**STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**NORTHERN NEW ENGLAND TELEPHONE**

**OPERATIONS, LLC**

**D/B/A FAIRPOINT COMMUNICATIONS - NNE**

**v.**

**TOWN OF ACWORTH**

**No. 2018-0570**

---

**APPEAL FROM THE MERRIMACK COUNTY**

**SUPERIOR COURT PURSUANT TO**

**SUPREME COURT RULE 7**

---

# OPPOSING BRIEF OF NORTHERN NEW ENGLAND TELEPHONE OPERATIONS, LLC D/B/A FAIRPOINT COMMUNICATIONS - NNE

---

**Matthew R. Johnson (Bar No. 13076)**
**DEVINE, MILLIMET & BRANCH, PA**
**111 Amherst Street**
**Manchester, NH 03101**
**(603) 669-1000**
**mjohnson@devinemillimet.com**

**Oral Argument by: Matt Johnson**
**June 28, 2019**

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Rules**

**Treatises**



**Regulations**

## QUESTIONS PRESENTED FOR REVIEW

The Towns of Hanover and Durham have waived all issues set forth in their Notice of Appeal but not briefed, including issues IV, V, VI, and IX. *See*, *e.g.*, *Town of Londonderry v. Mesiti Dev.*, 168 N.H. 377, 380 (2015). The Town of Belmont has filed no brief and therefore has waived all issues set forth in the Notice of Appeal. *See id.*

## STATEMENT OF THE CASE AND FACTS

The Towns of Hanover and Durham (hereinafter "Towns") challenge two distinct procedural events in this litigation: (1) the trial court's summary judgment Orders concerning the *ultra vires* issue, and (2) the trial court's tax abatement decisions.

### I. FairPoint's poles, conduit, and use of public rights of way.

The Towns in this appeal have assessed two varieties of *ad valorem* property taxes: (1) a tax measured by the assessed value of FairPoint's use and occupation of public rights-of-way; and (2) a tax measured by the value of FairPoint's poles and conduits assessed pursuant to RSA 72:8-a. *See* FairPoint's App. II at 4-7 (pretrial stipulations).

A statutory framework governs each tax. Pursuant to RSA 72:6, "[a]ll real estate, whether improved or unimproved, shall be taxed except as otherwise provided." RSA 72:6. Effective July 1, 2010, RSA 72:8-a provides that "all structures, poles, towers, and conduits employed in the transmission of telecommunication, cable, or commercial mobile radio services shall be taxed as real estate in the town in which such property or any part of it is situated." RSA 72:8-a. RSA 72:8-a provides for what is referred to in this litigation as the "pole/conduit tax."

Municipalities have for many years also taxed FairPoint's use of public rights of way ("ROW").[1] Companies such as FairPoint place their equipment in the ROW. *See* FairPoint's App. I at 124-161, 182-84, and 216-20. Municipal property, such as ROW, are statutorily exempt from taxation by virtue of RSA 72:23, I(a). That statute eliminates the exemption and renders municipal property taxable if, and only if, municipally owned property "is used or occupied by other than the state or a city, town, school district, or village district under a lease agreement or other agreement the terms of which provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property." RSA 72:23, I(a) (emphases added). RSA 72:23 further requires that such "leases or other agreements" expressly shift the tax burden onto the party "using or occupying" public property. *See* RSA 72:23, I(b).

FairPoint places its equipment in the public rights-of-way pursuant to a statutory licensing scheme in RSA chapter 231. *See* FairPoint's App. I at 124-161; 182-184; 216-220. Specifically, RSA 231:160 authorizes telephone companies to place "poles and structures and underground conduits and

[1] The Towns incorrectly assert that ROWs only recently became taxable. *See* Towns' Brief at 18. As will be discussed, ROW use has been taxable for years.

cables" in public highways "as provided in this subdivision and not otherwise." RSA 231:160. RSA 231:161 requires an entity such as FairPoint to obtain a permit or license in accordance with this statute. Once a license has been issued, municipalities may amend or even revoke the license. *See* RSA 231:163.

This Court already has addressed the interplay between the tax-shifting language required by RSA 72:23, I, and the pole licensing scheme in RSA chapter 231. In *New England Tel. & Tel. Co. v. City of Rochester*, 144 N.H. 118 (1999), ("*Rochester I*"), the parties disputed whether the RSA 231:161 licenses constituted "agreements" within the meaning of RSA 72:23, I(b). This Court decided that "[t]he terms of RSA 72:23, I(b) are applicable to the [telephone company's] pole licenses," and that "RSA 72:23, I(b) . . . requires [the municipality] to shift the tax burden imposed by RSA 72:6 to the [telephone company] by making tax liability a condition of the pole licenses." *Rochester I*, 144 N.H. at 121-22 (emphasis added).

FairPoint filed this litigation beginning in tax year 2011 (running April 1, 2011 to March 31, 2012), against many municipalities asserting a variety of claims concerning the pole/conduit tax and the ROW tax. Relevant to this appeal, FairPoint asserted claims of *ultra vires* taxation and of disproportionate taxation. *See* FairPoint's App. I at 4-27

(Town of Hanover Petition & Answer, Tax Year 2011); 31-65 (Town of Durham Petition & Answer, Tax Year 2013). The trial court administratively consolidated the matters and specially assigned them to Judge McNamara. *See* Add. to Towns' Brief at 94.

The parties entered into a phased discovery plan. *See* FairPoint's App. I at 28-30. Phase 1 consisted of discovery and litigation of several test cases for FairPoint's *ultra vires* claim, which asserted that municipalities had failed to follow the mandated statutory procedure to permit taxation of FairPoint.

## II. Summary judgment as to FairPoint's *ultra vires* claims.

As part of Phase 1, FairPoint filed an omnibus summary judgment motion on its *ultra vires* claim, which was objected to by the test case towns. *See* FairPoint's App. I at 66-123.

By Order dated December 14, 2015, the trial court granted the summary judgment motion as to virtually all of FairPoint's *ultra vires* ROW taxation arguments. The trial court denied the summary judgment motion as to FairPoint's *ultra vires* pole/conduit taxation arguments. The trial court denied the subsequent reconsideration motions, expanding on certain parts of its original Order/analysis. *See* Add. to Towns' Brief at 82.

**III. Trial of FairPoint's tax abatement claims.**

Judge McNamara next worked with the parties to identify a subset of *ultra vires* test cases that could be brought forward for trial on the remainder of FairPoint's claims to produce a final decision. *See* Add. to Towns' Brief at 94.

The *ultra vires* test cases of Belmont and Durham were set down for additional discovery and trial. Hanover was also chosen as a test case as a pure abatement case.

Following a discovery period, the trial court conducted a five-day trial in April 2018. The parties stipulated to certain background facts, *see* FairPoint's App. II at 4-7, and also stipulated to the admissibility of many exhibits, including all expert reports (including FairPoint's Trial Exs. 37, 38, 39, 40). *See* Tr. Day One at 8:7-10.

FairPoint's expert witness—Ann Bulkley of Concentric Energy Advisors, Inc.("Concentric" or "Bulkley")—developed an appraisal for each town. *See* Tr. Exs. 37-39. Bulkley is a Certified General Appraiser in Massachusetts, holds a master's degree in economics, a bachelor's degree in economics/finance and, for more than two decades, has served as an expert in the field of valuing utility property. *See* Tr. Ex. 45, Resume. Her appraisal for Hanover was for the 2011 tax year, *see* Tr. Ex. 38 at 1, and her appraisal for Durham was for the 2013 tax year. *See* Tr. Ex. 38 at 1. Her

analysis confirmed that Durham and Hanover over-assessed the value of FairPoint's poles, conduit and use of ROW. *See* cover letters Tr. Exs. 38 and 39; *see also* FairPoint's App. II at 4-7 (Fact Stipulations).

