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

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

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QUESTIONS PRESENTED

1. Whether the trial court erred as a matter of law in ruling that the Town had the right, pursuant to RSA 75:8, to increase the assessment of the subject property from tax year 2016 to tax year 2017, despite the fact that there were no physical, zoning, or ownership changes to the subject property subsequent to the town-wide tax year 2016 reassessment. See Apx. I at 5; I at 7; I at 179, 181-183 (Complaint; Objection to Town's Motion to Dismiss; Taxpayer's Pre-Trial Brief)

2. Whether the trial court erred in granting the Town's Motion to Compel Further Answers to Interrogatories, where the further answers sought documents relevant to the value of the subject property, and the value of the subject property was not relevant to either the Taxpayer's claim that the Town did not have the statutory authority to reassess the subject property, or to the Taxpayer's claim that the spot reassessment of the subject property violated the Taxpayer's right to equal protection.
   See Apx. II at 101 (Objection to Town's Renewed Motion to Compel Answers to Interrogatories)

3. Whether the trial court erred in dismissing the Taxpayer's case with prejudice as a sanction for failing to provide further answers to the Town's interrogatories by a specified date where the Taxpayer: a) did file further answers by that date; b) prior to that date, filed a

Motion for Partial Reconsideration seeking reconsideration of the trial court's order denying a Protective Order; and c) had agreed to a Protective Order in a form that had been proposed by the Town. See Apx. III at 41; III at 73; III at 98 (Taxpayer's Objection to Town's Second Motion for Sanctions; Taxpayer's Motion for Reconsideration; Taxpayer's Reply to Town's Objection to Taxpayer's Motion for Reconsideration)

4. Whether the trial court erred in denying the Taxpayer's First Motion In Limine (which sought to exclude from evidence the substantive content of a document entitled "Merrimack Premium Outlets Loan Detail," published by Morningstar), where that document (a) was not relevant to the Taxpayer's claim that the Town's spot reassessment of the subject property violated the Taxpayer's right to equal protection, and (b) was inadmissible hearsay.
See, Apx. I at 146 (Taxpayer's First Motion In Limine)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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

STATEMENT OF THE CASE AND FACTS

Merrimack Premium Outlets, LLC and Merrimack Premium Outlets Center, LLC (jointly, the "Taxpayer") appeal from pre-trial rulings of the Hillsborough County Superior Court (Southern District) concerning statutory interpretation (RSA 75:8), discovery, evidence, and the trial court's dismissal with prejudice of the Taxpayer's equal protection claim as a discovery sanction.

This Statement of the Case and Facts will recite those facts relevant to the substance of the Taxpayer's statutory and constitutional claims concerning the Town's spot reassessment of the Property for tax year 2017 and tax year 2018; the procedural facts relevant to the dismissal of the case are dealt with in more detail within Argument III.

There has never been an evidentiary hearing in this case. The facts are taken from the parties' pleadings; there are no material disputes as to facts. For purposes of the Town's 2 Motions to Dismiss (Apx. I at 5; II at 49), all of the allegations of the Complaint must be assumed as true, and all reasonable inferences therefrom must be construed in the light most

favorable to the Taxpayer. Sanguedolce v. Wolfe, 164 N.H. 644, 645 (2013).

The Taxpayer, the owner and operator of the retail shopping outlet center commonly known as the "Merrimack Premium Outlets" (the "Property"), commenced this action by a Complaint in 2 counts, one for Declaratory Judgment and one for Injunctive Relief (the "Complaint"). Both counts relate to the Town's reassessment of the Property for property tax purposes for tax year 2017. The Complaint alleges, inter alia, that the tax year 2017 reassessment of the Property is an unauthorized, illegal and unconstitutional "spot" assessment, and violates the Taxpayer's right to equal protection, violates Part I, Article 12 and Part II, Articles 5 and 6 of the New Hampshire Constitution, and intentionally discriminates against the Taxpayer. Apx. I at 5.

For the tax year 2016, the Town conducted a town-wide revaluation pursuant to which the Property was assessed at $86,549,400, and the resulting real estate tax was $1,972,461. For tax year 2017, the Town issued a first-half tax bill based on an assessment of $154,149,500. The Town's reassessment of the Property for tax year 2017, as shown on the first-half tax bill for that year, represents an increase in value of 78% from tax year 2016 (in which the Town conducted a town-wide revaluation) to tax year 2017 ($154,149,500 compared with $86,549,500). Agreeing with the Taxpayer that a "physical change in valuation" is required to permit the issuance of a first-half tax bill with an assessment different from the assessment for the previous tax year, the trial court ruled that the Town violated RSA 76:15-a by using the tax year 2017 reassessed value to calculate the Property's first half tax bill for tax year 2017. Apx. I at 73.

