchester Attorney

Favors this bill. Feels it would make things more equitable. This would put focus on assessing and on making tax payments. Perhaps use the term "prevailing party" so the town would also be protected and would discourage frivolous suits.

***Paul Franklin, BTLA**

Already have ability to assess costs. The courts can assess costs and taxpayers fees. 'A clear stated right' is a determination of eligibility for repayment of costs and attorney fees. BTLA can assess costs (not attorneys' fees). This bill is only for property tax. Maybe amend to put it under RSA 71-B:9. The BTLA would like to include attorneys' fees under RSA 71-b:9. Should not include selectmen.

Laura Thibodeau, Assessor, Keene

This bill does not address when municipalities prevail. It should be fair for both parties. No definition of reasonable cost.

Barbara Reid, DRA

Request time for in-house lawyer opinion.

Gary Roberge, Avitar Association

Opposes the bill. Would approve giving BTLA power to assess attorney fees. Afraid this opens up lots of problems. Assessing is not 'cut and dried.'

Respectfully submitted,

Priscilla P. Lockwood

Priscilla P. Lockwood, Clerk
Municipal and County Government

Testimony

File HB 413

State of New Hampshire

HOUSE OF REPRESENTATIVES

CONCORD

March 7, 2003

Hon. Betsey L. Patten, Chair
House Committee on Municipal and County Government
301 Legislative Office Building
Concord, NH 03301

Re: HB413 Written Testimony of Co-Sponsor

Dear Chairman Patten and Committee Members:

Thank you for your thoughtful consideration of HB413. Please accept the following in supplementation of my oral testimony in support of the above-referenced bill:

This legislation amends RSA 76:17 and RSA 21-J:28-b, VI. Section 1 gives the local selectmen, as well as the board of tax and land appeals (BTLA) and the superior court, the option of awarding attorney's fees and costs to a taxpayer who prevails in an abatement proceeding. Section 2 of HB 413 permits the board of land and tax appeals to award reasonable costs and attorney's fees to the prevailing party in a tax appeal, where presently the BTLA can only assess costs and attorney's fees against the taxpayer and in favor of the State.

Please note that Section 1 is not an unfunded mandate on localities. This is because the locality may voluntarily control the expenditure of these amounts by (1) assessing fair and reasonable local property taxes so as to obviate the need for taxpayers to file for abatements in the first place or (2) exercising the discretion given to it by Section 1 to award or not award costs and attorney's fees as the equities dictate. The selectmen may or may not award fees and costs at the local level, and the discretion of the superior court or the BTLA to award fees and costs always depends on the equities and factual circumstances of the particular case.

As to Section 2, HB413 corrects a fundamental injustice and imbalance. Under current law, the BTLA may assess the State's costs and attorney's fees against a taxpayer, seemingly whether the taxpayer prevails or not. Fairness suggests that the BTLA should only be able to assess costs and fees against a taxpayer if the State prevails. Fairness would also suggest that after having prevailed and proved the State DRA wrong, the taxpayer should have the same opportunity as the State to recover the costs of proving the State wrong.

TDD Access: Relay NH 1-800-735-2964

Rationale: under the New Hampshire Constitution, the right to acquire, keep, defend and enjoy property is on a par with the rights to life and liberty itself:

> All men have certain natural, essential, and inherent rights--among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.

Part 1, Article 2.

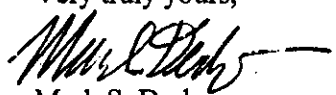
Part 2, Article 5 of the New Hampshire Constitution states in part, that the State may "impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state."

So, acquiring and possessing property-real and personal property-is a fundamental natural human right guaranteed by our Constitution, and, depending on which philosopher you consult, God himself. To the extent that it may (and must, if we are to fund a civilized society) be taxed, the taxes must be proportional and reasonable. A taxpayer who prevails before the BTLA and/or before the superior court has proven his or her case to the satisfaction of the fact finder--that the government over-taxed the taxpayer, did not obey our constitution and levied taxes that were not proportional or reasonable.

In criminal cases where there is a threat of incarceration (loss of liberty), the State will pay for an indigent criminal defendant's attorney--win or lose. This is because the right to liberty is so fundamental that it should not be deprived without substantial procedural safeguards and free legal counsel. Is taxation of a citizen's property so different? As a matter of our natural human rights as expressed in the Constitution, I believe it is not.

