THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2020-0358

MERRIMACK PREMIUM OUTLETS, LLC & a.

v.

TOWN OF MERRIMACK

APPEAL FROM THE HILLSBOROUGH COUNTY SOUTHERN DISTRICT SUPERIOR COURT PURSUANT TO SUPREME COURT RULE 7

ANSWERING BRIEF OF APPELLANT/CROSS-APPELLEE MERRIMACK PREMIUM OUTLETS, LLC, & a.

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The full texts of the following are set out in the Addendum to this Brief.

SUMMARY OF THE ARGUMENT

This summary addresses the Town's argument on cross-appeal that the trial court erred in denying the Town's motions to dismiss the Taxpayer's equal protection claims. That issue is important not only to the tax years at issue in these appeals (2017 and 2018), but also to tax year 2019, for which the Taxpayer has filed a similar action. Merrimack Premium Outlets, LLC, et al. v. Town of Merrimack, Hillsborough County

Superior Court Southern District, Docket No. 226-2020-CV-00410. The Superior Court has stayed proceedings in the tax year 2019 case until this Court issues an opinion or final order in this appeal.

The Taxpayer has alleged, and for purposes of the motions to dismiss it is admitted, that 1 year after a Department of Revenue Administration certified town-wide revaluation, the Town increased the Property's assessment by 78% by using a new methodology that it did not apply to other retail and shopping center properties. The Taxpayer alleged that the Town's action violated the Taxpayer's right to the equal protection of the laws. The Town attempted to dismiss this claim 3 times, and the trial court denied the Town's motions to dismiss.

This Court has recognized that 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. This doctrine has not been limited to cases where a taxpayer is selectively taxed, but has also been applied to other cases of intentional discrimination. There is no rational relationship between reassessing only the Property (solely because the Town randomly came into possession of unverified document), and the state interest in proportional assessments.

The Town's action is intentional, arbitrary, and not rationally related to a legitimate state interest. The trial court correctly denied the Town's motions to dismiss.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED THE TOWN'S SUCCESSIVE MOTIONS TO DISMISS THE TAXPAYER'S CONSTITUTIONAL CLAIM.

The Town argues in its cross-appeal that the trial court erred in denying the Town's motions to dismiss, contending that there is no cause of action for an unconstitutional spot assessment, and that the Taxpayer's sole remedy is through the abatement process. Town Brief, at 46-62. The Town is wrong on both counts, and the trial court correctly denied its motions to dismiss.

The constitutional issue in this appeal – the Taxpayer's right to the equal protection of the laws in the context of property taxation – is not novel. This Court had made it clear that the equal protection clauses of the New Hampshire Constitution afford to property taxpayers the right to uniform taxation and strictly prohibit discrimination between taxpayers. N.H. CONST pt. I, arts. 2 and 12; pt. II, arts. 5 and 6. See generally, North Country Environmental Services v. State of New Hampshire, 157 N.H. 15 (2008); Smith v. N.H. Dept. of Revenue Admin., 141 N.H. 681 (1997).

The Taxpayer here contends that its right to equal protection has been violated by the Town, and the facts supporting that claim have been

alleged in the Taxpayer's Complaint, and, in most material respects, admitted by the Town.

A. The Standard of Review For A Motion To Dismiss.

In reviewing the trial court's rulings on the Motions to Dismiss, the standard of review is whether the allegations in the Taxpayer's pleadings are reasonably susceptible of a construction that would permit recovery. Sanguedolce v. Wolfe, 164 N.H. 644, 545 (2013). For this purpose the Court assumes the Taxpayer's pleadings to be true and construes all reasonable inferences therefrom in the light most favorable to the Taxpayer. Id. In making this inquiry the Court may also consider documents attached to the pleadings, documents the authenticity of which is not disputed by the parties, official public records, or documents sufficiently referred to in the complaint. Boyle v. Dwyer, 172 N.H. 548, 553 (2019).

The trial court, in denying the Town's 3 attempts to dismiss the Taxpayer's constitutional claims, correctly applied this standard.

B. The Allegations of The Taxpayer's Complaint.

To the extent relevant to the Taxpayer's constitutional claim, the Complaint for Declaratory and Injunctive Relief alleges as follows, and, for

purposes of the Motions to Dismiss, all the facts in these allegations are assumed to be true:

¶ 26. For tax year 2016, Avitar's [the Town's contract assessor] opinion of value of the Property was $86,549,400, and the Town assessed the Property for that amount.

¶ 27. Avitar's opinion of value for the Property for tax year 2016, and the Town's assessment of the Property for tax year 2016, were consistent with the Town's assessments of the Property for prior tax years, as follows:

Tax Year 2015	$83,894,491
Tax Year 2014	$83,895,077
Tax Year 2013	$81,825,092

¶ 28. In reassessing the Property for $154,149,500 for tax year 2017, the Town disregarded the 2016 Revaluation Report.

¶ 29. There were no changes in the Property from tax year 2016 to tax year 2017 that justify the increase in the assessment from $86,549,400 to $154,149,500.

¶ 30. There were no changes in the market that justify the increase in assessment.

¶ 31. The Property was not sold between tax year 2016 and tax year 2017.

¶ 32. The tax year 2017 reassessment did not correct any clerical or mathematical errors in the 2016 assessment.

¶ 33. The increase in assessment from tax year 2016 to tax year 2017 did not result from changes in the Town's or Avitar's assessment methodology that were applied to all properties in the Town in a proportionate and uniform manner; rather, the Town based the tax year 2017 reassessment on the basis of information it found on the internet regarding the Property. The Town had no legal authority to make such a reassessment, and the reassessment is void and illegal.