The Town has refunded, with interest, that part of the first-half tax payment attributed to the increase in assessment, and the legality of the first-half tax bill is no longer part of this case. However, the second half tax bill for tax year 2017 did use the increased assessment of $154,149,500, and the resulting real estate tax was $3,602,474 – an increase of $1,630,013 in taxes. Apx. I at 67.

In setting the reassessment of the Property for tax year 2017 at $154,149,500, the Town disregarded the results of its town-wide 2016 revaluation, and, with respect to the Property only, changed the valuation methodology used to assess shopping center and retail properties. The 2016 revaluation was performed for the Town by Avitar Associates of NE, Inc. ("Avitar"), through one of its principals, Loren Martin. For tax year 2016, Avitar's opinion of value of the Property was $86,549,400, and the Town assessed the Property for that amount. That assessment was consistent with the Town's assessment of the Property in tax years 2013, 2014, and 2015, which range from $81,825,092 to $83,894,491. Apx. I at 5, 9.

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. While there may have been some minor alterations to the Property between 2016 and 2017, those alterations did not affect the assessment, or justify the reassessment, as the Town relied on the income approach to value for both years. Apx. I at 307. The Town has admitted that there were no changes in the market that justify the increase in assessment. Apx. I at 24, 181. The Property was not sold between tax year 2016 and tax year 2017. (Apx. I at 38; Town's Answer, ¶31), nor did the

tax year 2017 reassessment correct any clerical or mathematical errors in the 2016 assessment. Apx. I at 38; Town's Answer, ¶32.

Importantly, 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 of the Property solely on the basis of hearsay information it received from an assessor in another town.

While the facts underlying the Taxpayer's spot assessment claim are largely undisputed, an important clarification is in order. The Town initially claimed as follows: "For the 2017 tax year, the Town adjusted the assessment based upon new information – Simon's annual reports published online – and the first-half of the 2017 tax bill for the Property reflected the new assessment of $154,149,500." That statement of fact is incorrect. As shown in the deposition testimony of Loren Martin, the Town's reassessment of the Property had nothing to do with information it received from the Taxpayer. What actually happened is that Ms. Martin received, from the assessor in another town during an assessors' association meeting, a document entitled "Merrimack Premium Outlets – Loan Detail" (the "Morningstar Document"). Apx. I at 289. This document is from Morningstar, a financial reporting company that receives information from lenders. Ms. Martin could not identify the lender for the property, and did not even know what a commercial mortgage-backed security is. Apx. I at 202-203. Moreover, it is clear that Ms. Martin knew nothing whatsoever about the Morningstar Document itself:

a. In the course of her duties, Ms. Martin does not review Morningstar reports. Apx. I at 198.

b. Ms. Martin has never read a Morningstar report to understand how that agency compiles its data. Apx. I at 198.

c. Ms. Martin has no first-hand knowledge that the Taxpayer provided any information to Morningstar. Apx. I at 154.

d. She does not know what information was provided to Morningstar. Apx. I at 200.

e. The Taxpayer did not commission any appraisal referenced in the Morningstar Document. Apx. I at 199.

f. Morningstar is not the lender with respect to the "loan" in the Morningstar Document. Apx. I at 202.

g. Ms. Martin has not seen the June 2013 "appraisal" referenced in the Morningstar Document; nor does she know who did it. Apx. I at 202.

h. Although acknowledging that fee simple is the correct standard for real property tax purposes, Ms. Martin does not know whether the "appraised value" appearing in the Morningstar Document is based on a fee simple analysis (as required for property tax purposes) or a leased fee analysis. Apx. I at 203.

From the foregoing, it is clear that the Morningstar Document is not the work of Ms. Martin or anyone else at the Town. She has no understanding of how it was compiled, what the sources are, or what it means. In fact, Ms. Martin "is not an appraiser." Apx. I. at 202. She has never been hired to do a fee simple appraisal. Apx. I at 196, 202. She has never done private appraisals, and she has never signed an appraisal for a

retail property. Apx. I at 196. Nonetheless, that document was the sole basis for the reassessment. Apx. I at 200.

