STATE OF NEW HAMPSHIRE

SUPREME COURT

2021 TERM

Case No. 2020-0358

MERRIMACK PREMIUM OUTLETS, LLC, ET AL.

V.

TOWN OF MERRIMACK

APPEAL FROM DECISION OF THE HILLSBOROUGH SUPERIOR COURT, SOUTHERN DISTRICT

BRIEF OF APPELLEE / CROSS-APPELLANT TOWN OF MERRIMACK

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QUESTIONS PRESENTED (CROSS APPEAL)

1. Whether the Trial Court erred when it found that the Taxpayers stated a viable equal protection claim when the Town increased the value used for the taxpayer's Property for assessment of property taxes from $86,549,400 in 2016 to $154,149,500 in 2017, resulting in an increased assessment in 2017, but did not similarly revalue other commercial properties, after the Town discovered information suggesting that it had previously significantly under assessed the Taxpayers' Property and had no information to believe that any other properties were so affected. [Town's Motion to Dismiss, dated December 27, 2017, APPX. VOL. I 43; Town's Pre-trial Brief, dated January 22, 2018, APPX. VOL. I 243; Town's Motion to Dismiss Complaint, dated August 5, 2019, APPX. VOL. II 49]

2. Whether the Trial Court erred in allowing the Taxpayers to pursue constitutional claims when the Taxpayers did not allege selective taxation and was not seeking any damages separate and distinct from its tax burden relative to other property taxpayers, when the sole remedy available to a taxpayer aggrieved by the amount of a property tax assessment is through the statutory abatement process. [Town's Motion to Dismiss, dated December 27, 2017, APPX. VOL. I 43; Town's Pre-trial Brief, dated January 22, 2018, APPX. VOL. I 243; Town's Motion to Dismiss Complaint, dated August 5, 2019, APPX. VOL. II 49]

STATEMENT OF THE CASE AND FACTS

The following facts are those alleged in the Taxpayers' pleading or found by the Trial Court in its various orders. The Taxpayers' statement of facts inappropriately includes facts not contained in its pleading, not found by the Trial Court, and not relevant to this appeal.

The Taxpayers own and operate a retail shopping outlet center known as the "Merrimack Premium Outlets" ("Outlets"), which includes the property upon which the Outlets sit (collectively "the Property"). APPX. VOL. I 6; APPX. VOL. II 143. The Property consists of 144 acres of land, contains 408,996 square feet of leasable space, and currently has 101 tenants. APPX. VOL. I 14; APPX. VOL. I 10. The Taxpayers are owned and/or operated by Simon Property Group ("Simon"), "a global leader in the ownership of premier shopping, dining, entertainment and mixed-use destinations and an S&P 100 company." *Complaint Exhibit B*, Affidavit of Mark G. McCarthy; http://business.simon.com/about, APPX. VOL. I 17.

In 2016, the Town conducted a town-wide revaluation pursuant to RSA 75:8-a ("The assessors and/or selectmen shall reappraise all real estate within the municipality so that the assessments are at full and true value at least as often as every fifth year.") APPX. VOL. I 6; APPX. VOL. II 144. Based

upon the information then available to the Town, the Town assessed the Property using an assessed value of $86,549,400. APPX. VOL. I 6; APPX. VOL. II 144. In late 2016, the Town learned that the Outlets had been used as collateral for a secured loan, and as part of that transaction, the Outlets were appraised at a value of $220,000,000. APPX. VOL. II 144. The Town obtained this information from a report published by the company Morningstar. APPX. VOL. II 144. For the 2017 tax year, the Town increased the assessed value of the Outlets to $154,149,500. APPX. VOL. II 144.

The Taxpayers then filed a Complaint for declaratory judgment, alleging, in pertinent part, that "there were no changes in the Outlets from tax year 2016 to tax year 2017 that justified the increase in valuation from $86,549,400 to $154,149,500" and that the "revaluation is void and illegal." APPX. VOL. II 145. The Taxpayers also claimed the increase in the assessed value from $86,549,400 to $154,149,500 constituted a so-called "unconstitutional spot assessment in violation of their rights to equal protection and due process." APPX. VOL. II 145. The Town maintained it had a legal obligation to change the assessed value. APPX. VOL. I 254-257. After briefing, the Trial Court ruled that the Town did have the statutory authority to change the assessed value from one year to the next, but allowed the

Taxpayers to proceed on their "underdeveloped" constitutional claims. APPX. VOL. II 44-46. The Trial Court later dismissed the Taxpayers' related abatement petitions for failing to allege disproportionate taxation. APPX. VOL. II 148-152.

On April 12, 2018, the Town served a set of interrogatories on the Taxpayers. APPX. VOL. I 85. The interrogatories also contained requests for production of documents. *See* Super. Ct. R. 23(h). On July 2, 2018, after futile attempts to obtain the responses from the Taxpayers, the Town moved for Conditional Default. APPX. VOL. I 80; *see* Super. Ct. R. 29(d). On July 5, 2018, the clerk granted the default. APPX. VOL. I 80. On July 11, 2018, the Taxpayers filed a response to the interrogatories with the Court and moved to strike the default, representing that "responses to the Defendant's Interrogatories and Requests for Production of Documents have this day been mailed…to the Defendant's attorney." APPX. VOL. I 101. On August 8, 2018, the Court cleared the default as a matter of course, pursuant to the rules. *See* Super. Ct. R. 29(d).

On August 8, 2018, the Town filed a motion to compel complete answers to the interrogatories, as the Taxpayers provided insufficient or incomplete answers to the interrogatories, and its objections were

inappropriate. APPX. VOL. I 124. On August 5, 2019, after receiving the Trial Court's order resolving other pre-trial issues, the Town filed a renewed motion to compel. APPX. VOL. II 71. After a hearing, by order dated November 21, 2019, the Trial Court granted, in part, the Town's Motion to Compel, compelling further responses to the Town's interrogatories. APPX. VOL. II 41. Thereafter, the Taxpayers failed to provide any further response despite the November Order and in defiance of repeated requests by the Town. APPX. VOL. II 155.

The Town then filed its first Motion for Sanctions. APPX. VOL. II 155. The Court found "that the [Taxpayers] have willfully disregarded the Court's [November] [O]rder in which it granted the Town's renewed motion to compel." APPX. VOL. II 322. The Trial Court awarded the Town its attorney's fees and reiterated its order compelling answers to the interrogatories discussed in the November Order and set an explicit deadline of May 4, 2020 for compliance. APPX. VOL. II 323. On Friday, May 1, 2020, the Taxpayers served what it called "Further Answers to the Interrogatories" on the Town. Almost every response by the Taxpayers relating to requested documents contained language similar to the following: "[the document(s)] is being

produced in the Sharefile, subject to the Protective Order." APPX. VOL. III 25.

At the time, there was no protective order in place and the Trial Court had already denied the Taxpayers' request for a protective order. APPX. VOL. II 324-325. The Town then filed its Second Motion for Sanctions. APPX. VOL. III 34. The Trial Court found that Taxpayers "failed to provide **all** of the interrogatory answers to the Town by that date" set forth in the April 2020 Order. APPX. VOL. III 70 (emphasis added). The Trial Court, again found, as it did in its April 2020 Order, "that the [Taxpayers] have willfully ignored the Court's clear order on a discovery issue." APPX. VOL. III 71. After considering lesser sanctions, the Trial Court then dismissed the case due to the Taxpayers' repeated willful violations of the Court's discovery orders and court rules.

This appeal followed.

SUMMARY OF THE ARGUMENT

It is well-established that a trial court has significant discretion in penalizing a party's discovery abuses, which includes dismissing a case, if necessary. Here, the Taxpayers flagrantly ignored multiple court orders to provide the Town with discovery responses that related to the market value of the Taxpayers' Property, an issue that the Trial Court correctly ruled was relevant. To be sure, the Trial Court was very careful in its punitive approach and dismissed the case only after prior sanctions proved ineffective. Given the importance of the evidence sought, and the Taxpayers' conduct, the Trial Court exercised sound discretion under the circumstances when it dismissed the Taxpayers' case, with prejudice.