¶ 34. The tax year 2017 reassessment is an unauthorized, illegal and unconstitutional "spot" assessment.

¶ 35. The tax year 2017 reassessment is disproportionate, violates the Plaintiffs' rights to equal protection and due process, violates Part I, Article 12 and Part II, Articles 5 and 6 of the New Hampshire Constitution, and intentionally discriminates against the Plaintiffs.

Apx. I at 5.

As discovery progressed and the parties filed additional pleadings, further facts became apparent, and are set forth in detail in the Taxpayer's opening Brief, at 11-16. Most importantly, with respect to the Taxpayer's constitutional claim, the Town reassessed the Property for tax year 2017 solely on the basis of the Morningstar Document (Apx. I at 200). As alleged in the Complaint (¶ 33) – and never denied by the Town - the change in methodology was not applied to all properties in the Town in a proportionate and uniform manner. The Town did not increase the tax year 2017 assessments of the other retail properties and shopping center in the Town. Apx. I at 10, 36.

While perhaps the Town did not understand the Taxpayer's constitutional claim, the trial court, in denying the Town's first Motion to Dismiss, clearly did:

> The Town argues that the plaintiffs have not sufficiently pled a claim that the 2017 assessment of the Property was unconstitutional. The Court disagrees. It is uncontested that for the 2016 tax year, the Town conducted a town-wide revaluation of all taxable property which, at the time, the Town believed to have been accurate. Subsequently, however, the Town apparently learned of the Simon Property Group's online annual report[1]– of which the Town asserts it

[1] This statement, taken from the Town's pleadings, is erroneous. What information the Town received came from the Morningstar Document, and not Simon's annual reports. See, Argument IV, infra.

> had not previously been aware – and the Town thereafter came to believe that it had grossly undervalued the Property … .
>
> The Town apparently credited Simon's annual report and thus determined that the process used during the 2016 Town-wide revaluation had resulted in a multi-million dollar error with respect to the value of the Property. Drawing all reasonable inferences in favor of the plaintiffs, id., the Town either should have ignored the report because it believed in the method used in the 2016 valuation, or the Town should have determined (based on the report) that the method used in the 2016 valuation was flawed, at least with respect to the manner in which it valued the Property. Under the latter scenario, the Town should have investigated whether a similar error was made relative to the assessed value of other similar properties within the Town. The plaintiffs contend that the Town did not take such an action, but simply engaged in "spot zoning"[2] by increasing the Property's assessed value based solely on the annual report. Viewing the facts in the light most favorable to the plaintiffs, id., the Court finds that the plaintiffs have alleged sufficient information in their complaint to support those inferences and survive a motion to dismiss.

Apx. I at 77-78.

The Taxpayer's Complaint, together with undisputed documents, facts and documents, sets forth sufficient facts to support an equal protection claim and to move that claim to trial.

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[2] Presumably "spot assessing."

C. This Court Has Repeatedly Recognized Equal Protection Claims In Property Tax Cases.

The allegations of the Taxpayer's Complaint, and undisputed documents, support an equal protection claim that is recognized in New Hampshire 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." Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster Cty., 488 U.S. 336, 345, 109 S. Ct. 633, 102 L.Ed.2d 688 (1989) (quotation and citation omitted) ("Allegheny"), cited in Verizon New England, Inc. v. City of Rochester, 156 N.H. 624, 630 (2007) ("Rochester III"). In Rochester III, this Court held that the city's selective imposition of a tax on Verizon was not rationally related to a legitimate state interest, was discriminatory, and violated the state equal protection clause. In Northern New England Tel. Operations, LLC v. City of Concord, 166 N.H. 653 (2014) ("Fairpoint"), this Court ruled that an equal protection claim in the realm of taxation requires that in order for a taxpayer to show that it was selected for discriminatory treatment, the selection must be intentional. Id., at 657-658. Any requirement of intention is, by the Town's admission, met here.

The Town would distinguish Rochester III and Fairpoint, maintaining that the equal protection principles at issue in those cases are limited to situations where a taxpayer is selectively taxed. Town Brief, at 49-51. That is not the case. There is nothing in Rochester III, or Fairpoint, that limits equal protection challenges to cases of selective taxation. In Rochester III this Court considered whether the city's taxation of only Verizon for its use and occupancy of public property constituted selective taxation not rationally related to a legitimate state interest; there was in Rochester III, as there is here with respect to the Taxpayer, a conscious decision to treat Verizon differently. In Fairpoint there was no evidence of such intentional selection for discriminatory treatment; in a case of selective tax treatment, this Court held, such evidence is required. In this case, the discrimination against the Taxpayer is acknowledged. No other retail or shopping center properties were reassessed between tax years 2016 and 2017 (Apx. I at 7, 36), and the Town has admitted that the tax year 2017 reassessment of the Property did not correct any clerical or mathematical errors in the tax year 2016 assessment. Apx. I at 9, 38. Any requirement of intentionality has been met.

Moreover, in Allegheny, a case cited with approval and relied on by this Court, there was no question as to whether a tax had been improperly imposed on one taxpayer and not on another. The issue in Allegheny was whether there was a constitutional defect in a system of local taxation that discriminated against properties that had been sold. The challenged assessments arose from distinct valuation methodologies that had been used by the assessors to assess properties that had been sold as compared with properties that had not been sold. The U.S. Supreme Court held that the assessments violated the Equal Protection Clause. The reasoning of Allegheny was adopted, without reservation, by this Court in Rochester III.