Thank you in advance for your kind attention to and consideration of HB413.

Very truly yours,



Mark S. Derby
State Representative, District 7:
Moultonborough, Tuftonboro
and Wolfeboro

MSD/
C:\Documents and Settings\default\My Documents\2003 Legis Session Corresp\HB413 Written Testimony.wpd

File HB 413

State of New Hampshire

Board of Tax and Land Appeals

Paul B. Franklin, Chairman
Michele E. LeBrun, Member
Douglas S. Ricard, Member
Albert F. Shamash, Esq., Member

State Office Park South
107 Pleasant Street
Concord, New Hampshire
03301-3834

603-271-2578

To: Representative Betsey L. Patten
Municipal & County Government

From: Paul B. Franklin, Chairman
Board of Tax and Land Appeals

Date: March 7, 2003

Re: HB 413

The following summarizes the board's comments on the bill as drafted.

- Page 1, lines 3-5. This proposed new section would allow for selectmen, board of tax and land appeals ("board") and superior court to award costs and attorneys' fees to prevailing taxpayers in an RSA Ch. 76 tax appeal. First, we would note that RSA 71-B:9 already contains the ability for the board to assess costs against either party (but not attorney fees. See Appeal of Land Acquisition, L.L.C., 145 N.H. 492, 497 (2000)) and that the superior court inherently has the authority to assess costs and attorneys fees against either party. Second, there are other local tax appeals that are authorized outside RSA Ch. 76. Consequently, we would suggest that if the intent is to allow costs and attorneys fees to be awarded in tax appeals in general, it should be included in RSA Ch. 71-B, the chapter on the board's general statutory authority. Otherwise, it would exclude the award of costs and attorneys fees from other property tax appeal scenarios, such as the appeal from a denial of exemptions, credits and deferrals pursuant to RSA 72:34-a and current-use and land-use-change-tax appeals in RSA Ch. 79-A. Third, it is incongruous that the bill authorize selectmen to award costs to a prevailing taxpayer because it is the selectmen that determine whether, in the first instance, the taxpayer prevails in the abatement request to the selectmen. Fourth, this section limits the awarding of costs only to the benefit of the taxpayers. There are instances where the board, and the court, could reasonably find that costs and attorneys fees be awarded against taxpayers if they pursue an appeal in a frivolous and unreasonable manner. The board would welcome an amendment to RSA 71-B:9 to allow the board to assess attorneys' fees when appropriate in addition to the current authority to assess costs.

- Page 1, lines 10-13. Consistent with the board's comments in the paragraph above, we would support the ability to assess "reasonable costs and attorneys' fees" to either party in appeal of taxes administered by DRA.

State of New Hampshire
Department of Revenue Administration
45 Chenell Drive, P.O. Box 457
Concord, NH 03302-0457

Stanley R. Arnold
Commissioner

Barbara T. Reid
Assistant Commissioner

March 11, 2003

The Honorable Betsy L. Patten
Chairperson, Municipal & County Government

Re: HB413 – A bill to allow an award of costs and attorneys' fees against the State or a municipality in tax appeals.

Dear Representative Patten:

I am writing concerning HB 413. My comments are limited to section 2, which affects the Department of Revenue Administration ("DRA"). My comments are based upon a review of the legislation by the DRA's legal staff.

First, the American rule provides that each party pays for its own attorney. However, there is an established body of law that provides that a court, in the exercise of its discretion, may grant an award of attorneys' fees as part of the relief that is granted. Generally, this is either done pursuant to a statute that authorizes such an award, or an exception to the American rule. There are two exceptions that have been recognized by the New Hampshire Supreme Court that have provided a justification for an award of attorneys' fees to a party litigating against the State. The first is the "bad faith litigation" exception as set forth in Harkeem v. Adams, 117 N.H. 687 (1977). This exception provides that an award of attorneys' fees is appropriate where an individual is forced to litigate a clearly defined right. The second exception is the substantial benefit doctrine. Most recently, the Supreme Court set forth the standard to grant such an award in Claremont School District v. Governor et al (costs & attorneys' fees), 144 N.H. 590 (1999).