As explained above, the Property's market value was highly relevant to the Town's defense against the Taxpayers' equal protection claim. To that end, the Court also properly rejected the Taxpayers' attempt to exclude the Morningstar report from evidence as that document also related to the Property's value and was well within the scope of records allowed under N.H. R. Evid. 803(17).

Finally, the Town had the authority under RSA 75:8 to adjust the Taxpayers' assessed value in an effort to ensure town-wide proportionality.

ARGUMENT

I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DISMISSED THE TAXPAYERS' CASE AFTER THE TAXPAYERS REPEATEDLY AND WILLFULLY VIOLATED ITS ORDERS, AND AFTER THE TRIAL COURT HAD PREVIOUSLY IMPOSED LESSER SANCTIONS.

The Taxpayers next challenge the Trial Court's dismissal as a sanction for the Taxpayers' repeated violations of rules and court orders. "It is within the sound discretion of the trial court to dismiss [a] case for failure to comply with the court's discovery order." *Estate of Sicotte V. Lubin & Meyer,* 157 N.H. 670, 673 (2008)(quotation omitted); *see also* Super Ct. R. 21(d). However, before ordering dismissal, courts should consider less drastic alternatives. *See, e.g., DeButts v. LaRoche*, 142 N.H. 845, 847 (1998). Here, the Trial Court dismissed the case only as a last resort, after it had previously imposed lesser sanctions for the same violation. Prior to dismissal, the Trial Court found that the Taxpayers had "repeatedly flouted the Court's orders and the Court's rules" and ruled that lesser sanctions did not work or were not appropriate. APPX. VOL. III 72. The Trial Court's well-reasoned dismissal was a proper exercise of discretion, and should be affirmed.

The Trial Court's dismissal in 2020 was the result of the Taxpayers' repeated failure to respond, in a *complete* manner, to a set of interrogatories propounded by the Town in 2018. First, the Taxpayers' failed to respond at all and their entire case was conditionally defaulted. APPX. VOL. I 80. Then, over the years, no less than two court orders compelled responses, and one imposed lesser sanctions in the form of attorney's fees. *See* APPX. VOL. II 323. The Taxpayers' Brief fails to disclose the whole history of its non-compliance, focusing primarily on its unpreserved complaint regarding a protective order.

When the Trial Court granted the Town's first Motion for Sanctions, it issued an order "find[ing] that the [Taxpayers] have willfully disregarded the Court's [November] [O]rder in which it granted the Town's renewed motion to compel." APPX. VOL. II 322. In that order, the Trial Court considered, and rejected, the Taxpayers' "proferred justifications for non-compliance," the same excuses it raises with this Court, determining that the justifications "simply do not survive scrutiny." APPX. VOL. II 322. Despite its "frustration with the [Taxpayers'] behavior," the Trial Court did not order dismissal at the time. Instead, it found that a lesser sanction was "appropriate" and awarded the Town its attorney's fees. APPX. VOL. II 323.

The Trial Court also reiterated its order compelling answers to the interrogatories discussed in the November Order and set an explicit deadline of May 4, 2020 for compliance. APPX. VOL. II 323. At the same time, the Trial Court denied the Taxpayers' request for a protective order. APPX. VOL. II 324-25.

On Friday, May 1, 2020, the Taxpayers served what they called "Further Answers to the Interrogatories" on the Town. The Taxpayers also filed a Motion for Reconsideration of the Trial Court's April 2020 Order to which it attached a copy of these answers. *See* APPX. VOL. II 73. The Town then filed its Second Motion for Sanctions. APPX. VOL. III 34. As noted in its Second Motion for Sanctions, almost every response by the Taxpayers relating to requested documents contained language similar to the following: "[the document(s)] is being produced in the Sharefile, subject to the Protective Order." *Id.* At the time, there was no protective order in place and the Trial Court had already denied the Taxpayers' request for a protective order. APPX. VOL. II 324-25. In other words, the Taxpayers did not, in fact, produce the documents because they refused to do so unless given a protective order, a request the Trial Court had already denied. *See* APPX. VOL. III 76.

The Trial Court then granted the Town's Second Motion for Sanctions, ultimately dismissing the case. In that order, the Trial Court found that Taxpayers "failed to provide **all** of the interrogatory answers to the Town by that date" set forth in the April 2020 Order. APPX. VOL. III 70 (emphasis added). The Trial Court, again, as it did in its April 2020 Order, found "that the [Taxpayers] have willfully ignored the Court's clear order on a discovery issue." APPX. VOL. III 71. The Trial Court noted that it had previously imposed a lesser sanction, attorney's fees, for the same violation but that "this type of sanction has apparently not deterred the [Taxpayers] from further non-compliance." APPX. VOL. III 71. The Trial Court went on to explain that instead of complying with its orders, the Taxpayers "continue to stonewall and insist that they will only disclose the requested information pursuant to a protective order, even though the Court has explicitly denied their request for one." APPX. VOL. III 71.

The Trial Court then considered all the sanctions "at its disposal," including "exclusion of evidence at trial" and "issue sanctions," but ultimately concluded that "dismissal is the most appropriate sanction." APPX. VOL. III 71. The Trial Court reasoned that the Taxpayers "ha[d] repeatedly

flouted the Court's orders and the Court's rules," and that "lesser sanctions are not appropriate and/or would be ineffective." APPX. VOL. III 71.

A. The Taxpayers did not comply with the Court's orders.

In their Brief, the Taxpayers argue that the "trial court's dismissal [was] predicated on a finding that the Taxpayer[s] 'failed to provide answers to the interrogatories'" and argues that this "is not correct" because it did file a document entitled "Further Answers" by the deadline. BRIEF FOR TAXPAYERS p. 37. Notably, the case on which the Taxpayers rely, *American Express Travel v. Moskoff*, 144 N.H. 190 (1999), concerned what constituted an "answer" for purposes of the then-equivalent of Rule 29(d) Conditional Default. This Court held that "a party need only answer in good faith" to strike a conditional default for failing to answer interrogatories, and that issues of completeness or improper objections should be resolved by a separate motion to compel. *American Express,* 144 N.H. at 193. The Taxpayers seek to hide behind this principle, arguing that even if the responses are "inadequate," the "dismissal is not the inappropriate remedy" under these circumstances because it provided *some* further response to the Town. BRIEF FOR TAXPAYERS p. 37.

First, this was no mere conditional default, this was the repeated willful disregard of Court orders. To the extent *American Express* stands for the proposition that inadequate answers are sufficient to avoid dismissal pursuant to Rule 29, it has no bearing here. The Taxpayers had their bite at that apple in 2018, when they forced the Town to move for conditional default regarding *these interrogatories* after the Taxpayers failed to respond at all. While the Taxpayers eventually responded, lifting the default automatically, their responses were inadequate. The Town then did exactly what the *American Express* Court said a party should do under those circumstances: it filed motions to compel. It is the Taxpayers' failure to comply with the November 2019 and April 2020 orders granting and reaffirming the order compelling responses that led to dismissal, not the conditional default. Therefore, *American Express* is inapposite.

Further, while the Taxpayers provided some updated written responses, they still refused to produce **any** documents as previously **ordered** by the Trial Court. As the Trial Court specifically observed in its order granting dismissal "while the [Taxpayer] ha[s] the information….they refuse to disclose it unless the Town agrees to a protective order." APPX. VOL. III 70.

The Taxpayers concede that dismissal is available where a party evidences a clear intention to disregard a court order, but claims it had "no intention" here. BRIEF FOR TAXPAYERS p. 38. The Trial Court found otherwise. The Trial Court specifically found that the Taxpayers willfully ignored the Court's orders on multiple occasions:

- In its April 2020 Order, the Trial Court found "that the [Taxpayers] have willfully disregarded the Court's order in which it granted the Town's renewed motion to compel." APPX. VOL. II 323.
- In its June 2020 order, the Trial Court again found "that the [Taxpayers] have willfully ignored the Court's clear order on a discovery issue." APPX. VOL. III 71.