This Court has found actionable discrimination even without "selective taxation." In Fearon v. Town of Amherst, 116 N.H. 392, 394 (1976), it was held that where the town improperly "discriminated" in favor of persons who held their property by virtue of a single deed, rather than through separate deeds (as did the plaintiff), the town had placed a disproportionate share of the tax burden on the plaintiff. The Court so held notwithstanding that the plaintiff failed to establish that the disputed assessment was disproportionally higher than that of other property in the town.

A similar result was reached in Duval v. Manchester, 111 N.H. 375 (1971). The taxpayer in Duval challenged the city's practice of reassessing properties as they were sold, but not reassessing properties that were not sold, thereby causing the plaintiff to bear more than its fair share of the tax burden. The city argued that the plaintiffs had the burden of proving the proportionality factor, the fair market value of their properties, and the fact that they are being required to pay more than their proportionate share of taxes.

This Court disagreed, and held:

> The last issue is the ultimate requirement [citations omitted]. The other two [the proportionality factor and fair market value] are a usual means by which the ultimate issue is proved. They are not, however, the only means of proving that a taxpayer is being required to pay more than his share of the tax burden. We are of the opinion that when, as here, plaintiffs' property was reappraised merely because it had been sold and was assessed at 40% of market value while 50-60% of all other property remains assessed at 20-30% of value as it has for over 20 years, the plaintiffs have met their burden and the court was justified in finding as it did.

Id., at 376 (emphasis added).

The requirement of uniformity trumps value.

The discrimination against the Taxpayer (and, to a large extent, its tenants), is actionable, and the Taxpayer can meet its burden, even in the absence of "selective imposition."

D. The Undisputed Facts Support The Taxpayer's Constitutional Claim.

While perhaps more than the Taxpayer needs to show to defeat the motions to dismiss, it is already clear that the Town selected only one property -- the Property -- in the retail and shopping center classes, and changed its valuation methodology from a gross rent model for tax year 2016 to a net rent model for tax year 2017. This selective change, made only one year after a town-wide, Department of Revenue Administration certified, revaluation, was made notwithstanding the fact that the assessor was aware that other retail and shopping center properties, including the property adjacent to the Property and known as 17 Premium Outlets Boulevard, were in fact net leased. See, Apx. II at 30, 34-40. Had the Town's net lease methodology been applied to the property at 17 Premium Outlets Boulevard, the assessment of that property would have increased from $4,850,000 in tax year 2016 to $7,177,940 in tax year 2017. Apx. II at 12. The Taxpayer was singled-out for discriminatory treatment while other

properties in its "same class" were intentionally ignored. See, Rochester III, at 630.

The intentional and selective reassessment of the Property for tax year 2017 was based solely on information found in the Morningstar Document. The Town cannot, consistent with equal protection principles, select to reassess only those properties for which it has found such information.[3] There is no rational distinction between properties for which the town found such information and properties for which it did not; there is no legitimate state interest in reassessing properties because they are referred to in a Morningstar Document. See, Rochester III, at 631. The Town does not subscribe to Morningstar, and its acquisition of the document was arbitrary, and not the product of an attempt to review all assessments of similar properties. The selection of the Property for a 78 % increase in assessment can in no way be considered rationally related to furthering a legitimate state interest.

This case presents an issue very similar to that addressed in Duval, in which the plaintiffs' properties had been reassessed merely because they

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[3] As discussed herein, the accuracy of that information has not been verified. Argument IV, infra.

had been sold. There cannot be a separate and distinct standard of valuation applied only to those properties for which the town assessor has randomly received unsubstantiated information from unrelated third parties. Equal protection protects an entity from state action that discriminates against it by subjecting it to taxes not imposed on others in the same class; the equal protection guarantee is essentially a direction that all persons similarly situated should be treated alike. North Country Environmental Services, 157 N.H. at 25.

Even at this stage of the case, the Taxpayer has shown, and the Town has not denied, that until the reassessment of the Property for tax year 2017, the Town had used the same gross lease methodology to assess the Property as it had used to assess all other properties in the Town in the "Retail" and "Shopping Center" classes. Apx. I at 206-227, 228-231; 232-233. The Town cannot contend with any credibility that 6 years after the Property opened it suddenly became unique, in the valuation sense, from the other Retail and Shopping Center properties in the Town. If the Town believed that it had "severely undervalued" the Property (Town Brief, at 52) by using its gross rent methodology, it necessarily follows that the same methodology would have resulted in the "severe undervaluation" of the

other Retail and Shopping Center properties in the Town. The Town's hypothesis that "the disproportionality in 2016 was to the Taxpayer's sole benefit" (Town Brief, at 61) is unsupported by any evidence the Town has offered, and is directly undermined by the undisputed facts. "Relative undervaluation of comparable property denies [the Taxpayer] of the equal protection of the law." Allegheny, 488 U.S. at 346. The Taxpayer has the right to have its property assessed "upon the same standard of value as that applied in the taxation of other property in the (town)." Rollins v. Dover, 93 N.H. 448, 450 (1945). The Town has failed to do that here.

Should the Town contend that the facts differ, that issue is to be resolved at trial, not on the basis of a motion to dismiss.

Given the arbitrary nature of the spot reassessment, the burden to produce evidence is now on the Town to demonstrate that notwithstanding the Town's illegitimate action, the tax year 2017 spot reassessment of the Property is proportionate and the Taxpayer has suffered no damages. Porter v. Town of Sanbornton, 150 N.H. 363, 371-372 (2003). Without such evidence, the Town's claims of "corrected" disproportionately fail.