"Generally, three methods may be used to value property for tax purposes: the replacement cost approach, the comparable sales approach, and the capitalization of income approach." *Appeal of Sawmill Brook Dev. Co.*, 129 N.H. 410, 413 (1987). The parties' experts did not dispute the general pole/conduit valuation approach. Each party's expert relied primarily[2] on the cost approach in valuing the poles/conduit, which "is particularly applicable when the property being appraised involves . . . relatively unique or specialized improvements . . . for which there exist no comparable

[2] Bulkley considered the other two approaches, but ultimately could not develop either. Bulkley observed that there was insufficient community-specific information to develop an income approach and too much imprecision in trying to allocate net income to just poles, conduit and ROW. *See*, *e.g.*, Tr. Ex. 38 at 11-12. She found insufficient reported sales of installed poles and conduit to rely on the sales approach in this matter. *See*, *e.g.*, Tr. Ex. 38 at 24-28. The Towns' expert did rely on the income approach to tax pole/conduit attacher revenue as a purportedly independent incremental component of value.

properties on the market."[3] Each party's expert also used the following general replacement cost new ("RCN") less depreciation ("RCNLD") framework: RCN – Depreciation (to a 20% floor)[4] = Total Fair Market Value. *See*, *e.g.*, Tr. Ex. 38 at 13 (Durham), Def's Ex. A (combined) at 69-108, Add. to Towns' Brief at 98 (following same framework).

Bulkley's approach to ROW valuation employed a sales comparison approach known as the across-the-fence method ("ATF"), which in general terms used the town's MS-1[5] data reported to the Department of Revenue Administration ("DRA") to derive a value-per-acre that is then applied to the acreage of the corridor running with the public ways and, ultimately, the amount of that corridor's value being used by FairPoint. *See*, *e.g.*, Tr. Ex. 38 at 28-30; *see also* Tr. Ex. 54 (ROW worksheet). The Towns' expert, George E. Sansoucy ("Sansoucy"), essentially used the same ATF methodology,

---

[3] 14-22 New Hampshire Practice: Local Government Law § 831 (2017); Grafton County Elec. Light & Power Co. v. State, 78 N.H. 330, 334 (1917) (observing cost approach proper for valuing electrical plant).

[4] Both experts applied only physical deterioration, meaning neither applied functional or economic obsolescence.

[5] MS-1 is a report towns provide to the Department of Revenue Administration with an inventory of the town's property.

with differences as to certain variables discussed below. *See* Tr. Ex. A at 108-09.

Following trial and briefing, *see* FairPoint's App. II at 9-58 (FairPoint's Post-Trial Memorandum) and 228-38 (Reply to Towns' Post Trial Memorandum), the trial court essentially ruled in FairPoint's favor and ordered abatements by the Towns of Durham and Hanover. The trial court found Bulkley (FairPoint's expert) credible, but it did not adopt all of her opinions. The trial court's fair market value ("FMV") determinations relied on only one of the two pole/conduit RCN methods employed by Bulkley. Bulkley had developed an RCN for poles and conduit by (1) using a survey of actual cost data from New England utilities, and (2) relying upon the RS Means publication to develop a RCN. The trial court accepted only Bulkley's RCN derived from her utility survey. The trial court also relied on only one of Bulkley's depreciation periods for the telephone poles and conduit. The trial court accepted Bulkley's ROW values. The trial court rejected the value opinions of the Towns' expert.

The trial court then issued a final Order setting forth the refunds due FairPoint, *see* Add. to Towns' Brief at 128, and later denied the Towns' motion for reconsideration. *See id.* at 129.

## STANDARD OF REVIEW

The trial court's post-trial decision concerning FairPoint's abatement claims is reviewed deferentially. "The valuation of property is a question of fact for the trial court, and [this Court] will not overturn its finding unless it is clearly erroneous or unsupported by the evidence." *Rye Beach Country Club v. Town of Rye*, 143 N.H. 122, 127 (1998).

This Court reviews the trial court's summary judgment Orders *de novo*. *See Beckles v. Madden*, 160 N.H. 118, 125 (2010).

## SUMMARY OF THE ARGUMENT

The Towns on appeal challenge two separate categories of decisions by the trial court. First, the towns challenge the tax abatement analysis performed by Judge McNamara. These challenges, at their core, attack Judge McNamara's ultimate conclusion that, after considering all of the evidence and evaluating the witnesses, FairPoint's expert, Bulkley, was more credible than the Towns' expert, Sansoucy. However, Judge McNamara did not adopt all of Bulkley's conclusions, instead engaging in his own independent analysis of the various competing valuation methodologies. All of the Towns' arguments concerning what the trial court should or should not have considered directly implicate the trial court's broad discretion. Additionally, as will be explained below, several of the Towns' arguments are predicated on a series of misunderstandings of the undisputed evidence and the trial court's decision. The Towns' brief articulates no basis to overturn Judge McNamara's reasoned decision on the valuation of FairPoint's poles and conduit and FairPoint's use of the ROWs in the test case towns.

Second, the Towns appeal the trial court's summary judgment ruling on FairPoint's argument that certain Towns acted *ultra vires* when they attempted to tax FairPoint without including the language mandated by RSA 72:23, I(b) in their pole licenses. The Towns' first argument, that their ability to

tax FairPoint is incorporated by reference into their pole licenses, has been waived because this argument was only raised below by Belmont and Belmont filed no brief. Even if not waived, the Towns' argument ignores the plain language of the statute and basic canons of statutory interpretation. The Towns' next argument, that FairPoint's pole licenses are actually perpetual leases, likewise fails because of the plain language of RSA 261:163 establishes that the licenses are neither leases nor perpetual. Again, the Towns' brief articulates no basis for this Court to overturn the trial court's decision.

## ARGUMENT

The Towns primarily appeal discretionary credibility decisions made by the trial court following a five-day trial and the type of battle of experts common in tax abatement matters. Each of the trial court's abatement rulings finds considerable support in the evidence, most of which the Towns stipulated to as full, admissible exhibits. The Towns identify no error as to the trial court's abatement rulings.

The Towns press only two *ultra vires* arguments, each of which the trial court properly rejected because the argument directly contravened clear, express statutory language. The Towns identify no error in the trial court's *ultra vires* rulings.

### I. The trial court committed no error in its abatement decisions.

New Hampshire has a well-developed statutory framework and decisional law governing real estate tax abatements.

RSA 76:17 governs real estate tax abatement actions brought in the Superior Court. The trial court has statutory authorization to make such orders "as justice requires" in a tax abatement proceeding using "broad discretion and equitable powers." *See LSP Ass'n v. Town of Gilford*, 142 N.H. 369, 373 (1997). In this case, FairPoint alleged disproportionate assessments. "[T]o carry the burden of proving disproportionality, a taxpayer must establish that the

taxpayer's property is assessed at a higher percentage of fair market value than the percentage at which property is generally assessed in the town." *Verizon New Eng., Inc. v. City of Rochester*, 151 N.H. 263, 272, (2004). The parties stipulated to the DRA equalization ratio as reflecting the general level of market value assessed in each town.

The trial court below focused on the FMV of FairPoint's taxed property (poles, conduit, and use of ROW). "The search for fair market value is not an easy one, and is akin to a snipe hunt carried on at midnight on a moonless landscape." *Pub. Serv. Co. v. Town of Bow*, 170 N.H. 539, 542 (2018) (quotation omitted). Property valuation "is a question of fact for the trial court . . . ." *Rye Beach Country Club*, 143 N.H. at 127. "Expert testimony will generally be required in order to demonstrate the market value of the property . . . ." 16-27 *New Hampshire Practice, Municipal Taxation & Road Law* § 27.08 (2017). The evidence consisted almost exclusively of written appraisals and testimony by the parties' respective appraisers.

Against that backdrop, the Towns make a series of arguments in essence challenging the trial court's expert credibility determinations. The Towns identify no error.