The Trial Court's findings with respect to the Taxpayers' incomplete responses and willful conduct are supported by the record, and the dismissal should be affirmed.

B. The Taxpayers held the documents hostage in bad faith while they tried to obtain a protective order that the Court had already expressly denied.

The Taxpayers devote almost the entirety of their discussion regarding dismissal to complaining about the Trial Court's refusal to grant it a

protective order. *See* BRIEF FOR TAXPAYERS pp. 31-38. As a threshold matter, the Taxpayers did not appeal the Trial Court's denial of its request for a protective order, and that issue is not before this Court. *See* NOTICE OF APPEAL. *See Colla v. Town of Hanover*, 153 N.H. 206, 210 (2006) (Issue not raised in notice of appeal is ordinarily deemed waived). The Taxpayers argue, however, that "the trial court failed to consider…the degree to which the Town acted in bad faith in the protective order/confidentiality agreement discussions," ostensibly suggesting that those discussions somehow justify reversing the dismissal. The Taxpayers tried this tactic with the Trial Court, and the Trial Court flatly rejected the Taxpayers' blatant mischaracterizations of its discussions with the Town, and the Taxpayers' related arguments. This Court should do the same.

The Taxpayers argue that "[t]here was no intention to disregard a court order. There was a bona fide dispute as to a protective order/confidentiality agreement." BRIEF FOR TAXPAYERS p. 38. Much like the Taxpayers' refusal to comply with discovery orders, the Taxpayers continue to refuse to acknowledge the Court's denial of its request for a protective order. At the time of dismissal, there was no "bona fide dispute as to a protective order." The Taxpayers had already litigated and lost that issue.

They simply did not want to comply with the necessary result of the Trial Court's decisions.

As discussed above, the Trial Court first issued an order compelling complete responses to certain interrogatories in November 2019. "As the Court did not specify a specific deadline in which the [Taxpayer] had to respond, the answers were due by December 2, 2019." APPX. VOL. II 320 (*citing* Super. Ct. R. 29(f)). The Taxpayers did not provide responses by the deadline. Appx. Vol. II 321. As a result, the Town filed its first Motion for Sanctions on January 23, 2020. APPX. VOL. II 155.

On March 10, 2020, while the Town's first Motion for Sanctions remained pending, the Taxpayers filed an untimely motion for a protective order. APPX. VOL. II 224. Prior to the Taxpayers' motion, while the Town was attempting to obtain voluntary responses to the outstanding discovery request, the parties had discussed the possibility of entry of an assented-to protective order. During those negotiations, the Town offered a specific compromise order in an effort to obtain, without further litigation, the discovery responses that *it was already entitled to* by court order and rule. APPX. VOL. III 68. The Taxpayers rejected the Town's offer and instead chose to file its motion and litigate the issue. APPX. VOL. III 68.

In its April 2020 order, the Trial Court explicitly denied the Taxpayers' request for a protective order as untimely. As the Trial Court noted, the Taxpayers "did not even begin to discuss the parameters of a confidentiality agreement with the Town until late January 2020, and those conversations only came to fruition after the Town repeatedly pushed the [Taxpayers] to provide the interrogatory responses ordered by the Court." APPX. VOL. II 324. The Trial Court also said that it "cannot find that the [Taxpayers] were acting in good faith" and that it appeared the "[Taxpayers] sat on their hands, ignored the Court's order on the motion to compel, and now seek relief that should have been requested months ago." APPX. VOL. II 324.

At this stage, the Trial Court had issued two different orders compelling the Taxpayers to produce the discovery, and had explicitly denied the Taxpayers' request for a protective order. Yet, the Taxpayers continued to refuse to produce the documents by the new deadline set by the Court unless the Town agreed to a protective order. APPX. VOL. III 45. As the Trial Court later observed in its order on the Town's Second Motion for Sanctions, "[t]his [was] particularly rich considering that the [Taxpayers] previously

litigated the protective order issue and the Court denied their request for one." APPX. VOL. III 70.

In its Objection to the Second Motion to Compel, and in a related Motion for Partial Reconsideration the Taxpayers argued, as they do here, that the Trial Court should force the Town to accept the draft protective order that it had previously offered as a compromise (that was no longer on the table). The Trial Court rejected this argument and saw it for what it was:

> The [Taxpayers] could have agreed to the Town's proposed protective order at the time the Town proposed it. Instead, the [Taxpayers] chose to "roll the dice," and sought a more expansive protective order through litigation. Now, having litigated and lost, they still seek the benefit of the Town's proposed compromise order. For the same reason that courts do not allow criminal defendants to take plea deals after losing at trial, the Court will not reward the [Taxpayers] for their refusal to compromise.

APPX. VOL. III. 68. That the Taxpayer is continuing to take this position on appeal is remarkable. The Trial Court correctly rejected the Taxpayers' attempt to exempt itself from court rules and court orders, while simultaneously attempting to impose its will on the Town and the Trial Court, and this Court should do the same.

II. THE TRIAL COURT DID NOT ERR IN RULING THAT RSA 75:8 PROVIDED THE TOWN WITH THE AUTHORITY TO ADJUST THE TAXPAYERS' ASSESSED VALUE.

The Taxpayers make numerous arguments why RSA 75:8 did not authorize the Town to adjust the assessed value of the subject property, which will be addressed seriatim.

A. The plain language of RSA 75:8 authorizes the Town to adjust individual assessed values and the Town had a duty to do so under these circumstances.

First, the Taxpayers contend that the Trial Court's decision ignored the plain meaning of RSA 75:8. The interpretation and application of RSA 75:8 is a question of law, which this Court reviews *de novo*. *Trefethen v. Town of Derry*, 164 N.H. 754, 755 (2013). In matters of statutory interpretation, the Court is the "final arbiter of the legislature's intent as expressed in the words of a statute considered as a whole." *Id*. When examining the language of a statute, the Court will ascribe the plain and ordinary meaning to the words used. *Id*. The Court will not interpret a statute in such a way that renders statutory language superfluous and irrelevant, or otherwise leads to an absurd result. *See State v. Duran*, 158 N.H. 146, 155 (2008).

RSA 75:8 states:

> I. Annually, and in accordance with state assessing guidelines, the assessors and selectmen shall adjust assessments to reflect changes so that all assessments are reasonably proportional within that municipality. All adjusted assessments shall be included in the inventory of that municipality and shall be sworn to in accordance with RSA 75:7.
>
> II. Assessors and selectmen shall consider adjusting assessments for any properties that:
>
> (a) They know or believe have had a material physical change;
> (b) Changed in ownership;
> (c) Have undergone zoning changes;
> (d) Have undergone changes to exemptions, credits or abatements;
> (e) Have undergone subdivision, boundary line adjustments, or mergers; or
> (f) Have undergone other changes affecting value.

When interpreting RSA 75:8, one must also consider RSA 75:7, which provides that the selectmen and assessors must take an oath that "all taxable property was appraised to the best of [their] knowledge and belief at its full value, in accordance with state appraisal standards." Read collectively, these statutes make clear that maintaining annual proportionality among taxable property is the touchstone.

While conceding that maintaining proportionality is the purpose of RSA 75:8, the Taxpayers encourage a restrictive reading of the statute by

arguing that no change in assessment may occur unless it satisfies one of the conditions listed in RSA 75:8, II. In an attempt to bolster this argument, the Taxpayers rely upon prior changes to the statutory language. Specifically, the Taxpayers claim that because RSA 75:8 no longer contains express language that "assessors and selectman shall, in the month of April in each year…correct all errors that they find in the then existing appraisal," the town "no longer has that power"; i.e. can no longer correct errors in an assessed value from one year to the next. The Taxpayers' interpretation is contrary to the plain language of the statute which provides that: "[a]nnually, and in accordance with state assessing guidelines, the assessors and selectmen shall adjust assessments to reflect changes **so that all assessments are reasonably proportional within that municipality.**" (emphasis added).