E. The Town's Attempt To Distinguish Spot Assessment Cases .

The Town is correct that many of the reported cases involving spot assessments concern the disproportionate effect of those spot assessments on the properties there at issue in comparison to comparable properties. Town Brief, at 55-57. What the Town fails to recognize is that that is precisely the issue here, and that the reasoning of those cases supports the Taxpayer's claims.

This Court's recognition that intentional discrimination in equal protection cases is actionable is also found in the case law of other jurisdictions. In Township of West Milford v. Van Decker, 120 N.J. 3564 (1990), the court held that the assessors' practice of increasing the assessments of properties that had recently sold, while leaving in place, assessments of properties in the same class that had not sold, constituted selective or spot assessment in violation of the New Jersey and federal constitutions. As in Van Decker, the Taxpayer here has been the subject of discrimination. If spot reassessment of a class of properties on the basis of sales (which, arguably, might be some evidence of fair market value) is invalid, it is difficult to imagine that the spot assessment of a single

property can be justified on the basis of an unverified document from 4 years prior to the relevant assessment date of April 1, 2017.

In Mt. View Crossing Investors LLC v. Township of Wayne, 20 N.J. Tax 612 (2003), the revised assessment at issue " … was not an isolated event. It had been preceded by revisions to four apartment complex assessments in 2000 and one in 2001, as part of the revision of numerous other assessments for each of those years." Id., at 622. What was done to the Taxpayer here was, without any doubt, not an isolated event, not part of a systematic review of assessments, and cannot be justified.

The analysis in Valley Forge Towers Apartments N, LP, et al v. Upper Merion Area School District, et al, 163 A. 3d 962 (Pa. 2017) is also informative. Under Pennsylvania law a school district is permitted to appeal the county's assessments of real property. The school district did so, but appealed only the assessments of commercial properties, including apartment complexes; single-family homes were not appealed. Pennsylvania law, like New Hampshire law, requires that all real estate be treated uniformly. Accordingly, the Pennsylvania court held that the systematic, disparate enforcement of the tax laws based on classification, even absent wrongful conduct, is constitutionally precluded.

The Complaint alleges, and other undisputed documents support, the Taxpayer's claim of an equal protection violation. The trial court properly denied the Town's Motions to Dismiss.

F. Property Tax Relief Is Available Outside Of The Abatement Process.

The Taxpayer's claim is not for an "abatement" of its taxes on the grounds of overvaluation; the claim is that the Property was singled-out for reassessment in violation of its right to equal protection. Argument I, supra. This is precisely the type of intentional, focused discrimination, resulting in measurable harm to the Taxpayer, that is actionable in a declaratory judgment action. Sirrell v. State, 145 N.H. 364 (2001). Questions as to whether the spot reassessment violated the Town's statutory and constitutional duty to maintain proportionality are better suited to judicial review. Porter, at 176 (the issues raised by plaintiffs raised a threshold issue as to legality of the assessment, and not merely the amount of the assessment) (cited by the trial court, Apx. I at 68-70). The Taxpayer seeks declaratory and injunctive relief, remedies outside of the typical abatement process. No resort to the abatement procedure is required.

II. WHERE THE VALUE OF THE PROPERTY IS NOT RELEVANT TO THE TAXPAYER'S EQUAL PROTECTION CLAIM, THE TRIAL COURT ERRED IN GRANTING THE TOWN'S MOTION TO COMPEL FURTHER ANSWERS.

The Town would attempt to justify the trial court's ruling on the Motion To Compel Further Answers by claiming that the information sought in discovery would "explain the actions [the Town] 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." Taxpayer Brief, at 37-38. There is no logical connection between these purported justifications and the undisputed facts, nor are these illusory rationales in any way material to the Taxpayer's equal protection claim.

First, the Town did not have the information sought by discovery at the time it set the April 1, 2017 reassessment of the Property, so it cannot be used to show "why" the Town spot reassessed the Property. That reassessment was based solely on the Morningstar Document**.** Apx. I at 200.

Secondly, the issue is not whether the spot reassessment was, in the valuation sense, "reasonable." As discussed in Argument I herein, the issue

is whether the Town violated the Taxpayer's right to the equal protection of the laws by singling out the Taxpayer for a reassessment solely on the grounds that the Town happened to receive the Morningstar Document. In relying on the word "reasonableness," the trial court (and the Town) misconstrue this Court's holdings in Rochester III and Fairpoint. It is not a defense to an equal protection claim that the value of the Property may have been higher than the tax year 2016 assessment. The reassessment cannot be "reasonable" where, as here, the Town selected only one property in the retail and shopping center classes, and changed its valuation methodology from a gross lease to a net lease model, notwithstanding the fact that the town assessor was aware that other retail and shopping center properties were, in fact, net leased. Apx. I at 233; Apx. II at 7-8.

The "reasonable justification" referenced in Rochester III is inextricably linked to the rational basis text.

> As we discussed in [Verizon New England v. City of Rochester, 151 N.H. 263 (2004)] ("Rochester II"), to determine whether Verizon's right to equal protection is being violated, we must apply the rational basis test." Rochester II, 151 N.H. at 270. Under this as-applied challenge, we determine whether the city's selective taxation of Verizon is rationally related to a legitimate state interest. Id.; Allegheny Pittsburgh Coal, 488 U.S. at 344.

> … There is no equal protection violation, however, if the city's selective taxation is reasonably related to a legitimate state interest. Rochester II, 151 N.H. at 270.

Rochester III, 156 N.H. at 630-631.