The Town's property record cards for the Property show how the Town arrived at the assessments of the Property for tax year 2016 and 2017. Apx. I at 206-227. The Town used the income approach to value, a method whereby the value of a property is calculated through an analysis of its capacity to generate income, and those future benefits are converted to an indication of present value. The Town's methodologies in arriving at the Property's assessment in the tax year 2016 revaluation, and its reassessment in the tax year 2017 spot assessment, can be summarized from the property cards as follows:

	Tax Year 2016	Tax Year 2017
Potential Gross Income ($36 psf)	14,751,144	14,751,144
Vacancy (5%)	737,557	737,557
Expenses	4,204,076	1,681,630
Net Income	9,809,511	12,331,957
Capitalization Rate	11.334%	8%
Value	86,549,400 ($211 psf)	154,149,500 ($375 psf)

In arriving at the tax year 2017 reassessment of the Property, Ms. Martin changed 2 of the inputs in her formula: expenses (from 30% of the effective gross income in 2016 to 12% in 2017); and, cap rate (from 11.334% to 8%). The different inputs result from Ms. Martin's changing her valuation model for the Property from "Gross Rent", which was the model used for all of the other Shopping Center Properties in the tax year 2016 revaluation, to a "NNN," or triple net basis. None of the other Retail Properties, or Shopping Center Properties, in Merrimack were assessed on a triple net basis for either tax year 2016 or tax year 2017.[1]

The cap rate that Ms. Martin used for the Property for tax year 2016 was almost identical to that used for the other "Retail" properties in Merrimack – 11.334% for the Property, 11.58% for the other 26 "Retail" properties. App. I at 228-231. For those Retail Properties, she used a Modified Gross Rent model with the landlord paying operating expenses in the range of 22.7% to 40% of income. The expenses she used for the Property (30%) fell comfortably within that range.

As to the 5 shopping center properties in Merrimack (Apx. I at 232-233), Ms. Martin used a Gross Rent model, a cap rate of 9.25%, a vacancy deduction of 10%, and expenses ranging from 31.25% to 63.16%. The

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[1] In a typical Gross Lease situation, the landlord is responsible for the payment of a property's operating expenses and real estate taxes; the tenant only pays rent. The other end of the spectrum is a triple net lease, where the tenant is responsible for rent as well as the payment of the operating expenses and real estate taxes. "Modified Gross" is somewhere in the middle, and the allocation of the expenses and real estate taxes can vary.

expenses she used for the Property for the tax year 2016 were at the low end of that range.

The Town made 3 unsuccessful attempts to dismiss the Taxpayer's claim of an unconstitutional spot assessment: twice in motions to dismiss, and a third request in its Pre-Trial Brief. Apx. I at 20, 43; Apx. II at 49. Those dismissals are the subject of the Town's cross-appeal.

As to the Town's statutory claim, the trial court ruled that the Town had the statutory right to adjust the appraised value of the Property for the 2017 tax year despite the fact that there were no physical, zoning, or ownership changes to the Property following the tax year 2016 town-wide revaluation. Add. at 61. That ruling is a subject of the Taxpayer's appeal. Argument I. Subsequent to the denial of its first Motion to Dismiss, the Town filed a Motion to Compel Further Answers to Interrogatories. The Court's ruling, granting, in part, the Motion to Compel is the subject of Argument II of this Brief. The trial court granted, in part, the Town's Second Motion for Sanctions, and dismissed the Taxpayer's constitutional claims, and that ruling is addressed in Argument III. The trial court's denial of the Taxpayer's First Motion In Limine, to exclude the substantive content of the Morningstar Document, is addressed in Argument IV of this Brief.

STANDARD OF REVIEW

I. This Court reviews the trial court's statutory interpretation de novo. In matters of statutory interpretation this Court is the final arbiter of the Legislature's intent as expressed in the words of the statute considered

as a whole. In re A.D., 172 N.H. 438, 441 (2019). The Supreme Court also reviews the trial court's application of the law to the facts de novo. Jessurum v. WBTSCC Limited Partnership, 169 N.H. 469, 469 (2016).

II. A trial court's rulings on the management of discovery are reviewed under an unsustainable exercise of discretion standard. A party's request for information must appear relevant and reasonable calculated to lead to the discovery of admissible evidence; the trial court is permitted to keep discovery within reasonable limits to avoid harassment. N.H. Ball Bearings v. Jackson, 158 N.H. 421, 429-480 (2009).

III. This Court reviews a trial court's decision to dismiss a case for failure to comply with a discovery order for an unsustainable exercise of discretion. Estate of Sicotte v. Lubin & Meyer, P.C., 157 N.H. 670, 673 (2008).

IV. The trial court's evidentiary rulings are reviewed under the unsustainable exercise of discretion standard. This court will reverse such rulings if they are untenable or unreasonable to the prejudice of a party's case. Carlisle v. Frisbee Memorial Hospital, 152 N.H. 762, 777 (2005).