The plain language of RSA 75:8, II contains no limitation on why the Selectmen may consider adjusting an assessment. The statute is merely suggestive, and does not even require the municipality adjust assessments under any particular circumstance. Rather, it merely directs the municipality to "consider" adjusting assessments if one of the enumerated conditions is present. It neither mandates such an adjustment, nor does it preclude an adjustment under other conditions. Had the legislature intended to

specifically limit adjusting assessments to the categories set forth in RSA 75:8, II it could have easily done so. *See In re Town of Seabrook*, 163 N.H. 635, 644 (2012) ("We do not look beyond the language of the statute to determine legislative intent if the language is clear and unambiguous. Nor will we consider what the legislature might have said or add words the legislature did not include.").

This Court has interpreted the current statute to require that a "Town must adjust assessments annually so that all assessments are reasonably proportional within that municipality." *The LKK Trust v. Town of Wolfeboro*, 159 N.H. 734, 736 (2010) (*citing* RSA 75:8, I). Indeed, to accept the Taxpayers' reading of RSA 75:8, II would significantly curtail an official's ability to faithfully carry out the oath taken in RSA 75:7. *See Blagbrough Family Realty Trust v. A & T Forest Products, Inc.*, 155 N.H. 29, 44 (2007) ("We do not construe statutes in isolation; instead, we attempt to do so in harmony with the overall statutory scheme. When interpreting two statutes that deal with a similar subject matter, we construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes.").

To the extent the present statute no longer contains express language regarding "errors," the absence of that language is not persuasive because the change was the result of a repeal and a replace, not an incremental and intentional removal of language. Moreover, this is not a situation where the Town was correcting any "error" as previously defined by this Court. *See Tennessee Gas Pipeline Co. v. Town of Hudson*, 145 N.H. 598, 605 (2000) ("The plain and ordinary meaning of "error" is "an act involving an unintentional deviation from truth or accuracy: a mistake in perception, reasoning, recollection, or expression."). Rather, this is a situation where the Taxpayers continually tried to conceal the Property's value by refusing to provide current income and expense data to the Town, and the assessor subsequently discovered reliable information that disclosed the true value. Information whose accuracy the Taxpayers have never directly challenged.

Even if a "change" is required under the statute, the discovery of the extreme underassessment of the Property here satisfies any "change" requirement in the statute. "Since at least 1876, the General Court has required local assessors and selectmen annually to examine all the real estate in their respective cities and towns and to reappraise any real estate that has changed in value since the last appraisal." *Sirrell v. State*, 146 N.H. 364

(2001). Here, for tax year 2016 the Town under-valued the Property at $86,549,400. In 2017, the Assessor became aware of new information bearing directly on the Property's value, and therefore adjusted the assessed value to $154,149,500 in an effort to ensure proportionality. RSA 75:1 provides that when determining the "market value" of any given property, the "selectmen shall receive and consider all evidence that may be submitted to them relative to the value of property, the value of which cannot be determined by personal examination." In other words, while the law requires a municipality to assess property at "market value," there are no restrictions as to what information a municipality may rely on in reaching that value. This is an actionable change "affecting value." Nothing limits such "changes" to physical manifestations. To hold that the Town could not adjust an assessment on this basis would erode the very foundation upon which the statute was adopted – to ensure proportionality throughout the community.

This case is distinguishable from *Pheasant Lane Realty Trust v. City of Nashua,* where this Court held that the city lacked authority to increase a property's assessed value in the same tax year because it believed the property was undervalued. *Pheasant Lane Realty Trust v. City of Nashua*, 143 N.H. 40, 43 (1998). While a municipality may not issue a new or revised

assessment during the same tax year simply because it discovers it had under-assessed the property, it is entitled to increase the assessed value of the property in ensuing years. *Compare Pheasant Lane Realty Trust*, 143 N.H. at 43 *with Porter v. Town of Sanbornton*, 150 N.H. 363 (2003)(reversing grant of abatement where Town increased the assessed value of waterfront properties after discovering the properties were under-assessed by upwards of 20%). Thus, nothing in *Pheasant Lane Realty Trust* prohibits a municipality from increasing an assessment from one year to another.[1]

As the Taxpayers readily admit, the "Town must adjust assessments annually so that all assessments are reasonably proportional within that municipality." *The LKK Trust*, 159 N.H. at 736 (*citing* RSA 75:8, I). The change here simply carried out that obligation. While the Taxpayers attempt to distinguish *LKK Trust* on the basis that the plaintiff there challenged the assessed value and did not raise a constitutional challenge, that is a distinction without a difference. The question presented in *LKK Trust*, as in this case, is whether the Town had the right to adjust the Taxpayers' assessed value under RSA 75:8. While the Town did concede in *LKK Trust* that it erred in reclassifying the taxpayer's land, it nevertheless changed the

[1] Indeed, upon information and belief, the City of Nashua increased the assessment of the Pheasant Lane mall the following year and was not challenged for doing so.

assessment for the house because it "undervalued it significantly." *LKK Trust*, 159 N.H. at 736. The plaintiff argued that the Town could not change the house's site assessment because it lacked authority to make such a change. After examining the current language of RSA 75:8, this Court disagreed, and concluded that the Town had the authority to adjust the assessment. *Id*. at 737.

Finally, whether or not the Town has authority to make this change has nothing to do with the Town's motivations or whether the ultimate value used is correct or not. While the Taxpayers want to insert an additional question into the statutory analysis – whether the Town exercised its authority under RSA 75:8 in a non-discriminatory manner - that is a wholly separate question from whether the Town had the authority under the statute to adjust the assessed value in the first place. As discussed above, a municipality has a duty to ensure annual proportionality, and is authorized to adjust individual property values if it deems necessary to achieve that goal, as recognized by the New Hampshire Supreme Court in *The LKK Trust*. Under these facts, had the Town failed to adjust the assessed value of the Taxpayers' property it would have been derelict in its duty under RSA 75:8.

The Taxpayers' interpretation would lead to absurd results and conflicts with other law. Under the Taxpayers' theory, a property owner is permitted to benefit from an under-assessment unless or until a general reassessment occurs (whether every five years, or annually). That is not the law, and it conflicts with the constitutional obligation to ensure that all assessments are proportional. This interpretation would also reward taxpayers who, as here, refuse to provide income and expense information in the hopes that the municipality will then undervalue the property. There are thousands of other taxpayers in the Town, and it is patently unjust to force them to subsidize the Taxpayers.

B. The Town was not obligated to adopt the annual revaluation process set forth in RSA 75:8-b before adjusting the Taxpayers' Property.

The Taxpayers also appear to argue that the Town could only lawfully adjust the Property's assessed value between revaluations if it adopted RSA 75:8-b. To accept such an argument would render RSA 75:8 meaningless since RSA 75:8 separately requires the assessors and selectmen to make adjustments to ensure proportionality on an *annual* basis, whether or not a municipality has adopted RSA 75:8-b. *Appeal of Wilson*, 161 N.H. 659, 664 (2011) ("We will not interpret a statute so as to render it meaningless."). The

Taxpayers' argument also ignores the distinction between a municipality's duty to ensure proportionality *between* mass revaluations and when, and how, it must conduct a mass revaluation. RSA 75:8-b is concerned with the latter, as an alternative to the minimum five-year mass revaluation required by RSA 75:8-a. RSA 75:8-b has no bearing on the Town's duty to ensure proportionality each and every year, nor how it discharges that duty.

C. The methodology employed to assess a property has no relevance to whether the municipality is authorized to adjust a value under RSA 75:8.