The "reasonable justification," in the context of this case, means that the selective tax year 2017 reassessment must be rationally related to a legitimate state interest. In property taxation, the state interest is to ensure that assessments are proportional. Duval, 111 N.H. at 376. The Town cannot discriminate against the Taxpayer, and in favor of other retail and shopping center properties, merely because the town assessor was handed a document regarding the Property. That admitted discrimination makes any evidence of value or mathematical disproportion irrelevant. See, Fearon, 116 N.H. at 394.

III. RSA 75:8 DOES NOT AUTHORIZE RANDOM SPOT ASSESSMENTS.

The Taxpayer and the Town agree that RSA 75:8 mandates proportionality. However, the Town's arguments that the statute is merely "suggestive" (Town Brief, at 28) and that "extreme underassessment" qualifies as a "change" (Town Brief, at 28, 30) are counter to established principles of statutory construction.

A. The Unambiguous Language Of RSA 75:8.

It is difficult to accept the Town's argument that the factors enumerated in RSA 75:8(II) are merely suggestive, especially where RSA 75:8 (II)(f) itself contains a broad provision that includes "other changes affecting value." The common requirement of permissible "adjustments" is that they must reflect change; the statute cannot be interpreted in a way to negate that requirement. To do so would render the word "change," which appears 6 times in RSA 75:8, as mere surplusage, and the legislature is not inclined to "waste its words." Glick v. Ossipee, 130 N.H. 643, 645 (1988), quoting Blue Mountain Forest Ass'n v. Town of Croydon, 117 N.H. 365, 372 (1977). The trial court's ruling that annual adjustments "may be made for any number of reasons, including if a property is mistakenly undervalued in a prior tax year" (Apx. II at 43) would take the unambiguous requirement of "change" out of RSA 75:8. The Town's position that the statute is merely "suggestive" (Town Brief, at 28) is contrary to the plain and unambiguous words of the statute, and there is no justification for judicial modification. Bradley Real Estate Trust v. Taylor, 128 N.H. 441, 445 (1986), citing Appeal of Public Service Co. of N.H., 125 N.H. 46, 52 (1984).

The Town mistakenly relies (Town Brief, at 30) on the prior version of RSA 75:8 – a repealed version that permitted a more general correction of "errors." The Town, and the trial court, both without any supporting authority, would have it that the Legislature inadvertently left out that provision, and they would add language – "error" - that the Legislature did not. This Court will not add language that the Legislature did not see fit to include. Roberts v. Town of Windham, 165 N.H. 186, 190 (2013).

Even if RSA 75:8 were applicable in the absence of "change," the Town has neither offered any evidence, nor made any argument, that the reassessment was made "in accordance with state assessing guidelines," as required by RSA 75:8(I). The Town's argument fails on that ground as well.

The Town's theory that purported "extreme underassessment" of the Property satisfies any "change" requirement in RSA 75:8 (Town Brief, at 30-31) falls short on 3 counts. First, there is no evidence of underassessment, extreme or otherwise. Secondly, as discussed above, the Legislature took the entire concept of correcting errors out of the statute, and it cannot be rewritten. The case relied on by the Town, Sirrell v. State, 145 N.H. 364 (2001), cited the 1991 version of RSA 75:8. Most

fundamentally, the changes referred to in the statute are changes to a property itself, not changes in assessment methodology precipitated by documents that randomly fall into the hands of an assessor.

As to proportionality (Town Brief, at 31), the Town's position that the reassessment was "an effort to ensure proportionality" is not only not supported by any evidence, but is also contrary to what the Town actually did – it took one property in the shopping center and retail classes, and changed the Town's valuation methodology so as to increase the Property's assessment by 78% while leaving the other properties in its class untouched. The tax year 2017 spot reassessment cannot be proportional. The Town assumes, without any proof, that the increased tax year 2017 assessment of the Property is "proportional" and somehow "corrected" disproportionality. See, Town Brief, at 51-57. The Town, at this stage of the case, has offered no such evidence. In fact, the Town has conceded the obvious fact that the Town's tax year 2016 assessments and tax year 2017 assessments could not both be proportional. Apx. II at 108. This admission is certainly not proof that the tax year 2017 assessments were proportional; if the town-wide tax year 2016 reassessment as certified by the Department of Revenue Administration established proportionality, the tax year 2017

spot reassessment of the Property – and only the Property – destroyed that proportionality.

B. Even If There Were An Underassessment, There Is No Statutory Authority To Increase The Assessment.

While the Town posits a scenario where a taxpayer is permitted to "benefit from an under-assessment unless or until a general reassessment occurs …" (Town Brief, at 34), that issue has already been decided.

"Because the power to tax arises solely by statute, the right to tax must be found within the letter of the law and is not to be extended by implication." Mistaken property tax valuations can be corrected only through remedies authorized by the Legislature. LLK Trust v. Town of Wolfeboro, 159 N.H. 734, 736 (2010), quoting Pheasant Lane Realty Trust v. City of Nashua, 143 N.H. 140, 143 (1998) ("Pheasant Lane").

The facts before this Court are very similar to those in Pheasant Lane. In that case the city had assessed the Pheasant Lane Mall on the basis of city-generated estimates of lease income. The city thereafter found a mortgage document at the Registry of Deeds showing that the mall actually received about double the city's estimated lease income. The city increased the assessment of the mall and issued a supplemental tax bill.

This Court found that the city had no authority to issue a supplemental tax bill under RSA 76:14, which provides that:

> If the selectmen, before the expiration of the year for which a tax has been assessed, shall discover that the same has been taxed to a person not by law liable they may, upon abatement of such tax and upon notice to the person liable for such tax, impose the same upon the person so liable. And if it shall be found that any person or property shall have escaped taxation the selectmen, upon notice to the person, shall impose a tax upon the person or property so liable.