**a. The trial court did not shift the burden of proof and its findings were supported by the evidence.**

In an effort to give the illusion of an appellate issue of law, the Towns accuse the trial court of "shifting th[e] burden to the towns to prove that the assessments were correct." Towns' Brief at 28. The Towns acknowledge the trial court recited the correct burden of proof, *see id.* & Add. to Towns' Brief at 96, but argue the trial court "did not, in fact, apply that standard." Towns' Brief at 28.

The Towns failed to preserve this issue. The Towns purport to have raised the broad issue in their post-trial motion for reconsideration, *see* Town's Brief at 7, Question I, but the only section of that motion remotely raising this issue merely argued that the trial court's acceptance of Bulkley's survey data approach "impermissibly transfers FairPoint's burden of proof to the Towns" to dispute that data. Towns' App. at 231 ¶ 7. The Towns' current general attack on the burden of proof cannot now be raised for the first time.

Substantively, the Towns' "burden of proof" argument lacks merit. The trial court did not follow an incorrect procedure and was well aware of who had the burden of proof. The trial court required that the taxpayer put on credible evidence of FMV before awarding any relief. The trial court did not order any abatement until after the trial court had analyzed the evidence and determined that some, but not

all, of the taxpayer's FMV expert opinions were credible. The Towns' real argument is not that the trial court shifted the burden of proof, but that the trial court should not have found FairPoint's expert credible. That is not a legal issue. It is a discretionary finding supported by the evidence.

The Towns' other attacks on the credibility of FairPoint's expert, as discussed below, lack merit. Even the Towns' expert acknowledged FairPoint was entitled to a substantial abatement in Durham due to a computational error Sansoucy (acting as tax assessor) hid until discovery in this case unearthed the issue.[6]

---

[6] Sansoucy over-assessed in Durham 2013 due to an error he discovered prior to May 15, 2014. *See* Tr. Day 3 at 502:6 (acknowledging error); at 503:19–505:12 (explaining error in "life" column of spreadsheet); Tr. Ex. 7 at 2 (recommending aggregate of $4,813,100 for taxation of FairPoint), Tr. Ex. 21 (Sansoucy worksheets with pole value of $3,170,700 with error in "life" column), Tr. Day 3 at 512:12-19 (conceding that error had been discovered prior to May 15, 2014). *See* Tr. Ex. 22 (corrected Sansoucy worksheets (dated May 5, 2014) with pole value of $1,598,000). Yet, knowing that he erred, in June 2014, Sansoucy inexplicably recommended that Durham deny FairPoint's abatement request. *See* Tr. Ex. 36 (Sansoucy letter post-dating the discovery of the error in "life" column but nonetheless recommending against FairPoint's abatement), *and* Tr. Day 3 at 513:2 (acknowledging same). In his report prepared for this litigation, moreover, Sansoucy arrived at an aggregate value of $3,433,400, *see* Tr. Ex. A, Sansoucy Report Cover Letter at 2, an admitted over-assessment of $1,379,700. Such

**b. The trial court properly found FairPoint's expert credible.**

The Towns next argue that the trial court erred in accepting Bulkley's opinions. The trial court's FMV determinations relied on one—and only one—of the two pole/conduit RCN methods employed by Bulkley. Bulkley had developed an RCN for poles and conduit by (1) using actual cost data from New England utilities, and (2) relying upon the RS Means publication to develop an RCN. The trial court accepted only Bulkley's RCN derived from her utility survey.[7]

The Towns argue to this Court, as they argued below, that Bulkley's utility survey RCN is not credible because Bulkley did not disclose the identity of the New England utility companies surveyed. The Towns identify no error.

---

indefensible conduct provides ample justification for why the trial court did not find Sansoucy credible.

[7] The Towns incorrectly state the trial court adopted pole RCNs derived through Bulkley's utility survey and RS Means approach. *See* Towns' Brief at 30 n.4. The trial court's Order relative to pole RCN adopted only Bulkley's utility survey RCN for poles. *Compare* Add. to Towns' Brief at 95 (trial court's table summarizing findings), *with* Tr. Ex. 38, at 22 & Tr. Ex. 39, at 22.

First, the Towns ignore the fact that they stipulated to the admissibility of Bulkley's appraisal reports (Trial Exs. 38-39) as full exhibits at trial. The Towns, therefore, have conceded that each of those reports met all of the requirements of the New Hampshire Rules of Evidence, including relevance (*N.H. R. Ev.* 402) and the sufficiency of data and reliability for expert testimony (*N.H. R. Ev.* 702). Therefore, the Towns' lengthy discussion of what underlying data may have been discoverable pursuant to RSA 516:29-b, *see* Towns' Brief at 30-34, is irrelevant. During discovery, the Towns never sought to compel Bulkley's raw data and instead tried to leverage the issue as a tactic (a credibility attack at trial).[8]

Viewed for what it really is, the Towns' arguments over the confidentiality of the utility survey data are purely attacks

[8] The Towns have provided this Court with portions of FairPoint's written discovery responses. *See* Towns' App. at 46, 52. Those documents, however, were neither raised with the trial court, filed with the trial court, or used as evidence at trial. As such, those discovery responses are not part of the record on appeal. *See Sup. Ct. R.* 13(1). In addition, FairPoint's discovery responses show that the Towns were well aware of the claims of confidentiality over the data during discovery, yet failed to take any action. The trial court saw through this approach and called it out for what it really illustrated—the Towns knew the raw data would not have changed the landscape. *See* Add. to Towns' Brief at 100 & 132.

on Bulkley's credibility.[9] "'Credibility, of course, is for the trial judge to determine as a matter of fact and if the findings could reasonably be made on all the evidence they must stand.'" *Pub. Serv. Co.*, 170 N.H. at 542 (quoting *Southern N.H. Water Co. v. Town of Hudson*, 139 N.H. 139 (1994)). The Towns identify "no reason to disturb the trial court's assessment," *id.*, because the trial court based its findings on (stipulated) evidence in the record, namely Bulkley's appraisals.

Bulkley, moreover, followed a recognized appraisal methodology – the Uniform Standards of Professional Appraisal Practice ("USPAP"). *See* Tr. Ex. 38 at 1, 22, *and* Tr. Ex. 39 at 1; *see also* RSA 310-B:18-a (adopting USPAP). The Towns' attacks on Bulkley go to only the weight of the expert evidence. *See*, *e.g.*, *In re Creekside Senior Apts., L.P.*, 477 B.R. 40, 65 (6th Cir. B.A.P. June 29, 2012) ("The issue of whether an appraiser's report complied with USPAP standards goes to the weight the report should be given, instead of whether it should be admitted. The nature and extent of the deviations from USPAP concern only the report's credibility." (quotations and brackets omitted)).

---

[9] At trial, the Towns' counsel openly acknowledged that the confidential data issue "goes to her credibility." Tr. Day One at 165:19-20, at 167:3-6.

The Towns, in essence, ask this Court to re-weigh the evidence on appeal, which is plainly improper:

> [C]onflicts in the evidence were to be resolved by the trial judge, who could accept or reject such portions of the evidence presented as he found proper, including that of the expert witnesses. As the fact finder, it was proper for the trial court to weigh the conflicting expert testimony. Because there is support in the record for the trial court's valuation determination, we cannot find that the court erred as a matter of law in accepting [the taxpayer's] appraisals.

*Pub. Serv. Co.*, 170 N.H. at 542; *see also LLK Trust v. Town of Wolfeboro*, 159 N.H. 734, 739-40 (2010).

It is also inaccurate for the Towns to suggest that FairPoint or its expert "hid" the underlying data. The Towns deposed Bulkley prior to trial after receiving a copy of her file, but then never sought to compel the production of the raw utility survey data. Bulkley did provide the Court and the Towns with a summary form of the utility survey data. *See* Tr. Exs. 46-49. She also testified at length about the process she used to develop the utility survey approach and why, in her view, the approach used good data in a methodologically sound approach to the appraisal.