The Taxpayers also argue that once a Town utilizes a certain methodology for a five-year mass revaluation, it cannot deviate from that methodology when adjusting assessments to ensure proportionality. *See* BRIEF FOR TAXPAYERS p. 24. However, this argument has no basis in law. It is well-established in this jurisdiction that there is no restriction on the methodology used to arrive at an appraised value. Similarly, the Taxpayers' reliance upon the Trial Court's early order concerning the Town's motion to dismiss is unpersuasive (when the Trial Court had not yet ruled on the applicability of RSA 75:8), as is its citation *to In re Johnson*, 161 N.H. 419 (2011). APPX. VOL. I 77.

The authority relied upon by the Taxpayers simply supports the premise that "a flawed methodology **can** lead to a disproportionate tax burden." BRIEF FOR TAXPAYERS p. 24 (emphasis added). While this is true, the problem for the Taxpayers is twofold. First, to the extent the Taxpayers contend that the Town taxed them disproportionately by virtue of a flawed methodology or otherwise, which they appear to argue throughout the Brief, the sole remedy is an abatement. RSA 76:16; *LSP Assoc. v. Town of Gilford*, 142 N.H. 369, 374 (1997) ("abatement statutes…provide the exclusive remedy available to a taxpayer dissatisfied with an assessment made against his property"). Second, even assuming the Town used a flawed methodology when it adjusted the assessed value of the Taxpayers' Property, the Taxpayers expressly refused to address, much less prove, it resulted in any disproportionality. As this Court recognized, "[w]hile it is possible that a flawed methodology may lead to a disproportionate tax burden, the flawed methodology does not, in and of itself, prove the disproportionate result." *Porter*, 150 N.H. at 369. By failing to challenge proportionality, at most the Taxpayers are alleging that the Town used the wrong methodology, even if it achieved the right result. However, the Town is not required to use any

particular methodology, and this complaint is not actionable in the property tax context.

III. THE VALUE OF THE TAXPAYERS' PROPERTY WAS RELEVANT TO THIS PROCEEDING, AND THE TRIAL COURT PROPERLY GRANTED THE TOWN'S MOTION TO COMPEL THE TAXPAYERS TO ANSWER THE TOWN'S INTERROGATORIES.

The Taxpayers argue that the Trial Court erred by compelling them to answer the Town's discovery requests relating to the Property's value. As will be discussed in more detail below, the Taxpayers' constitutional claim does not assert a viable equal protection claim (i.e., wherein the Taxpayers were subject to a tax not otherwise assessed on other similarly-situated properties). Rather, the Taxpayers' claim the Town violated their rights to equal protection by adjusting the assessed value of the Property, while allegedly not adjusting other assessments, something that is not actionable. However, assuming a viable claim exists, as the Trial Court found, the Town is entitled to defend against such a claim. This includes the absolute right to explain the actions it chose to take, and not take, which includes showing first why it adjusted the Taxpayers' assessment, why the Taxpayers' assessment was reasonable, or even why assessments for other retail

properties were not adjusted.[2] Although the Taxpayers did not directly seek damages, they sought to achieve the same effect by way of an order rolling back the assessed value to 2016 levels (and ostensibly a return of the tax paid). Even assuming the Taxpayers could proceed on this basis without themselves demonstrating disproportionality, the Town is entitled to develop evidence to substantiate the Property's current assessed value. This would demonstrate, among other things, both that equity required the assessment remain as-is, and that the Town's actions were reasonable. It is axiomatic, therefore, that the Property's value is relevant.

This Court reviews "a trial court's decisions on the management of discovery and the admissibility of evidence under an unsustainable exercise of discretion standard, [and it] will not disturb the trial court's order absent an unsustainable exercise of discretion." *Kukesh v. Mutrie*, 168 N.H. 76, 80 (2015). To meet this standard, the Taxpayers bear the burden of showing that

[2] Fundamentally, the Town is under no obligation to reassess all (or even similar) properties when it reassesses one. The only time the Town is obligated to engage in collective reassessments is during a five-year mandatory revaluation pursuant to Part II, Article 6 of the New Hampshire Constitution and RSA 75:8-a. As discussed above, RSA 75:8, I obligates the assessors or selectmen to adjust assessments, if necessary, so that all assessments are reasonably proportional within that municipality. RSA 75:8, I. Thus, the legislation envisions isolated adjustments to property assessments. As a result, the Taxpayers' focus on whether or not the Town reassessed other property is misplaced.

the trial court's ruling was clearly untenable or unreasonable to the prejudice of its case. *Id*.

The Taxpayers attempt to have it both ways, in that they challenge the amount of the assessment and request as a remedy that the assessed value should remain at the 2016 level, while ignoring whether they bear a disproportionate tax burden. As much as the Taxpayers try, it is inescapable that the value of the Property is an issue here and related information is, therefore, discoverable.

This is true even where the Taxpayers intentionally choose to avoid using or relying on such evidence themselves. In granting the Town's motion to compel, the Court stated:

> The common issue in the remaining interrogatories relates to the value of the Outlets. The plaintiffs contend that such information is irrelevant because, as the Court discussed above, they need not prove disproportionality in order to prevail on their equal protection claim. Nonetheless, the Court still finds that the value of the Outlets is relevant and may lead to the discovery of admissible evidence. As the supreme court stated in *Rochester III*, in order to prevail on an equal protection claim, the taxpayer has the burden to prove that its selection for different treatment is arbitrary or without some reasonable justification. Here, the Town may attempt to justify its decision to reappraise the Outlets for the 2017 tax year by showing that it had severely undervalued that property in the 2016 town-wide valuation. Thus, if the Town can demonstrate that the true value of the Outlets was significantly higher than

> the 2016 appraised value, such a showing may support the reasonableness of its actions.

APPX. VOL. II 153-54. As the Trial Court's ruling highlights, the question is not simply whether the value information is relevant to the Taxpayers' claim, but also whether it is relevant to the Town's case. To prohibit the Town from obtaining value information would severely prejudice its defense, while also turning RSA 75:8 on its head since every adjusted property value could conceivably be subject to an equal protection challenge without the municipality being able to discover evidence in defense of its actions.

Ultimately, the Town has a constitutional duty to ensure proportionality of taxation among all the taxpayers in the community, and the Taxpayers cannot hide behind the cloak of discovery objections in order to maintain an undervaluation of their property in order to receive an improper windfall at the expense of the rest of the taxpayers. Consequently, the Trial Court did not err in finding that the information pertaining to the value of the Taxpayers' property was relevant, and it properly granted the Town's motion to compel complete answers to the Town's discovery requests seeking that information.

IV. THE TRIAL COURT DID NOT ERR IN RULING THAT THE MORNINGSTAR REPORT WOULD BE ADMISSIBLE AT TRIAL.

The Taxpayers challenge the admissibility, although never directly challenge the accuracy, of the Morningstar report. In its order denying the Taxpayers' motion in limine, the Trial Court ruled that the Morningstar report was: 1) relevant to the Taxpayers' equal protection challenge since it related to the Town's motivation for adjusting the 2017 assessed value[3]; and 2) not considered inadmissible hearsay because it falls under the exception set forth in New Hampshire Rule of Evidence 803(17). The Taxpayers do not challenge the Trial Court's ruling as it pertains to relevance, but rather argue only that the court erred in finding that the document was admissible under Rule 803(17).

The Trial Court's decision denying the Taxpayers' motion in limine was not an unsustainable exercise of discretion and should be affirmed. New Hampshire Rule of Evidence 803(17) provides an exception to the hearsay rule for evidence that consists of "market quotations, lists, directories, or other compilations, that are generally relied on by the public or by persons in particular occupations." "The kind of publications contemplated by Rule

[3] This is a non-hearsay use for which the report is independently admissible.

803(17) are those which deal with compilations of objective facts not requiring for their statement, a subjective analysis of other facts." *White Industries, Inc. v. Cessna Aircraft Go.*, 611 F.Supp. 1049, 1069 (W.D. Mo. 1985). The exception covers "lists, etc., prepared for the use of a trade or profession, newspaper market reports, telephone directories, and city directories. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate." *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007) (citations, quotations and ellipsis omitted).