As the only error in Pheasant Lane was the appraisal of the mall, it was held that since the mall had neither been assessed to the wrong person, nor had escaped taxation, there was no authority for a supplemental tax bill under RSA 76:14. The Court further held that even if the statute were found to be ambiguous, an ambiguous tax statute would be construed against the taxing authority rather than the taxpayer, and underassessed property is not within the scope of property which "escapes taxation." Id., at 143-144, citing, Appeal of John Denman, 120 N.H. 568, 571 (1980).

Contrary to the Town's position (Town Brief, at 31-32), the reasoning of Pheasant Lane is not limited to supplemental assessments. The authority to correct assessments is limited, and even if an error of undervaluation "may affect as great inequity of taxation as an omission to assess, but though discovered immediately after the record is delivered to

clerk, it is irremedial." 16 P. Loughlin, New Hampshire Practice Municipal Taxation and Road Law, § 15.07, at 15-7 (2020). If a remedy is to be provided, it must come from the Legislature. LSP Ass'n v. Town of Gilford, 142 N.H. 369, 375 (1997). See also, Granite State Mgmt. & Res. V. City of Concord, 165 N.H. 277 (2013).

RSA 75:8 is the only statute that allows adjustments in assessments between revaluations, and the change requirement of that statute has not been met here. Arguments III(A) and (B), supra. There is no alternative that would legitimize a single property reassessment.

The Town's attempt to impugn the Taxpayer for not providing income and expense information to the Town (Town Brief, at 34) fails because of the simple fact the Taxpayer, like all other taxpayers, is under no legal obligation to submit such information. The Taxpayer was not required to provide its confidential information, and exercised its right, as undoubtedly did many taxpayers, not to do so.

C. RSA 75:8-b Shows The Legislative Intent That Random Reassessments Are Not Permitted.

The Town contends that RSA 75:8-b, which mandates the procedures pursuant to which a municipality may "appraise real estate annually at market value," is not relevant here. Town Brief, at 34-35.

RSA 75:8, as discussed above, delineates the limited circumstances in which a Town can adjust the assessment of 1 property on account of change so as to keep assessments proportional. In the absence of such limited circumstances, if the Town wishes to appraise property annually at market value, which is what the Town purported to do here, it must comply with the procedures of RSA 75:8-b. Assessors do not have carte blanche to assess only 1 property at what they perceive to be "market value," especially, as is the case here, that discrimination violates a taxpayer's right to equal protection. RSA 75:8-b acts as a check on assessors, and the only exception to its requirements is a 5-year reappraisal under RSA: 75:8-a.

D. The Town's Discriminatory Methodology.

The Town suggests that it can arbitrarily change its methodology as to just 1 property. Town Brief, at 35-37. While there may be no limits on a municipality's methodology (except those promulgated by the Department of Revenue Administration), a municipality may not use one methodology to value the property of one taxpayer while using a separate methodology to value the properties of other taxpayers in the same class. Here, the tax year 2016 revaluation used a methodology for the Property that was almost identical to the other properties in the Retail and Shopping Center classes.

Taxpayer Brief, at 14-15. If the Town wishes to argue that this admitted and intentional discrimination is rational, it should do so at trial.

IV. NEITHER THE OPINIONS NOR THE "FACTS" IN THE MORNINGSTAR DOCUMENT ARE ADMISSIBLE.

The Town's argument as to the admissibility of the Morningstar Document under N.H. Rule Evid. 803 (17) (found at Apx. I at 135) proceeds on a faulty premise – that the document includes "the Taxpayers' reported revenues and expenses, including the Taxpayers' reported Net Operating Income (NOI), and rental information." Town Brief, at 43. That is simply not the case, and continues a fiction first presented by the Town to the trial court in the Town's first motion to dismiss, in which the Town claimed that the Town based the tax year 2017 assessment of the Property on "new information – Simon's annual reports published online … ." Apx. I at 46.

In fact, the town assessor has no knowledge as to what, if any, information the Taxpayer, or anyone else, provided to Morningstar. She did not even know how Morningstar compiles its information, and does not review such documents in the course of her work. Apx. I at 154, 198, 200. The document was obtained from the assessor of another town at an

assessors' conference; no one from Morningstar was even present. Apx. I at 152, 155. Where the reliability of a document depends on whether a fact exists, proof must be presented that the fact does, in fact, exist. N.H. Rule Evid. 104(b). The Town has failed to do so. United States v. New-Form Mfg. Co., 277 F. Supp. 2d 1313 (Ct. Int'l Trade 2003), the case relied on by the Town (Town Brief, at 44), did not deal with a "company's financial performance." The report at issue in that case dealt with whether a company had declared bankruptcy – a fact readily ascertainable from public documents – and not, as here, the company's unsubstantiated income and expenses.

As to the "appraisal" referenced in the Morningstar document, the Town suggests, without any foundation, that the "appraisal" is "financial information that was simply reported objectively." Town Brief, at 43-44. The town appraiser has not seen this appraisal, does not know who did it, and does not know whether the "appraised value" is based on the fee simple analysis required for property tax purposes or a leased fee analysis. Apx. I at 202, 203. See, e.g., Demoulas v. Salem, 116 N.H. 775 (1976). The appraisal is a subjective opinion, and not an objective fact. Taxpayer's Brief, at 39-40.