The Towns had ample opportunity to, and did, cross-examine Bulkley on the subject and other subjects. "Objections to the basis of an expert's opinion go to the weight to be accorded the opinion evidence" and "[t]he

appropriate method of testing the basis of an expert's opinion is by cross-examination of the expert." *Goudreault v. Kleeman*, 158 N.H. 236, 248 (2009) (quotations and brackets omitted). In the end, the Towns failed to persuade the trial court (as a factual matter) that Bulkley's utility survey approach lacked credibility.

Additionally, corroborating sources of cost data in evidence confirmed the credibility of Bulkley's utility survey data. *See* Add. to Towns Brief at 105 ("The Court finds persuasive the fact that the conclusion reached by Bulkley are essentially consistent with the information obtained from other sources, including GES's [Sansoucy] own PSNH pole data study . . . ."). The table below summarizes the other data sources as to pole RCNs, for example, with the sole outlier (by almost a factor of two) being the Towns' expert, Sansoucy:

| **Pole Cost Data Source** | **Durham** | **Hanover** |
|---|---|---|
| Concentric: Utility Survey | $2,019,277 | $2,176,248 |
| PSNH Data (provided by Sansoucy) | $1,878,245 | $1,746,470 |
| NH DRA Data | $1,805,219 | $1,846,527 |
| GES Pole Cost RCN | $3,663,552 | $3,541,538 |

*See* Tr. Ex. 38 at 20; Tr. Ex. 39 at 20; Tr. Ex. 40 at 26.

The Towns next attack the trial court's reliance on Bulkley's utility survey approach in view of ledge boring costs. *See* Towns' Brief at 32. Bulkley testified that subsurface

"conditions were very similar across New England" and this "made [the New England utility survey data] a very reasonable sample." Tr. Day 1 at 35:13-20. Bulkley also testified at length about the quality of the FERC data. *See* Tr. Day 1 at 42:23–43:2. The FERC accounting rules confirm that costs associated with excavation and backfill are included in the data Bulkley relied upon. *See* 18 C.F.R. Part 101, Account 364 ("Poles, towers and fixtures."), *and* Account 366 ("Underground conduit."). The Towns' own expert agreed that the FERC accounting data is "complete," "robust," and "reliable," Tr. Day 3 at 558:11.

The trial court's RCN findings were reasonable and based on evidence in the record. The Towns identify no error.

**c. The trial court correctly found that guywires/anchors are not taxable and, in any event, the issue is a red herring.**

The Towns next take issue with the trial courts' resolution of whether guywires and anchors are taxable cost components, which is an issue that relates only to pole RCN.

The issue centers upon RSA 72:8-a, which at all times only authorized taxation of "structures, poles, towers, and conduits employed in the transmission of telecommunication . . . services" and specifically excluded "[o]ther devices and equipment, including wires, fiber optics, and switching equipment employed in the transmission of

telecommunication . . . services." RSA 72:8-a (amended 2016).

In view of the statutes' plain language, the trial court correctly construed the statute as not allowing or authorizing taxation of guywires and anchors. *See* Add. to Towns' Brief at 104-05. The Towns fail to identify any tax-enabling provision in the statute. "[T]he right to tax must be found within the letter of the law and is not to be extended by implication." *Pheasant Lane Realty Trust v. City of Nashua*, 143 N.H. 140, 143 (1998) (quotation omitted). The Towns point to the ambiguous term "structures," but "[a]n ambiguous tax statute will be construed against the taxing authority rather than the taxpayer." *Id.* at 144 (quotation omitted).

Beyond that, the DRA, who develops RCNs under the current method (required by RSA 72:8-a and RSA 72:8-c), does not include guywiress and anchors in its pole values, *see* Tr. Day 4 at 592:9; *see also* Tr. Ex. 40 at 11 (discussing Sansoucy testimony). That places an administrative gloss on the tax-enabling language. *See DHB v. Town of Pembroke*, 152 N.H. 314, 321 (2005). And the new statute concerning valuation contemplates only "wooden poles" being taxable, *see* RSA 72:8-c, I, which sheds light on the meaning of the tax-enabling language in RSA 72:8-a. *See Franklin v. Town of Newport*, 151 N.H. 508, 512 (2004) (looking to subsequent legislative history).

The Towns' argument also ignore the express, unambiguous statutory exclusion for "[o]ther devices and equipment, including wires, fiber optics, and switching equipment employed in the transmission of telecommunication . . . services." RSA 72:8-a (amended 2016). That exclusion expressly identifies "wires" and extends to any and all "other devices and equipment" of any kind used by a telecommunication distribution system. *Cf. Public Serv. Co. v. Seabrook*, 126 N.H. 740, 745-46 (1985) (construing similar taxing language in RSA 72:8 broadly to include any item owned by utility with "some intimate connection with the business of generating, producing, supplying, and distributing electricity"). The statutes' exclusionary language confirms that guywires and anchors are not taxable.

The taxability of guywires and anchors is, ultimately, a red herring in view of the trial court's findings adopting solely Bulkley's utility survey approach. Bulkley's utility survey approach was derived from FERC accounting data (Account 364), and this data did include the costs of guywires and anchors. *See* 18 C.F.R. Part 101, Account 364 ("Poles, towers and fixtures."). As such, the result below actually included the cost component, meaning the Towns were not prejudiced.

The bigger picture here is, "[a]s [this Court] has recognized, there is never one exact, precise or perfect

assessment; rather, there is an acceptable range of values which, when adjusted to the municipality's general level of assessment, represents a reasonable measure of one's tax burden." *Aclara Meters LLC v. City of Somersworth*, Docket No. 28086-15PT, 2018 N.H. Tax LEXIS 1, at *8, n.3 (N.H. B.T.L.A. March 27, 2018) (citing *Wise Shoe Co. v. Town of Exeter*, 119 N.H. 700, 702 (1979)). The parties' dispute over guywires and anchors is but one of many cost components for pole installation. And, as the Towns' expert conceded, "not every pole requires guys and anchors." Tr. Ex. A at 72 (estimating "approximately 20% of all poles" require same). What is more, the cost-per-pole (according to the Towns' expert) was on the order of $115 or $170—a minor cost consideration. *See id.* In short, there is no reason to believe that the parties' dispute over guywires and anchors would have rendered Bulkley's opinions of value outside of a reasonable range. *See Aclara Meters LLC*, 2018 N.H. Tax LEXIS at *8, n.3. The cost approach also tends to inflate FMV which is another reason why this issue and the towns' other hypertechnical costs arguments do not alter the fundamental reasonableness of Bulkley's opinion. *See Manchester Hous. Auth. v. Reingold*, 130 N.H. 598, 602 (1988).

The Towns identify no error or no reversible error with respect to the issue of guywires and anchors.

**d. The trial court properly credited Bulkley's pole/conduit valuations based on the evidence.**

The Towns next assert a variety of challenges to the trial court's RCN and depreciation findings and conclusions. These consist of the following: (i) rejection of the Towns' expert's approach to RCN and costs and treatment of Bulkley's RS Means approach, *see* Towns' Brief at 43-44, (ii) the rejection of Sansoucy's mobilization costs and Bulkley's utility survey approach with respect to mobilization, *see* Towns' Brief at 44-45, (iii) the issue of contributions in aid of construction ("CIAC"), *see* Towns' Brief at 45-46, and (iv) the trial court's finding of the pole depreciation period. *See* Towns' Brief at 48-51.

Each of these issues is one of disputed expert credibility. The trial court had no obligation to accept the opinions of any expert. *See Brooks v. Allen*, 168 N.H. 707, 715 (2016) (trial court "not compelled to believe even uncontroverted evidence" (quotations and brackets omitted)).[10] Accordingly, the trial court's resolution of each

[10] "Expert opinions . . . are not ordinarily conclusive in the sense that they must be accepted as true on the subject of their testimony, but are purely advisory in character and the trier of facts may place whatever weight it chooses upon such testimony and may reject it, if it finds that it is inconsistent with the facts in the case or otherwise

issue below is a finding of fact supported by the evidence and should be deferred to and affirmed as such.