The Taxpayers do not dispute that Morningstar is a reputable company that individuals and companies in the financial industry regularly rely upon. Rather, the Taxpayers argue that the Morningstar report is inadmissible because it "contains an unsubstantiated opinion of the 'Appraised Value' of the Property as of June 4, 2013." BRIEF FOR TAXPAYERS p.39. The Taxpayers mischaracterize the nature and content of the Morningstar report, and the cases they rely upon are, therefore, readily distinguishable. *See In re Dual-Deck Video Cassette Recorded Antitrust Litigation*, 1990 WL 126500, at 4 (D. Az. 1990) (holding that foreign newspaper articles are not the type of publication that rely upon objective

facts, and that the information contained in the articles was not deemed to be trustworthy); *see also JIPC Management, Inc. v. Incredible Pizza Co., Inc.*, 2009 WL 8591607, at 24 (C.D. Cal. 2009) (holding that commercial sponsor reports prepared by a marketing research company were not admissible under Rule 803(17) because the publication was generated for a very limited segment of interested parties, and was a report that set forth subjective conclusions the company reached after its analysis of data).

In contrast to the documents addressed in the above-cases, the Morningstar report is a compilation of reported data showing the Taxpayers' financial performance, portions of which relate to a loan for which the Property served as security. APPX. VOL. I 135-38. Included in this report is information such as the Taxpayers' reported revenues and expenses, including the Taxpayers' reported Net Operation Income (NOI), and rental information. These are some of the objective facts that formed the basis for the Town's adjustment to the 2017 assessed value. While the Morningstar report also refers to an appraisal prepared in 2013, which concluded that the market value of the property was $220,000,000 (the accuracy of which the Taxpayers have never questioned), this too is financial information that was

simply reported objectively, and not the product of Morningstar's own analysis.

This Report is similar to the one found admissible in *Lee v. Holoubek*, 2016 WL 2609294, at 5 (Tex. 2016). In that case, the court found a Morningstar report admissible in a post-divorce case under Texas's Rule of Evidence 803(17). *Id*. That report provided a forecast of how some of the ex-husband's investments would have performed from his retirement to the time of trial, and provided an average annualized rate of return. *Id*. Indeed, reports such as the one introduced here have been admitted in other cases. *See Avondale Mills, Inc. v. Norfolk S. Corp*., 2008 WL 6953956, at 4, (D.S.C. 2008). In *Avondale Mills, Inc.*, the court ruled that financial reports published by Moodys and Standard & Poors (companies similar to Morningstar) were admissible under Rule 803(17). *Id*. In support of that ruling, the court cited *United States v. New–Form Mfg. Co.*, 277 F.Supp.2d 1313 (Ct. Int'l Trade 2003), which similarly held that a report of a company's financial performance, published by Dun & Bradstreet, was admissible because it was "compiled largely from public records by one of the world's leading providers of global business information, and offered through a subscriber

service aimed at the business and financial communities—is clearly the sort of record contemplated by Rule 803(17)."

Notably, the Taxpayers have never directly challenged the accuracy of the information contained in the Morningstar report, much less provided any evidence to refute it. Instead, the Taxpayers refused to disclose information and documents requested in the Town's interrogatories specifically designed to confirm its accuracy, and, more specifically, the value of the Property. In essence, the Taxpayers are arguing that the Morningstar report contains inadmissible hearsay because the Town lacks personal knowledge of the information contained therein, when **they** are the ones with the available knowledge and **they** are actively refusing to comply with court orders to disclose the relevant information. APPX. VOL. I 84-100.

Thus, the Trial Court did not commit an unsustainable exercise of discretion by denying the Taxpayers' motion in limine to exclude the Morningstar report.

CROSS-APPEAL ARGUMENT

V. THE TRIAL COURT ERRED WHEN IT DENIED THE TOWN'S MOTIONS TO DISMISS AND ALLOWED THE TAXPAYERS TO PROCEED ON A SO-CALLED CONSTITUTIONAL CLAIM WHERE AN "UNCONSTITUTIONAL SPOT ASSESSMENT" IS NOT A RECOGNIZED CAUSE OF ACTION AND THE TAXPAYERS DID NOT ALLEGE SELECTIVE TAXATION.

After the Taxpayers filed their complaint, the Town immediately moved to dismiss, arguing, in pertinent part, that the Taxpayers' complaint failed to state a claim for relief that the Town's assessment of the Taxpayers' property was unconstitutional, and that the Taxpayers' sole recourse to challenge the assessment was through the abatement process. APPX. VOL. I. 49-50. The Trial Court denied the Town's motion, ruling that "the plaintiffs here question the legality of the assessment" and therefore "were not obligated to go through the abatement process." APPX. VOL. I 69-70. The Trial Court further ruled that the Taxpayers' allegations supported inferences that the Town should have "ignored the [Morningstar report]" or "determined…that the method used in the 2016 valuation was flawed" and "investigated whether a similar error was made relative to the assessed value of other similar properties within the Town." APPX. VOL. I 77-78.

In 2019, in an effort to narrow the disputed legal issues, the parties filed prehearing briefs. APPX. VOL. I 179, 243. The Court then issued an omnibus order resolving numerous pending issues. APPX. VOL. II. 41. In that order, the Trial Court found that, even after extensive briefing, the Taxpayers' constitutional claim "[was] presently undeveloped to warrant judicial review," yet still allowed the claim to proceed. APPX. VOL. II 47.

Thereafter, the Town again moved to dismiss the so-called constitutional claim, APPX. VOL. II 49, but the Trial Court treated the motion as an untimely motion for reconsideration, stating that the "Court ha[d] already ruled [in March 2018] that the [Taxpayers] have stated a viable equal protection claim." APPX. VOL. II 146. The Trial Court also noted that although "[Taxpayers] made a passing reference to a due process claim in the complaint, they no longer appear to be pursuing it." APPX. VOL. II. 148. After dismissing the Taxpayers' abatement petitions for failing to allege disproportionate taxation, the Trial Court then ruled that "the [Taxpayers'] equal protection claim is all that remains." APPX. VOL. II. 154. The Trial Court's ruling that the Taxpayers' complaint stated a viable equal protection claim independent from an abatement proceeding was error and should be reversed. *See* NOTICE OF CROSS-APPEAL #1-3.

A. The Taxpayers' Complaint failed to state a claim for an equal protection violation.

The Taxpayers alleged that the Town's mere act of changing the assessed value of their property from one year to the next, allegedly using a different methodology than in the 2016 revaluation, violated their right to equal protection of the laws. Although the Taxpayers never clearly articulated their theory, the Trial Court construed the Complaint as alleging that the Town should have "ignored the [Morningstar report]" or "determined…that the method used in the 2016 valuation was flawed" and "investigated whether a similar error was made relative to the assessed value of other similar properties within the Town." APPX. VOL. I 77-78. While the Taxpayers vaguely alleged "disproportionality" in conclusory terms, it was later revealed to be nothing more than sleight of hand when the Taxpayers fought all efforts to determine the actual value of its Property, as discussed below. Effectively, under the Taxpayers' theory of "equal protection," if the Town changes the assessed value - or methodology – for one property it is obligated to examine the assessments of other properties using the same methodology, regardless of whether change resulted in disproportionality. That is not the law.

"The equal protection clause protects an entity from state action which selects it out for discriminatory treatment by subjecting it to taxes not imposed on others of the same class." *Verizon New England v. City of Rochester*, 156 N.H. 624, 630 (2007) ("Rochester III") (quotation and brackets omitted). To determine whether a municipality violated a taxpayer's equal protection rights, the Court applies the rational basis test, and asks whether the Town's actions constituted selective taxation and, if so, whether that selection is rationally related to a legitimate state interest. *Id*. To prove selective taxation one must show that the imposition of the tax was a "conscious, intentional discrimination." A municipal official's error of judgment is insufficient to establish selective taxation. *Northern New England Telephone Operations, LLC v. City of Concord*, 166 N.H. 653, 657 (2014) ("Fairpoint"). The Taxpayer has the burden, therefore, "to prove that the selection is arbitrary or without some reasonable justification and ... to negative every conceivable basis which might support the selection, whether or not the basis has a foundation in the record." *Id*.