As the proponent of the Morningstar Documents, the Town has the burden of demonstrating its admissibility. Opinion of the Justices, 141 N.H. 562, 577 (1997). It has not done so, and the trial court erred in denying the Taxpayer's First Motion In Limine.

V. THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING THE TAXPAYER'S CONSTITUTIONAL CLAIM WHERE THE TAXPAYER HAD MADE THE REQUESTED INFORMATION AVAILABLE.

Should this Court affirm the trial court's granting of the Town's Motion to Compel (Argument II, supra), the trial court's dismissal of the Taxpayer's equal protection claim must be reversed. The Town's arguments against reversal (Town Brief, at 15-25) fail to consider undisputed facts, all of which demonstrate that the drastic remedy of dismissal is inappropriate and grossly disproportionate.

First, the Taxpayer did provide the documents requested, in a Sharefile, on January 31, 2020. Apx. II at 181. Counsel for the Taxpayer had previously sent a Confidentiality Agreement to the Town's attorney, consistent with past practice with that attorney, and the Town attorney said that he would discuss it with his client the following week.

A different attorney for the Town then took a contrary position, objecting in general to a Confidentiality Agreement. Apx. II at 197. Thereafter, a lengthy discussion as to the terms of a Protective Order ensued. To the extent that the Town, and the trial court (Town Brief, at 23) rely on the "10 day rules" of N.H. Sup. Ct. R. 29(b) and (f), that deadline must be deemed to have been waived by the conduct of the Town's attorneys.

Secondly, the confidential documents were available to the Town on January 31, 2020, which was long before the trial court denied the Taxpayer's Motion for Protective Order on April 23, 2020. That Motion was filed prior to the May 4, 2020 date by which the trial court had ordered the interrogatories to be answered.

Third, on April 28, 2020 (again, prior to the May 4, 2020 due date) counsel for the Taxpayer emailed counsel for the Town a clean version of the Town's own draft of a Protective Order, and indicated that the Taxpayer would agree to that draft. Apx. III at 8, 19. This offer was in direct response to the trial court's April 23, 2020 Order, in which the trial court stated:

> However, nothing in this order shall prohibit the parties from reaching their own agreement regarding the confidentiality and/or disclosure of any information produced through the discovery process. In fact, it appears that the Town has agreed to be bound by a more limited protective order. The Court encourages the plaintiffs to seriously consider the Town's proposal, as a limited order is likely better than the alternative – nothing. Accordingly, if the parties reach an agreement on a proposed protective order, they may file an assented-to motion. Assuming the proposed order is reasonable and otherwise appropriate, the Court will likely grant it.

Apx. II at 325 (emphasis added).

Given the trial court's Order, and the Town's agreement to a more limited protective order, the Town's refusal to respond to the emails of April 28 and 29, 2020 can only be attributed to gamesmanship.

As counsel for the Town did not respond to those e-mails, the Taxpayer, as is its right (Sup. Ct. R. 12(e)), filed on April 30, 2020 a timely Motion for Partial Reconsideration of the trial court's denial of the Motion for Protective Order. Apx. III at 1.

Finally, the Town has never alleged, and can show no prejudice resulting from either the timing of the Taxpayer's responses or the entry of a Protective Order, particularly where the Taxpayer agreed to the Town's own proposed Protective Order.

The sequence of events demonstrates that the Taxpayer took appropriate steps to provide the confidential information to the Town prior to the May 4, 2020 deadline established by the trial court; the trial court abused its discretion in dismissing the case.

CONCLUSION

The Taxpayer respectfully requests that this honorable Court:

A. Affirm the trial court's denials of the Town's motions to Dismiss;

B. Reverse the trial court's ruling that the Town had the statutory authority to reassess the Taxpayer's Property in the absence of any of factors enumerated in RSA 75:8;

C. Reverse the trial court's ruling granting the Town's Renewed Motion to Compel;

D. Reverse the trial court's ruling dismissing the Taxpayer's constitutional claims;

E. Reverse the trial court's ruling denying the Taxpayer's First Motion In Limine; and

F. Remand the case to the trial court for trial on the merits.

RESPECTFULLY SUBMITTED,

MERRIMACK PREMIUM OUTLETS, LLC and MERRIMACK PREMIUM OUTLETS CENTER, LLC

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April 30, 2021

CERTIFICATION OF COMPLIANCE

I hereby certify that this brief complies with Rule 16(3)(i) because copies of the appealed decisions are appended to this brief; Rule 16(11) because this brief contains 7,091words exclusive of pages containing the table of contents, table of authorities, text of pertinent statutes, and addendum; and Rule 26(7) because, on this 30th day of April 2021, copies of this brief were forward to Matthew R. Serge, Esquire and Demetrio F. Aspiras, III, Esquire, counsel of record for the defendant, via the Court's electronic filing system's electronic services.

Dated: April 30, 2021

By: /s/ Anthony M. Ambriano

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N.H. Constitution:

[Art.] 2. [Natural Rights.] All men have certain natural, essential, and inherent rights among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.
June 2, 1784,
Amended 1974 adding sentence to prohibit discrimination.

[Art.] 12. [Protection and Taxation Reciprocal.] Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this State controllable by any other laws than those to which they, or their representative body, have given their consent.
June 2, 1784
Amended 1964 by striking out reference to buying one's way out of military service.