RS Means Approaches: The Towns seem to argue first that the trial court improperly accepted Bulkley's RS Means approach and improperly rejected Sansoucy's RS Means approach (including his mobilization costs). Contrary to the Towns' assertion, the trial court ultimately used *only* Bulkley's utility survey RCN for poles and conduit, and did not base its finding of value on any party's RS Means approach. *Compare* Add. to Towns' Brief at 95 (trial court's table summarizing findings) and 112,[11] *with* Tr. Ex. 38, at 22 & Tr. Ex. 39, at 22. As such, the Towns' entire line of argument about the experts' respective RS Means approaches is beside the point because the Court did not utilize a RS Means approach.

---

unreasonable." *Gibson v. Ferguson*, 562 S.W.2d 188, 189-90 (Tenn. 1976).

[11] The trial court's summary table on page 2 of its post-trial Order by mistake included undepreciated conduit values. Page 19 of its same Order (Add. to Towns' Brief at 112) includes the correct, depreciated values. The parties recognized this and submitted a joint, proposed final Order to the Court explaining the issue. *See* FairPoint's App. II at 255-59. The trial court's final findings quantifying the abatement and refund used the correct, RCNLD figures for poles and conduit. *See* Add. to Towns' Brief at 128.

Beyond that, there was ample basis in the record to reject Sansoucy's credibility as to any subject. Sansoucy has spent a career working nearly exclusively on behalf of taxing authorities, during which time he has established himself as the outlier even among municipal assessors in arriving at the highest value levels he possibly can. *See* Tr. Ex. 13. New Hampshire tribunals have observed as much for years. *See Portland Pipeline v. Town of Gorham*, No. 24198-08PT, 2013 N.H. Tax LEXIS 83, at *29 (BTLA July 22, 2013) (observing that Sansoucy's analysis of value failed the "sanity test"), *aff'd* No. 2013-0613, 2014 N.H. LEXIS 180 (N.H. Nov. 25, 2014); *see* FairPoint's App. 2 at 186, *EnergyNorth Natural Gas, Inc. v. City of Nashua*, No. 93-E-348, at 9 (Hills. S. Feb. 14, 1995) (*Hampsey*, J.) (finding that "Sansoucy . . . drastically overvalued the utility property" and, later, that Sansoucy's explanations given for his certain assumptions in his RCN approach "disingenuous"). In this litigation, Sansoucy (who served as the assessor in Durham for tax year 2013 in addition to his role as specially retained expert in the litigation), indefensibly departed from his prior analysis and valuation recommendations in nearly every category. FairPoint highlighted a series of illustrative examples of Sansoucy's prior inconsistent statements in the post-trial briefing below. *See* FairPoint's App. II at 32-35.

Mobilization Costs: The Towns erroneously argue Bulkley's utility survey RCN did not include mobilization costs. The Towns did not properly preserve this issue below. They raised it for the first time on reconsideration. They assert no reason for this, nor could they, where the Towns had every opportunity to raise the issue earlier during the trial or at least in the post-trial briefing. *See Mortgage Specialists, Inc. v. Davey*, 153 N.H. 764, 786-90 (2006).

Even assuming *arguendo* that the Towns preserved this issue, the argument is misguided. As the trial court held in its reconsideration Order, *see* Add. to Towns' Brief at 133, the FERC accounting data forming the basis of the utility data survey does indeed capture costs for transportation of "employees, materials and supplies, tools, purchased equipment, and other work equipment . . . to and from points of construction." 18 C.F.R. Part 101, "Electric Plant Instructions" 3(A)(4). As such, the trial court's findings based on the utility data survey also accounted for mobilization costs.

CIAC Costs: As for CIAC[12] costs the Towns argue were not included in the FERC data, the issue is beside the point.

[12] CIAC (contributions in aid of construction) refers to construction work undertaken by a company such as FairPoint but is paid for by another (usually a customer).

The taxable pole counts in this matter were agreed-upon by the parties and their experts.[13] In addition, Bulkley used the data to develop a generic RCN, not FairPoint's actual costs of construction related to a specific pole count. As such, whether the utilities who participated in Bulkley's survey had some small subset of pole installations paid for by a customer is irrelevant and had no effect on the generic RCN. Bulkley's RCNs were also independently corroborated by other sources, including the PSNH data and the DRA's approach. The Towns' own expert agreed that the FERC accounting data is "complete," "robust," and "reliable," Tr. Day 3 at 558:11, and offered no attempt to quantify his (newfound) criticism specific to CIAC. For any or all of these reasons, the trial court's rulings rested on adequate evidence in the record.

Pole Depreciation Period: The Towns next argue that the trial court selected the wrong pole depreciation period. The Towns incorrectly assert that the trial court "rejected the

[13] The Towns' citation to *Southern N.H. Water v. Hudson*, 139 N.H. 139 (1994), does not support their argument. That case merely states the unremarkable proposition that it would be improper to exclude CIAC from the property count itself, not that CIAC has to be considered in developing generic RCN costs.

opinions of both experts" and instead "adopted the depreciation rate set forth in HB 1198." Towns' Brief at 48.

The appropriate depreciation period is squarely an expert issue and the trial court's finding is supported by the evidence. In this case, Bulkley performed two different pole depreciation analyses: one based on Federal Communication Commission lives, which the trial court rejected, and another using the forty-year period that New Hampshire legislation had recently adopted for purposes of depreciating FairPoint's poles (starting in tax year 2017), *see* RSA 72:8-c, which the trial court found persuasive.[14] Importantly, Bulkley did not simply adopt and apply the forty-year period blindly. She testified that the forty-year period was reasonable and "at the higher end" for poles in comparison to depreciation studies she has seen. *See* Tr. Day 1 at 97:14-22; *see also* Tr. Ex. 38, at 21, *and* Tr. Ex. 39, at 21.

In addition, HB 1198 was the product of significant legislative fact-finding. *See* Docket of N.H. HB 1198 (2016).[15]

---

[14] The Towns inaccurately state that "neither expert advocated for a 40 year depreciation for valuing the poles." Towns' Brief at 50. Bulkley did in her forty-year depreciation approach.

[15] *available at* https://gencourt.state.nh.us/bill_Status/bill_docket.aspx?lsr

Representatives from the industry and from municipalities (both individual ones and the New Hampshire Municipal Association) had significant input. Even Sansoucy acknowledged that "[he] or one of [his] staff participated in the entire proceedings" before the Assessing Standards Board. Tr. Day 3 at 479:2-3. The legislature weighed a variety of advocated lives, including the PUC's 25-year life for electric poles. *See* N.H.S. Ways & Means Committee (April 12, 2016) (comments by Senator Lovejoy).[16]

---

=2047&sy=2016&sortoption=billnumber&txtsessionyear=2016&txtbillnumber=hb1198.

[16] *available at* https://gencourt.state.nh.us/bill_Status/HearingReport.aspx?id=9168&sy=2016. In their brief, the Towns improperly produce and quote from a letter from the New Hampshire Municipal Association to the Senate Ways & Means Committee, *see* Towns' App at 77, as evidence that a forty year depreciation period resulted because "'the floor amendment's sponsors doubted the House would accept' a 50 year period." Towns' Brief at 50. The letter from NHMA is not part of the record of this case, nor part of the legislative history of HB 1198 (although written testimony is referenced in the hearing report, the letter is not part of the docket), and should be disregarded by this Court. Moreover, the Towns misconstrue the record by asserting that the trial court "took judicial notice that HB 1198 resulted from 'lobbying on it by all sorts of people.'" *Id.* In fact, Judge McNamara stated, "[w]here are we going with this? I mean, I can take judicial notice that when legislation involving taxation is introduced and there are committee hearings

It is irrelevant that the trial court did not use the forty-year HB 1198 period for conduit depreciation as that choice was within the trial court's prerogative, *see Brooks*, 168 N.H. at 715, particularly where, as the trial court observed, neither party's expert advocated for a forty-year conduit depreciation period. *See* Add. to Towns' Brief at 112.