This case is distinguishable from the equal protection / selective taxation claims addressed in *Rochester III* and *FairPoint*. In *Rochester III*,

for example, the Court explained the distinction between Verizon's equal protection claim and disproportionality, stating:

> In its equal protection challenge, Verizon is not arguing that it is paying more than its share of the common burden; that is, that "its property is assessed at a higher percentage of fair market value than the percentage at which property is generally assessed in the city. Rather, it contends that the city has, without a rational basis, intentionally applied RSA 72:23, I, to only Verizon, even though other private utilities similarly use and occupy real estate on public ways.

Rochester III, 156 N.H. at 629. Stated another way, in *Rochester III*, as in *FairPoint*, the company was not challenging an adjustment to, or difference in assessed valuation. Rather, those companies were challenging being taxed at all since other similarly situated utilities were apparently not required to pay any tax. *See FairPoint*, 166 N.H. at 656; *Rochester III*, 156 N.H. at 629. In those cases, disproportionality did not matter since the value is irrelevant to whether or not the entity should be taxed in the first place. In contrast, the Taxpayers here are not challenging whether they should be taxed, but rather whether the Town erred by adjusting the assessed value of the Taxpayers' Property in 2017, when it did not adjust any other allegedly similarly-situated retail properties.

Unlike *Rochester III* and *FairPoint*, the Taxpayers can prevail only if they establish that they suffered damages as a result of the Town's alleged

conduct (i.e. does the adjusted value result in disproportionality with other property in the community?). Indeed, this Court explained in *Porter v. Town of Sanbornton*, that:

> In cases in which the town has increased a taxpayer's assessment, a finding of fraud, bad faith, or arbitrariness provides sufficient evidence to shift the taxpayer's burden of production to the town to produce evidence that demonstrates that, even with a finding of illegitimate action, the assessment is proportionate and the taxpayer has suffered no damages. If the town fails to produce evidence demonstrating proportionality then the taxpayer will be deemed to have met his or her burden of proof and the old assessment will remain in effect until and unless a new assessment is done correctly. If the town meets its burden of production, the burden shifts back to the taxpayer to produce evidence, aside from the evidence of illegitimate action, to demonstrate a disproportionate tax burden. If the taxpayer proves a disproportionate tax burden then the amount of the increase will be abated by the amount that is disproportionate. See RSA 76:17.

Porter, 150 N.H. at 371-372 (emphasis added).

Contrary to the Taxpayers' entire legal theory, an illegitimate (or even outright fraudulent) assessment stands so long as it is proportional. This is because the Town has a constitutional obligation to proportionately assess all property on a yearly basis and correct errors, as here. No one taxpayer is entitled to a windfall due to any defects in procedure or process.

Further, the Taxpayers' reliance on cases regarding reassessments is misplaced. The Town never "reassessed" or increased an existing assessment of the Property. The 2016 assessment of the property remained unchanged. It was only the following tax year, 2017, that the property value used to calculate the assessment increased, increasing the resultant assessment **from one tax year to another**. The Town had a legal obligation to change the assessed value of the Property and had no duty to reappraise others. *The LKK Trust v. Town of Wolfeboro*, 159 N.H. 734, 736 (2010) (*citing* RSA 75:8, I).

Here, the Town had information to believe that it had "severely undervalued [Taxpayers' property]" and therefore increased the assessed value of the Property to a figure it believed was more accurate for the following tax year. APPX. VOL. II 144. The Taxpayers never *directly* challenged the accuracy of the information and actively fought the Town's efforts to obtain discovery that would verify its accuracy. Likewise, the Taxpayers never alleged that the assessed value used by the Town was inaccurate, or that any other property was similarly under-assessed.

The Taxpayers' reliance on the methodology the Town used to change the assessed value as a basis for an equal protection claim misses the mark. As discussed above in Section II, there is no restriction on the

methodology used to arrive at a market value for a particular property, and no requirement that the same methodology be used for all properties at the same time. This is because, as this Court has noted, "[w]hile it is possible that a flawed methodology may lead to a disproportionate tax burden, the flawed methodology does not, in and of itself, prove the disproportionate result." *Porter v. Town of Sanbornton*, 150 N.H. 363 (2003). While using the same methodology for all properties gives a greater chance of ensuring proportionality, simply calling into question the credibility of certain materials or methods used for valuing a property does not give rise to an actionable claim under New Hampshire law. Even outright fraudulent assessments, absent disproportionality, are not actionable. *Porter*, 150 N.H. at 371-372.

Ultimately, the Taxpayers' theory that the Town was obligated to reexamine other properties lest an equal protection violation be committed is without merit. The Taxpayers never alleged that the Town possessed any information to suggest that it *should* reappraise those other properties. In other words: it is impossible for there to have been discrimination when the Taxpayers' Property was the only property for which the Town received information suggesting that it was under appraised by over **sixty-five million**

dollars. Ultimately, a property owner dissatisfied with the amount of an assessment has only one avenue of relief: the abatement process. RSA 76:16; *LSP Assoc. v. Town of Gilford*, 142 N.H. 369, 374, 702 A.2d 795 (1997) ("abatement statutes…provide the exclusive remedy available to a taxpayer dissatisfied with an assessment made against his property"). The Trial Court erred by ignoring this principle and finding the existence of an equal protection claim on the facts alleged by the Taxpayers.

B. There is no cause of action for "unconstitutional spot assessment" and the sole remedy for a property owner aggrieved by a change in assessed value is via abatement.

Throughout the litigation, the Taxpayers repeatedly used the phrase "unconstitutional spot assessment" without explaining what, exactly, that is or when a "spot assessment" is unconstitutional. New Hampshire has never recognized a cause of action for "unconstitutional spot assessment." Assuming that by "spot assessment," the Taxpayers mean changing the assessed value of one property and not another, municipalities, as discussed above, are **obligated** to do this to ensure proportionality, so necessarily it is only actionable if it results in disproportionality. *Duval v. City of Manchester,* 111 N.H. 375 (1971). In other words, it is the result,

disproportionality, that is actionable, not the means. Even then, if the result is disproportional, relief may only be pursued via an abatement.

All of the authority cited by the Taxpayers and the Trial Court regarding "spot assessments" concerned the disproportionate effect of the assessment vis-à-vis other comparable properties in the community. In other words, the method of "spot assessment" created actionable disproportionality. *See Allegheny Pittsburgh Coal Co. v. County Commission,* 488 U.S. 336, 346 (1989)("The relative undervaluation of comparable property in Webster County over time therefore denies petitioners the equal protection of the law"). For example, *Town of West Milford v. Van Decker* 120 N.J. 354 (1990) is essentially a New Jersey equivalent of *Duval v. City of Manchester:*

> Likewise the Van Deckers' complaint is not that their house was assessed for property tax purposes at a figure equal to 39.89% of their home's current value. Instead, the Van Deckers' complaint is that the Township of West Milford has not conducted a uniform assessment since 1970, and because of this, comparable properties that have not been recently sold reflect the fair market value of a bygone era and carry a much lower tax burden.
>
> Accordingly, the Township practice of increasing the assessed value only of homes purchased in the Township in 1984 and leaving the value of other homes undisturbed constitutes spot assessment in violation of the federal and state constitutions.

Town of West Milford, 120 N.J. at 364. In other words, the repeated practice of "spot assessing" upon sale *resulted* in actionable disproportionality.