Secondly, if the purpose of the legislation is to increase the award of attorneys' fees by either the Board of Tax and Land Appeals ("Board") or the courts, I submit that this legislation would not accomplish that goal. The Board and the courts already have the authority to award attorneys' fees against taxpayers, but it is very rare for either the Board or the courts to make such an award. HB 413 provides for a discretionary award of attorneys' fees. Both the Board and the courts will probably not exercise this discretion very often.

Lastly, this legislation would likely cause an increase in the number of appeals, thereby creating a drain on State resources. The increase in appeals would result because taxpayers who disagree with the DRA would pursue their appeals to the highest level possible because of the very appealing prospect of having the State pay their attorneys' fees. Even though the Board or courts will not grant attorneys' fees very often, a law that provides such an award is available will likely encourage protracted litigation.

Please let me know if you have any questions.

Yours truly,

Barbara T. Reid
Acting Commissioner

Tel. (603) 271-2191
TDD Access: Relay NH 1-800-735-2964

Voting Sheets

HOUSE COMMITTEE ON MUNICIPAL AND COUNTY GOVERNMENT

EXECUTIVE SESSION on HB 413-L

BILL TITLE: **relative to awarding attorneys' fees and costs in abatement and certain appeals proceedings when the taxpayer prevails.**

DATE: March 19, 2003

LOB ROOM: 301

Amendments:

Sponsor: Rep. Patten	OLS Document #:	2003	0828h
Sponsor: Rep.	OLS Document #:		
Sponsor: Rep.	OLS Document #:		

Motions: (OTP) OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Twombly

Amendment

Seconded by Rep. Buhlman

Vote: 14-0 (Please attach record of roll call vote.)

Motions: OTP, (OTP/A) ITL, Interim Study (Please circle one.)

Moved by Rep. Twombly

Seconded by Rep. Buhlman

Vote: 15-0 (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE: 15-0

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. Priscilla P. Lockwood, Clerk

OFFICE OF THE HOUSE CLERK 2003 SESSION

MUNICIPAL AND COUNTY GOVERNMENT

Bill #: HB 413 **Title:** Atty's fees + costs awarded

PH Date: 3/7/03 **Exec Session Date:** 3/19/03

Motion: OTP **Amendment #:** 2003-0828h

MEMBER	YEAS	NAYS
Patten. Betsey L. Chairman	14	
Brundige. Robert W. V Chairman	1	1
Lockwood. Priscilla P	2	
Twomblv. James E	3	
Bovce. Laurie J	4	
Dumaine. Dudlev Daniels	absent	
Pappas. Marc	absent	
Dunne. Christopher H	absent	
Stohl. Eric G	5	
Noves. Richard A	absent	
Buhlman. David L	6	
Dovle. Christopher L	absent	
Dupuis. Roland L	7	
Gillick. Thomas J	8	
Gould. Kenneth H	9	
Johnson. Nancv K	absent	
Coonev. Marv R	10	
Davidson. Robert A	absent	
Osborne. Jessie L	11	
Schmidt. Peter B	12	
Theberge. Robert L	13	
TOTAL VOTE:	14	0

Printed: 1/6/2003

OFFICE OF THE HOUSE CLERK 2003 SESSION

MUNICIPAL AND COUNTY GOVERNMENT

Bill #: HB 413 **Title:** Atty's fees & costs awarded

PH Date: 3/7/03 **Exec Session Date:** 3/19/03

Motion: OTP-A **Amendment #:** 2003-0828h

MEMBER	YEAS	NAYS
Patten. Betsey L. Chairman	15	
Brundige. Robert W. V Chairman	1	
Lockwood. Priscilla P	2	
Twombly. James E	3	
Boyce. Laurie J	4	
Dumaine. Dudley Daniels	absent	
Pappas. Marc	5	
Dunne. Christopher H	absent	
Stohl. Eric G	6	
Noyes. Richard A	absent	
Buhlman. David L	7	
Doyle. Christopher L	absent	
Dupuis. Roland L	8	
Gillick. Thomas J	9	
Gould. Kenneth H	10	
Johnson. Nancy K	absent	
Cooney. Mary R	11	
Davidson. Robert A	absent	
Osborne. Jessie L	12	
Schmidt. Peter B	13	
Theberge. Robert L	14	
TOTAL VOTE:	15	0

Printed: 1/6/2003

Committee Report

COMMITTEE REPORT

COMMITTEE: **Municipal and County Government**

BILL NUMBER: **HB 413-L**

TITLE: relative to awarding attorneys' fees and costs in abatement and certain appeals proceedings when the taxpayer prevails.