In short, the trial court based its finding of a forty-year depreciation period for poles on sufficient testimonial and other expert evidence. The Towns identify no reason to question the trial court's finding and resolution of competing expert evidence.

**e. The trial court's findings valuing FairPoint's use of public rights-of-way were supported by the evidence.**

The Towns' final attack on the trial court's abatement decision focuses on the issue of valuing FairPoint's use of ROW. *See* Towns' Brief at 46-48, 51-53. The Towns assert the following ROW arguments: (i) the trial court failed to account for "assemblage" costs, *see* Towns' Brief at 46; (ii) the trial court failed to account for the income stream of pole attachers, *see* Towns' Brief at 46-48; and (iii) the trial court should not have adopted and applied expert evidence utilizing Judge Morrill's ROW valuation approach in *Verizon New*

---

held, of course there's lobbying on it by all sorts of people." Tr. Day 3 at 479:12-17; Towns' App. at 22.

*England, Inc. v. City of Rochester*, No. 05-E-400, 2006 N.H. Super. LEXIS 1 (Rockingham Super. Ct. Nov. 9, 2006). *See* Towns' Brief at 51-53.

The trial court's resolution of each issue is a factual finding based on expert evidence. This Court should defer to, and affirm, each ruling made by the trial court.

Assemblage Costs: Bulkley, and by extension the trial court's findings based on Bulkley's analysis, properly rejected so-called assemblage costs as part of developing the ROW value. Assemblage costs are those costs incurred in the process of collecting easement rights. Sansoucy included in his ROW analysis a cost component for assemblage which, predictably, in part increased his overall ROW valuation. *See*, *e.g.*, Tr. Ex. A at 110-112, Tables 22 to 24, line 6. Bulkley did not do so and for good reason.

As discussed above, Bulkley's approach to ROW employed a sales comparison approach known as ATF, which used the town's MS-1 data reported to DRA in order to derive a value-per-acre that is then applied to the acreage of the corridor running with the ROWs. *See*, *e.g.*, Tr. Ex. 38 at 28-30; *see also* Tr. Ex. 54 (ROW worksheet).

Bulkley did not use assemblage costs[17] because her ROW approach was not a cost approach—it was a sales comparison approach. Adding a cost element (such as assemblage) would improperly conflate valuation methods. *See* Tr. Day 4 at 682:25–683:1 ("It is capturing the cost to create the right to operate in the right-of-way."); *id.* at 684:16 (Sansoucy testimony acknowledging assemblage as "[o]ne time land costs"). The trial court implicitly agreed, holding such costs should be incorporated into the pole/conduit cost methodology. *See* Add. to Towns' Brief at 24. In addition, even Sansoucy acknowledged assemblage costs as "a very low number," Tr. Day 4 at 50:5-21, meaning the cost component is not one that would render Bulkley's opinions outside the reasonable range of value. *See Aclara Meters LLC*, 2018 N.H. Tax LEXIS at *8, n.3.

Attacher Income: The Towns next argue that the trial court erred in rejecting Sansoucy's bizarre approach aiming to tax the income stream from pole attachers separate from poles, conduits, and ROW. The trial court correctly resolved that issue based on the evidence in the record.

Sansoucy's attacher income approach lacked any credibility. In this analysis, Sansoucy turned appraisal

[17] The Towns incorrectly state that "[b]oth experts included 'assemblage costs.'" Towns' Brief at 46. Bulkley did not.

methodology on its head. Sansoucy had been valuing this property in towns throughout the state, including Durham, for several years. Yet, Sansoucy acknowledged that none of his prior tax assessments of FairPoint included the new attacher income approach. *See* Tr. Day 3 at 498:13-17. And, as Bulkley explained in her admitted rebuttal report, standard appraisal practice actually forbids determining 100% of pole and conduit value by way of the cost approach, and then using (gross) revenue of one component to add yet another valuation component to poles, meaning to increase their value over 100%. *See* Tr. Ex. 40 at 4-5. "If a reproduction cost new less depreciation valuation methodology is utilized, then the value derived from that approach is representative of the entirety of the value of those pole and conduit assets." Ex. 40 at 5 (emphasis added); *see also Barrett v. Town of Warren*, 892 A.2d 152, 154-55 (Vt. 2005) ("The fair market value, arrived at by any of these methods, takes into account all the elements of the property's availability, its use, potential or prospective, and all other elements . . . which combine to give property a market value." (quotation omitted)).

Sansoucy also improperly relied on a gross revenue amount. As Bulkley explained, "[i]f the income-producing potential of the property is relied on for purposes of valuation, then the entirety of the income—all revenue less expenses—

associated with that property should be utilized." Tr. Ex. 40 at 5. FairPoint does incur costs associated with attachers, as reflected in the attachment rate formula. *See* Tr. Ex. 40 at 5-6; *see also* Tr. Day 4 at 691:18 to 692:4 (Sansoucy testimony acknowledging that attachers "load it up at the pole, telephone company and electric is supposed to come out and put in the anchors to hold them up"); Ex. 40 at 6-7 (discussing same deposition testimony). Yet, Sansoucy's analysis did not consider expenses, meaning he is purporting to value and tax gross "revenue," not real property. *See* Tr. Ex. 40 at 5. Not only was Sansoucy's new methodology fundamentally flawed, but it was also *ultra vires* because towns lack statutory authority to tax revenue. *See* RSA 72:6.

The trial court correctly rejected Sansoucy's attempt to separately value attacher revenue. As the trial court observed, Sansoucy "provided no authority for . . . this methodology [as] generally accepted by appraisers." *See* Add. to Towns' Brief at 97. The trial court held that Sansoucy's approach improperly conflated the sales and cost approach. *See id.* at 97-98. Expert evidence in the record supports the trial court's ruling.

The *Verizon* Methodology: The Towns' final challenge to the trial court's factual findings is a broad attack on the ROW methodology used by Bulkley. Bulkley relied largely upon the ROW valuation approach used by Judge Morrill in *Verizon*

*New England, Inc.*, 2006 N.H. Super. LEXIS 1. The Towns argue no evidence in the record supports the finding that "applying Judge Morrill's findings results in a credible opinion of market value in *this* case." Towns' Brief at 51.

The Towns' argument lacks merit for a number of reasons. First, the Towns, again, improperly raise witness credibility issues on appeal. The trial court heard and reviewed the evidence below, including Bulkley's reports and testimony establishing the *Verizon* ATF approach is a "very common approach to valuing . . . property" and was reasonable for valuing ROW use by FairPoint in this case. *See* Tr. Day 1 at 15:3-21, 20:3-16, 115:22–138:6, 190:6–199:24; Tr. Ex. 38 at 28-33; Tr. Ex 39 at 28-33; Tr. Ex. 54 (explanatory worksheet); Tr. Ex. 40 at 37.

The Towns also ignore that all parties' experts essentially used the same ATF methodology, with primary differences being (1) the percentage of ROW use/value assigned to utilities as a group, and (2) the method of allocating use/value to those users. Sansoucy assigned 70% of the ROW use/value to utilities, whereas Bulkley assigned 10% of the use/value to utilities based on her own experience and the finding in *Verizon*. *See* Tr. Day 1 at 126:21–128:7; Tr. Ex. 38 at 32; Tr. Ex. 39 at 32. Bulkley then allocated that 10% equally to all ROW users identified by the Towns in response to discovery requests and FairPoint's records. *See*

Tr. Day 1 at 129:4–131:21; Tr. Ex. 38 at 32-33; Tr. Ex. 39 at 32-33; Tr. Ex. 54 at nn. 16, 17.