Likewise, in *Mountain View Crossing Inv'rs LLC v. Twp. Of Wayne*, 20 N.J. Tax 612, 620 (2003), a taxpayer challenged an assessment by claiming it was premised solely on a sale of the property. Notably, in New Jersey, *Van Decker* and related cases resulted in the creation of a bright line prophylactic rule prohibiting assessment based solely on the sale value of a property if other properties in the same class are not revised, whereas New Hampshire has no such rule. *Compare Duval,* 111 N.H. 375 *with Van Decker*, 120 N.J. 354 ("By singling out for reassessment only that small group of taxpayers who purchased homes in 1984 while leaving undisturbed the assessments of other property in the class, West Milford deviated from the well-established assessment policy of the State. Such spot assessments known as the "welcome stranger" pattern, are commonly recognized as intentional discriminatory practices.").

The facts in *Mountain View Crossing* are somewhat analogous to this case:

> An assessor may revise assessments for "legitimate reasons" independent of a sale even in the absence of a municipal-wide revaluation. Here, there is no dispute that the sale of the subject property on December 29, 1998 triggered the assessor's review

> of the assessment on the subject property. The assessor's testimony demonstrates, however, that the assessment increase she placed on the property for tax years 2001 and 2002 was based on independent information provided to her in August 2000 during a settlement conference relating to the 1999 and 2000 appeals she caused to be filed. Before receipt of this information, the assessor never had received accurate actual full-year income and expense information for the subject property. She had received partial year figures, budgets, and rent rolls. From the rent rolls, she could have concluded what the potential rental income of the subject property was, but, in her view, she could not make an accurate analysis of the expenses.

Mt. View Crossing Investors v. Wayne, 20 N.J. Tax 612, 619-20 (2003)(quotations omitted); *See also Brunetti v. Cherry Hill TP*, 21 N.J. Tax 80, 86-87 (2002) ("Brunetti has offered no support for his position that an assessor must ignore facts demonstrating the need to reassess a single piece of property if all property in the municipality cannot be simultaneously reexamined. Indeed…case law holds otherwise.")

Here, even assuming the Town's act of changing the assessed value of the Taxpayers' property from one year to the next qualifies as a so-called "spot assessment," it did not *create* disproportionality, it *corrected* disproportionality. The Town severely undervalued the property in 2016 in large part because the Taxpayers hid information from the Town by failing to respond to the Town's requests for information during the 2016

revaluation. The Taxpayers full-well know this, which is why they failed to pursue their abatement claims and actively fought the Town's efforts to obtain discovery regarding the Property's value.

C. The Taxpayers' sole remedy is through the abatement process.

The Trial Court also erred when it allowed the Taxpayers to proceed on a constitutional theory after the Taxpayers failed to plead facts to support a claim of disproportionate taxation, and actively fought discovery of related evidence, all while still seeking relief in the form of a reduced tax assessment. The Taxpayers effectively sought to reduce its assessment outside of an abatement proceeding and without proving disproportionality. This is improper and not provided for by the law. *Signal Aviation Services, Inc. v. City of Lebanon*, 164 N.H. 578, 582 (2013) ("The New Hampshire tax abatement statutes are remedial in nature and provide the exclusive remedy available to a taxpayer dissatisfied with an assessment made against his property." (emphasis in original) (internal quotation and citation omitted)).

With respect to the so-called "constitutional claims," initially the Taxpayers did allege that the Town's act of changing the assessed value from one year to the next resulted in disproportionate taxation resulting in an equal protection violation. APPX. VOL. I 9. For years, the Taxpayers advanced

vague and incomplete arguments regarding disproportionality in its filings. APPX. VOL. I 9; APPX. VOL. II 5. However, the Taxpayers never produced any evidence regarding the Property's value and actively fought the Town's efforts to discover that information. Eventually, the Taxpayers effectively conceded they were not pursuing disproportionality, resulting in dismissal of their abatement petitions. APPX. VOL. II 153. As the Trial Court observed at the time in the context of the Taxpayers' fight against disclosure of value information, the Taxpayers "contend that [information relating to the property's value] is irrelevant because…they need not prove disproportionality in order to prevail on their equal protection claim." APPX. VOL. II 153.

Yet, the Taxpayers still sought to reduce their tax assessment to pre-2017 levels. While it wrapped up its request in the cloak of "constitutional claims," this was nothing more than an abatement in disguise.

In hindsight, the Taxpayers' intended scheme is clear: receive an abatement of their taxes outside of the statutory abatement process and without actually proving disproportionality. Although the Taxpayers did their level best to obfuscate their position throughout this litigation, their pretrial "reply" brief best exemplifies how they intended to carry out their

scheme. In that filing, the Taxpayers argued that proportionality "was achieved in the tax year 2016 cyclical revaluation" and then alleged that the 2017 increase in assessed value of its property "shattered that [2016] proportionality." APPX. VOL. II 16.

In essence, the Taxpayers attempted to use the 2016 revaluation to "prove" disproportionality in 2017 based solely on the fact that the assessed value of the Property changed. However, the Taxpayers did not allege any facts or produce any evidence to demonstrate that the change itself resulted in, rather than corrected, disproportionate taxation. The Taxpayers did not allege any facts or produce any evidence to demonstrate that the 2017 assessed value was inaccurate.

In the Taxpayers' own words: "[i]t is neither mathematically correct nor legally possible for both the tax year 2016 assessment and the 2017 assessment to have been proportional." APPX. VOL. II 9. That is the entire point. The Town has a duty to ensure proportional assessments. The entire reason the Town changed the assessed value of the Property in 2017 was because it discovered it had severely under assessed the Property in 2016. *Compare Pheasant Lane Realty Trust*, 143 N.H. at 43 *with Porter*, 150 N.H. at 363(reversing grant of abatement where Town increased the assessed

value of waterfront properties after discovering the properties were under-assessed by upwards of 20%). Of course that means, all other factors being equal, that the 2016 assessments were disproportional. However, the disproportionality in 2016 was **to the Taxpayers' sole benefit.**

This Court has rejected this type of gamesmanship by taxpayers before. In *Appeal of Net Realty Holding Trust*, 128 N.H. 795, 797 (1986), this Court explained, under similar circumstances:

> The taxpayer suggests a second formulation of the issue when it argues in its brief that the board's decision "has the effect of increasing the fair market value of the subject property in one year's time by almost one million dollars, even though no additions, alterations or improvements were made to the property ... [,] a result ... at odds with both common sense and economic reality." This statement will not do, however. No one pretends that there was any such increase in market value from April 1, 1981, to April 1, 1982. The board simply decided that the superior court's valuations for the earlier years were wrong and that the taxpayer had not proven that the city's assessment of its property for 1982 was disproportionate.

Ultimately, to the extent the Taxpayers challenged the amount of the assessment of the property, their exclusive remedy was the statutory tax abatement process with the attendant burden to prove disproportionality. To permit a taxpayer to avoid this burden by cloaking its claim in the guise of "constitutional violations" was error. The Trial Court should be reversed on the equal protection claim with an instruction that, under these

circumstances, the Taxpayers' sole recourse was through the statutory abatement process.

CONCLUSION

For the reasons set forth in this Brief, the Court should affirm the Trial Court's rulings discussed in Sections I through IV and, if necessary, reverse the Trial Court's ruling discussed in Section V.

Respectfully submitted,

TOWN OF MERRIMACK

By Its Attorneys,

DRUMMOND WOODSUM & MacMAHON

Date: March 30, 2021

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REQUEST FOR ORAL ARGUMENT

The Appellee/Cross-Appellant respectfully requests the opportunity to present oral argument not to exceed 15 minutes, to be presented by Demetrio F. Aspiras, Esq.

/s/ Matthew R. Serge
Matthew R. Serge

CERTIFICATION OF COMPLIANCE

Counsel for the Appellee/Cross-Appellant certifies that this Brief complies with the requirements of Supreme Court Rule 16(11).

/s/ Matthew R. Serge
Matthew R. Serge

CERTIFICATION OF SERVICE

I hereby certify that a copy of this Brief has been forwarded to Anthony M. Ambriano, Esq., counsel for the Appellants/Cross-Appellees, via the Court's electronic filing system.

/s/ Matthew R. Serge
Matthew R. Serge