DATE: March 19, 2003 CONSENT CALENDAR YES ☒ NO ☐

☐ OUGHT TO PASS

☒ OUGHT TO PASS WITH AMENDMENT

☐ INEXPEDIENT TO LEGISLATE

☐ REFER TO COMMITTEE FOR INTERIM STUDY
(Available only in second year of biennium.)

STATEMENT OF INTENT
(Include Committee Vote)

Although the title of the bill was shortened in the amendment, the amended bill allows the board of tax and land appeals, and the superior court to award reasonable cost and attorneys' fees when the taxpayer prevails in abatement proceedings. This bill allows reasonable costs and fees to be assessed against the state when a taxpayer prevails in an appeal for payment by the department of revenue administration, provided the taxpayer shows substantially unjustified action.

Vote 15-0.

Rep. James E. Twombly
FOR THE COMMITTEE

Original: House Clerk
cc: Committee Bill file

USE ANOTHER REPORT FOR MINORITY REPORT

CONSENT CALENDAR

Municipal and County Government

HB 413-L, relative to awarding attorneys' fees and costs in abatement and certain appeals proceedings when the taxpayer prevails. **OUGHT TO PASS WITH AMENDMENT**

Rep. James E. Twombly for Municipal and County Government: Although the title of the bill was shortened in the amendment, the amended bill allows the board of tax and land appeals, and the superior court to award reasonable cost and attorneys' fees when the taxpayer prevails in abatement proceedings. This bill allows reasonable costs and fees to be assessed against the state when a taxpayer prevails in an appeal for payment by the department of revenue administration, provided the taxpayer shows substantially unjustified action. **Vote 15-0.**

COMMITTEE REPORT

COMMITTEE: **Municipal and County Government**

BILL NUMBER: **HB 413-L**

TITLE: relative to awarding attorneys' fees and costs in abatement and certain appeals proceedings when the taxpayer prevails.

DATE: March 19, 2003 CONSENT CALENDAR YES ☒ NO ☐

☐ OUGHT TO PASS

☒ OUGHT TO PASS WITH AMENDMENT

☐ INEXPEDIENT TO LEGISLATE

☐ REFER TO COMMITTEE FOR INTERIM STUDY
(Available only in second year of biennium.)

STATEMENT OF INTENT
(Include Committee Vote)

Although the title of the bill was shortened in the amendment, the amended bill allows ~~the selectmen~~, the board of tax and land appeals, and the superior court to award reasonable cost and attorneys' fees when the taxpayer prevails in abatement proceedings. This bill allows reasonable costs and fees to be assessed against the state when a taxpayer prevails in an appeal for payment by the department of revenue administration, provided the taxpayer shows substantially unjustified action.

Vote 15-0.

Rep. James E. Twombly
FOR THE COMMITTEE

Original: House Clerk
cc: Committee Bill file

USE ANOTHER REPORT FOR MINORITY REPORT

Disko, Katherine

From: JTwo101588@aol.com
Sent: Wednesday, March 19, 2003 6:07 PM
To: katherine.disko@leg.state.nh.us
Subject: Municipal and County Government

CONSENT

HB 413, relative to certain appeals proceedings when the taxpayer prevails.
OUGHT TO PASS WITH AMENDMENT
Rep. James E. Twombly for Municipal and County Government: Although the title of the bill was shortened in the amendment, the amended bill allows the selectmen, the board of tax and land appeals, and the superior court to award reasonable cost and attorneys' fees when the taxpayer prevails in abatement proceedings. This bill allows reasonable costs and fees to be assessed against the state when a taxpayer prevails in an appeal for redetermination or reconsideration of an assessment or demand for payment by the department of revenue administration, provided the taxpayer shows substantially unjustified action. Vote 15-0