The Towns nonetheless argue that Bulkley, and by extension the trial court's reliance on Bulkley's opinions of value, made unsupported assumptions about the corridor width and use. That is incorrect. The Towns ignore that Verizon was FairPoint's predecessor in interest, *see* Tr. Ex. 48 at 1, meaning the *Verizon* decision was effectively a prior decision involving FairPoint's own ROW use. Bulkley also personally visited each community to review poles and conditions. *See* Tr. Ex. 38 at 4, n.6, 20; Tr. Ex. 39 at 4, n.6, 20. Sansoucy submitted evidence supporting Bulkley's approximation of a 15-foot wide ROW use for poles and 10-foot wide ROW use for conduit.[18] *See* Tr. Ex. X (NH DOT manual excerpt expressing preference, but not requirement, for eight-foot width on one side of a way—meaning sixteen feet in total (both sides), and showing in Conditions K and L that poles can be situated near the sidewalk, so there is no

[18] The Towns erroneously assert that the trial court found "that the utility corridor is 25 feet wide." Towns' Brief at 52. The trial court found, and agreed with, Bulkley's approximations of 15 feet for poles and 10 feet for conduits, not the sum of those two figures. *See* Add. to Towns' Brief at 29.

definitive width); *see also* Tr. Ex. A at 59 (photograph of a pole on Valley Road set directly beside the sidewalk).

Finally, the Towns argue that no evidence supported the even division of ROW across all users in the utility corridor. *See* Towns' Brief at 52. Bulkley identified ROW users by using the Towns's discovery responses and FairPoint's records. *See* Tr. Day 1 at 129:4–131:21; Tr. Ex. 38 at 32-33; Tr. Ex. 39 at 32-33; Tr. Ex. 54 at nn. 16, 17. As discussed, Bulkley found the equal division across all users approach fair and reasonable and opined as much. *See* Tr. Day 1 at 129:12-22. Sansoucy also assumed that the ROW users were present along the entire ROW. *See* Tr. Ex. A at 108-09 (Sansoucy narrative reporting differentiating users only as to perceived scope of use, not length of runs of wire or the like).

Intuitively, Bulkley's approach made sense because all users comprise the pole and its attachments (or conduit trench)—the attacher's wire depends on (and uses) the supporting pole. Bulkley's rebuttal report stated that FairPoint does incur costs related with attachers, making it all the more equitable to divide the tax burden. *See* Tr. Ex. 40 at 5-7; Tr. Day 4 at 691:18–692:4 (Sansoucy trial testimony acknowledging that attachers "load it up at the

pole, telephone company and electric is supposed to come out and put in the anchors to hold them up").[19]

As already discussed, the Towns stipulated to the admissibility of Bulkley's reports and opinions. The Towns' "[o]bjections to the basis of an expert's opinion go to the weight to be accorded the opinion evidence" and "[t]he appropriate method of testing the basis of an expert's opinion is by cross-examination of the expert." *Goudreault*, 158 N.H. at 248 (quotations and brackets omitted). In the end, the Towns failed to persuade the trial court (as a factual matter) that Bulkley's ROW valuation method lacked credibility.

Stepping back, the Towns' ROW arguments, and indeed their arguments generally in this appeal, in essence treat property appraisal as an exact science. Yet "[a]ppraising property is not an exact science based on set mathematical formulas." *Harris County Appraisal v. Hartman Reit Operating P'ship, L.P.*, 186 S.W.3d 155, 161 (Tex. App. 2006). "It is not error for an appraiser to use his or her personal experience and expertise to make certain determinations." *Id.* For these

---

[19] Sansoucy assigned a disproportionately low value to FairPoint (1/8th, *see* Tr. Ex. A at 108-09), underscoring that the equal division by Bulkley actually represents a greater proportion of the tax burden than the Towns' own expert asserted.

same reasons, this Court, and even the towns, have recognized that "[t]here is no rigid formula which can be used" in determining FMV for *ad valorem* tax assessment and, as a result, "[j]udgment is the touchstone." *New Eng. Power Co. v. Littleton*, 114 N.H. 594, 599 (1974) (cited favorably by Towns); *Public Serv. Co.*, 170 N.H. at 543. As such, this Court accords special deference to trial court resolutions of valuation opinions. *See id.* The trial court's rulings rested on considerable evidence and the trial court committed no error in its ROW rulings or any valuation rulings below. *See Southern N.H. Water Co. v. Town of Hudson*, 139 N.H. 139, 141 (1994) ("The trial court's order reveals a careful and thorough consideration of each of the valuation methods, and its ultimate decision reflects this.").

## II. The trial court committed no error in its summary judgment decisions concerning the *ultra vires* issue.

The Town of Durham, presumably,[20] appeals two declaratory judgments made by the trial court construing

[20] Belmont was an *ultra vires* test case but Belmont has now waived its appeal by filing no brief. Hanover was not an *ultra vires* test case municipality and, as a result, there is no trial court finding against, nor any argument by, Hanover. In any event, FairPoint's arguments below will reference Durham, but apply with equal force to any other municipality purportedly raising the argument in the Towns' Brief.

various New Hampshire statutes and decisional law related to FairPoint's *ultra vires* claim. The Town of Durham concedes that the trial court ruled correctly as to the core legal issue—that municipalities must have pole/conduit licenses including compliant statutory tax-shifting language as a predicate to assessing any tax for use of ROW.

The Town of Durham presents the Court with two *ultra vires* contentions as to assessment of ROW tax: (1) that poles deemed licensed by operation of law pursuant to RSA 231:160-a are taxable, *see* Town's Brief at 36; and (2) all licenses are "perpetual leases" independently taxable pursuant to RSA 72:6, *see* Town's Brief at 38. Neither argument has merit.

**a. *Ultra vires* argument 1 has not been preserved by Durham and, in any event, the trial court correctly construed the plain language of the operative statutes.**

The Towns' first *ultra vires* argument has been waived, in that only Belmont asserted it below, not Durham, *see* Towns' App. at 231, meaning the argument is waived because Belmont filed no brief. Even if not waived, the issue lacks merit. The plain text of RSA 72:23, I(b) requires—in four separate clauses—that an express provision requiring payment of taxes be set forth in the "lease and other agreement." *See* RSA 72:23, I(b) (amended 2017) ("shall

provide . . . . shall include a provision . . . shall clearly state . . . shall also state . . . .").

The Town of Durham's argument turns statutory construction on its head by purporting to imply that which the statute makes crystal clear must be expressly set forth in the license itself.[21] "[T]he right to tax must be found within the letter of the law and is not to be extended by implication." *Pheasant Lane Realty Trust v. City of Nashua*, 143 N.H. 140, 143 (1998) (quotation omitted). "The power of taxation can be exercised only in the manner prescribed by law. Strict compliance with the statutory provisions is a condition precedent to the imposition of a valid tax." 16 *McQuillin The Law of Municipal Corporations*, § 44:16 (3d ed. updated October 2014) (footnotes omitted) (emphasis added).

The default outcome—in the absence of a written agreement shifting the tax burden—is not an ability to tax. In order to take advantage of the ability to tax (otherwise exempt) use of public property, a municipality must strictly comply with RSA 72:23, I, and do so by "provid[ing] for the

---

[21] It also bears noting that this Court only has held that the RSA 231:161 licenses constitute "agreements" within the meaning of RSA 72:23, I(b). *Rochester I*, 144 N.H. at 121-22; *see also Verizon New England Inc.*, 151 N.H. at 267. The Town of Durham's argument presupposes that the RSA 231:160-a deemed license provision constitutes a similar "agreement."

payment of properly assessed real and personal property taxes by the party using and occupying said property no later than the due date," as well as "clearly stat[ing] whether the lessee has an obligation to pay real and personal property taxes on structures or improvements added by the lessee." *See* RSA 72:23, I. This Court held in *Appeal of Reid*, 143 N.H. 246 (1998), that use and occupation of public property is "not otherwise taxable because the town failed to include a tax provision in the lease"—a town's failure in this regard is "merely [a] fail[ure] to follow the dictates of the enabling provision of RSA 72:23" and nothing more. *Reid*, 143 N.H. at 494.