[Art.] 5. [Power to Make Laws, Elect Officers, Define Their Powers and Duties, Impose Fines and Assess Taxes; Prohibited from Authorizing Towns to Aid Certain Corporations.] And farther, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties, or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this state, and for the governing and ordering thereof, and of the subjects of the same, for the necessary support and defense of the government thereof, and to name and settle biennially, or provide by fixed laws for the naming and settling, all civil officers within this state, such officers excepted, the election and appointment of whom are hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits, of the several civil and military officers of this state, and the forms of such oaths or affirmations as shall be respectively administered unto them, for the execution of their several offices and places, so as the same be not repugnant or contrary to this constitution; and also to impose fines, mulcts, imprisonments, and other punishments, and to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state; and upon all estates within the same; to be issued and disposed of by warrant, under the hand of the governor of this state for the time being, with the advice and consent of the council, for the public service, in the necessary defense and support of the government of this state, and the protection and preservation of the subjects thereof, according to such acts as are, or shall be, in force within the same; provided that the general court shall not authorize any town to loan or give its money or credit directly or indirectly for the benefit of any corporation having for its object a dividend of profits or in any way aid the same by taking its stocks or bonds. For the purpose of encouraging conservation of the forest resources of the state, the general court may provide for special assessments, rates and taxes on growing wood and timber.
June 2, 1784
Amended 1792 changing "president" to "governor."
Amended 1877 changing "annually" to "biennially." Also amended to prohibit towns and cities from loaning money or credit to corporations.
Amended 1942 to permit a timber tax.

N.H. Constitution

[Art.] 6. [Valuation and Taxation.] The public charges of government, or any part thereof, may be raised by taxation upon polls, estates, and other classes of property, including franchises and property when passing by will or inheritance; and there shall be a valuation of the estates within the state taken anew once in every five years, at least, and as much oftener as the general court shall order.
June 2, 1784
Amended 1903 to permit taxes on other classes of property including franchises and property passing by inheritances.

75:8. Revised Inventory.

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.

75:8-a. Five-Year Valuation.

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, beginning with the later of either of the following:

I. The first year a municipality's assessments were reviewed by the commissioner of the department of revenue administration pursuant to RSA 21-J:3, XXVI and the municipality's assessments were determined to be in accordance with RSA 75:1; or

II. The municipality conducted a full revaluation monitored by the department of revenue administration pursuant to RSA 21-J:11, II, provided that the full revaluation was effective on or after April 1, 1999.

75:8-b. Annual Appraisal; Municipalities Over 10,000.

Except when assessing real estate under RSA 75:8-a, any municipality with a population over 10,000 as determined pursuant to RSA 78-A:25 intending to appraise real estate annually at market value, as defined in RSA 75:1, shall authorize such annual appraisal by a majority vote of the governing body. The governing body shall hold 2 public hearings regarding the annual appraisal process at least 15 days, but not more than 60 days, prior to the governing body's authorization vote. Any municipality with a population over 10,000 as determined pursuant to RSA 78-A:25 annually appraising real estate at market value shall provide notification of changes to the assessed valuation prior to the issuance of the final tax bill, either by individual notice to the property owner, by public notice in a newspaper of general circulation, or by any other means deemed appropriate by the governing body.

76:14. Correction of Omissions, or Improper Assessment.

If the selectmen, before the expiration of the year for which a tax has been assessed, shall discover that the same has been taxed to a person not by law liable they may, upon abatement of such tax and upon notice to the person liable for such tax, impose the same upon the person so liable. And if it shall be found that any person or property shall have escaped taxation the selectmen, upon notice to the person, shall impose a tax upon the person or property so liable.

N.H. Superior Court Rule 12(e):

(e) *Motions to Reconsider.* A party intending to file a motion for reconsideration or to request other post-decision relief shall do so within 10 days of the date on the written Notice of the order or decision, which shall be mailed or electronically delivered by the clerk on the date of the Notice. The Motion shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended and shall contain such argument in support of the Motion as the movant desires to present; but the motion shall not exceed 10 pages. To preserve issues for an appeal to the Supreme Court, an appellant must have given the court the opportunity to consider such issues; thus, to the extent that the court, in its decision, addresses matters not previously raised in the case, a party must identify any alleged errors concerning those matters in a motion under this rule to preserve such issues for appeal. A hearing on the motion shall not be permitted except by order of the court.

(1) No Answer or Objection to a Motion for Reconsideration or other post-decision relief shall be required unless ordered by the court.

(2) If a Motion for Reconsideration or other post-decision relief is granted, the court may revise its order or take other appropriate action without rehearing or may schedule a further hearing.

(3) The filing of a motion for reconsideration or other post-decision relief shall not stay any order of the court unless, upon specific written request, the court has ordered such a stay.

N. H. Superior Court Rule 29 (b):

(b) Motions for a protective order relating to trade secrets, confidential research, development or commercial information, or other private or confidential information sought through discovery shall be filed within the time set by these rules to respond to the discovery request or within 30 days of the date of automatic disclosure required by Rule 22, including any extensions agreed to by the parties or ordered by the court, or within ten days of an order of production of records. All protective orders, whether assented to or not, must be approved by the court.

N.H. Superior Court Rule 29 (f):

(f) Where a discovery dispute has been resolved by court order in favor of the party requesting discovery by court order, the requested discovery shall be provided within 10 days thereafter or within such time as the court may direct.

N.H Rule of Evidence 104 (b):

(b) *Relevance That Depends on a Fact*. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. If such proof is presented, and the court finds that the evidence is otherwise admissible, the court shall admit the evidence. The court may admit the proposed evidence on the condition that the proof be introduced later.

N.H. Rule of Evidence 803 (17):

(17) *Market Reports and Similar Commercial Publications.* Market quotations, lists, directories, or other compilations, that are generally relied on by the public or by persons in particular occupations.