Complying with RSA 72:23, I, presents no unreasonable burden. In the briefing below, the Town of Alexandria observed two potential (and practical) methods of accomplishing the tax-shift in the context of deemed licenses: "notify all said users during highway acceptance proceedings or otherwise periodically amend all pole and conduit licenses with the Town pursuant to RSA 231:163." Towns' App. at 23. What is more, RSA 72:23, I, requires that users be expressly notified of the obligation to pay taxes, and providing notice to users simply fulfills the statutory purpose of ensuring that ROW users are aware of (and consent to) paying taxes for their occupation. *See Reid*, 143 N.H. at 494 (observing that

RSA 72:23, I, is "a tax provision that ensures that the lessees are aware of, and consent to, taxation of their leasehold").

The trial court followed the plain language of the statue and prior New Hampshire decisions on the subject. The trial court did not err and correctly construed RSA 72:23, I.

**b. *Ultra vires* argument 2 lacks merit because the RSA 231:161 licenses are neither "leases" nor "perpetual."**

As for the second argument (likening the pole/conduit licenses to "perpetual leases,") Durham did purport in very general language to incorporate other towns' *ultra vires* arguments by reference. *See* Towns' App. at 142. Assuming without conceding that Durham's wholesale incorporation by reference preserved the issue for this Court's review, the "perpetual lease" argument nonetheless lacks merit and the trial court did not err in rejecting it. Put simply, the Town of Durham's "perpetual lease" argument finds no support in the statutory framework and the decisional law Durham cites offers no support because the decisions either pre-date the modern version of RSA 72:23, I, do not involve use of state or municipally owned property, or both.

As discussed, RSA 72:23, I, exempts taxation of use of public rights-of-way unless and until a municipality complies with the tax-shifting requirements. RSA 72:6 authorizes taxation generally, but not of exempt property, such as municipal property (and structures located thereon). *See*

*Rochester I,* 144 N.H. at 120-21. *Rochester I* confirms that any municipal taxation for use and occupation of public rights-of-way must first comply with RSA 72:23, I. Durham's failure to follow RSA 72:23, I, precludes any assessment of taxes pursuant to RSA 72:6.

Durham seeks to create an end-run around this statute by characterizing FairPoint's pole licenses as "perpetual leases." The trial court correctly rejected the argument for two reasons: (1) "licenses are not leases," Towns' Add. at 85, and (2) "[n]or are the licenses necessarily perpetual leases" because "under RSA 231:163, a municipality has the authority [to revoke them]." Towns' Add. at 85-86.

To begin, the factual record does not reflect that Durham in fact taxed FairPoint's use as a perpetual lease. At trial, the evidence all established that Durham taxed FairPoint's ROW use pursuant to the ATF method of valuing and apportioning a viatic easement.[22]

In addition, FairPoint's pole licenses are not "leases" of the sort analyzed in *Reid* and other cases assessing taxability of leases, but instead are licenses which, as explained in *Rochester I*, do not constitute property interests. *See*

---

[22] Sansoucy served as the assessor for Durham in tax year 2013 and used the ATF sales comparison method. *See* Tr. Ex. 17.

*Rochester I*, 144 N.H. at 120 (observing that the municipality did not attempt to tax the pole licenses directly "because a license does not ordinarily constitute a property interest").

Pole licenses, moreover, are not "perpetual" because municipalities may revoke the licenses. *See* RSA 261:163. To be perpetual, a lease must be "for a term of years approaching perpetuity." *Hampton Beach Casino v. Town of Hampton*, 140 N.H. 785, 790 (1996). In *Hampton Beach*, for example, the Court did not consider a ninety-nine year lease to be a "perpetual" lease. *See Hampton Beach*, 140 N.H. at 789-90 (citing out-of-state decision and suggesting that a 999-year lease would constitute a perpetual lease). In short, FairPoint has been given no right by Durham to occupy ROW for any particular term of years, much less a term of years approaching perpetuity.[23]

Durham also mistakenly relies upon *Piper v. Meredith*, 83 N.H. 107 (1927). Although *Piper* did involve taxation of a perpetual lease of municipal property, the *Piper* decision pre-dates the modern version of RSA 72:23, I, by fifty years. The exemption statute at issue in *Piper,* and the Court's analysis of that statute, turned on what had been known as the

---

[23] Durham improperly cites facts asserted by the Town of Alexandria in support of this argument. *See* Towns' Brief at 40. The Town of Alexandria is not a party to this appeal and facts unique to Alexandria are not material.

"public use" doctrine, which has since been abandoned by virtue of the modern version of RSA 72:23, I. Historically, municipalities lacked authority to tax a "public use" of municipal property.[24] A telephone company's use of public property constituted tax-exempt "public use" of that property, as confirmed in an 1881 session law (enacted as part of the modern-day statutory framework establishing RSA 263:161), which expressly stated that "[t]he use of the highways of this state, by telegraph, telephone, and electric lighting poles, structures, and wires, under and in accordance with the provisions of this act, is hereby declared to be a public use of such highways." *See* 16 New Hampshire Practice, Municipal Taxation & Road Laws § 51.01 (citing Laws 1881, 54:13) (emphasis added). In the 1970s, a series of statutory amendments to RSA 72:23, I(b), culminating in 1979, ended the era of tax-exempt "public use," such that today, RSA 72:23, I(b) directs municipalities to impose taxes upon those who enter into agreements to use and occupy municipal property, but only for agreements after July 1, 1979 (leaving

---

[24] *See generally Town of Canaan v. Enfield Village District*, 74 N.H. 517, 7 A. 250, 252 (1908); *City of Keene v. Town of Roxbury*, 97 N.H. 82 (1951); *Town of Hanover v. City of Lebanon*, 116 N.H. 264 (1976).

intact pre-1979 licenses). *See Rochester I*, 144 N.H. at 120-21.

In short, the modern version of RSA 72:23, I, did not come into existence until the 1970s, meaning the 1927 decision in *Piper* does not, and logically cannot, stand for the proposition that municipalities may independently tax use of municipal property without first complying with the modern-day requirements of RSA 72:23, I.

For all these reasons, the trial court did not err in rejecting the "perpetual lease" argument. Durham may not tax FairPoint's use and occupation of public rights-of-way without first complying with RSA 72:23, I.

## CONCLUSION AND REQUEST FOR ORAL ARGUMENT

FairPoint respectfully requests that the Court affirm the trial court's Orders below. FairPoint respectfully requests fifteen minutes of oral argument before the full Court. Matthew Johnson, Esquire, will present oral argument for the appellee, FairPoint.

Respectfully submitted,
**NORTHERN NEW ENGLAND TELEPHONE OPERATIONS, LLC D/B/A FAIRPOINT COMMUNICATIONS – NNE**

By its Attorneys,
**DEVINE, MILLIMET & BRANCH, PROFESSIONAL ASSOCIATION**

Dated: June 28, 2019 By: /s/ Matthew R. Johnson

Matthew R. Johnson (No. 13076)
111 Amherst Street
Manchester, NH 03101
Telephone: 603.669.1000
mjohnson@devinemillimet.com

**CERTIFICATION OF COMPLIANCE**

I hereby certify that this brief complies with the 11,000 word limit established by this Court's Order dated February 28, 2019. This brief contains _____ words in the indicated sections of Rule 16(11), exclusive of pages containing the table of contents, table of citations, and any addendum.

I have forwarded copies of the foregoing brief to Walter Mitchell, Esquire, Laura Spector-Morgan, Esquire, and Shawn M. Tanguay, Esquire via the Court's electronic filing system's electronic services.

/s/ Matthew R. Johnson
Matthew R. Johnson, Esq.