SUMMARY OF THE ARGUMENT

The trial court erred when it ruled that the Town had the right under RSA 75:8 to reassess the Property for tax year 2017. The Town had implemented a town-wide revaluation for tax year 2016, and there had been no intervening physical, zoning, or ownership changes to the Property. The trial court erroneously relied on a prior version of RSA 75:8, and a Court

decision interpreting that prior version. Even if the Town had authority to reassess, it could not do so in an admittedly discriminatory way.

The trial court also erred when it permitted the Town discovery regarding the value of the Property. The value of the Property was not relevant to the Taxpayer's constitutional claim that the Town's spot reassessment of only the Property violated the Taxpayer's right to equal protection.

The trial court erred in dismissing the Taxpayer's constitutional claim as a discovery sanction, where the record is clear that the parties were involved in a dispute as to the terms of a confidentiality agreement/protective order, and the Taxpayer ultimately agreed to a protective order in a form that had been proposed by the Town.

Finally, the trial court erred in denying the Taxpayer's First Motion In Limine, seeking to exclude the substantive content of a hearsay document containing opinions.

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THAT THE TOWN HAD THE RIGHT, PURSUANT TO RSA 75:8, TO INCREASE THE ASSESMENT OF THE SUBJECT PROPERTY FROM TAX YEAR 2016 TO TAX YEAR 2017.

The trial court ruled that the Town had the legal authority under RSA 75:8 to adjust the appraised value of the Property for the 2017 tax year, despite the fact that there were no physical, zoning, or ownership changes to the Property after the town-wide 2016 tax year revaluation.

Add. at 61. This issue, under the current version of the statute, has not been addressed by this Court.

The trial court's ruling both ignores the plain words of the statute, and, by authorizing the reassessment of just one property in the absence of the change factors enumerated in RSA 75:8, violates the well-established goal of making assessments proportional and uniform.

A. The Statutory Requirements for Adjusting Assessments.

RSA 75:8 (Add. at 104) provides:

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.

The statute imposes 2 limitations on a municipality's legal authority to reassess -- or, in the words of the statute, to "adjust assessments to reflect changes." Adjustments to existing assessments must reflect changes and must maintain proportionality. The statute does not authorize what the Town did here -- increase the assessment of just 1 property for no reason other than that the assessor was handed a document that refers to a 2013 "appraisal" whose author, methodology, and basis of value (fee simple or leased fee), are unknown, and whose unknown methodology was not applied to all similar properties.

The prior version of RSA 75:8, in effect until its amendment in 2001, provided that assessors and selectmen could "correct all errors that they find in the then existing appraisal." See Tennessee Gas Pipeline Co. v. Town of Hudson, 145 N.H. 598 (2000). Under the current statute, they no longer have that power, and the Town's tax year 2017 reassessment of the Property is invalid. 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. As such, mistaken property tax valuations can be corrected only through legislatively authorized remedies. Pheasant Lane Realty Trust v. City of Nashua, 143 N.H. 140, 143 (1998); The LKK Trust v. Town of Wolfeboro, 159 N.H. 734, 736 (2010). Any ambiguity in the statute is to be construed against the taxing authority. Pheasant Lane, at 143. No statute allows what the Town did here.

The deletion of this language cannot be deemed a mistake. More likely, the Legislature recognized that the 5-year cyclical revaluations mandated by RSA 75:8-a established uniformity and proportionality, and

once established those standards were not to be altered at the whim of an assessor.

The trial court's ruling that "annual adjustments to assessed values may be made for any number of reasons, including if a property is mistakenly undervalued in a prior tax year" is erroneously based, in part, on Tennessee Gas Line, in which the prior version of RSA 75:8 was considered. That predecessor statute, by its terms, mandated that assessors "in the month of April in each year . . . correct all errors they find in the then existing appraisal." Tenn. Gas, at 677-678. The term "error" no longer appears in RSA 75:8. Moreover, the town in Tenn. Gas revalued all utility property; it did not, as the Town did here, single-out one property.

The reliance of the trial court on the decision in LKK is similarly misplaced. LKK concerned a taxpayer's claim that his house site, which was in the middle of a much larger property that he also owned, was improperly reclassified from "shorefront residential" to "waterfront estate." At trial, the town conceded that the reclassification was in error, and on appeal this issue was found to be moot. LKK, at 738. As to the valuation issue, the Court, citing RSA 75:8, I, found that the town "must adjust assessments annually 'so that all assessments are reasonably proportional within that municipality.'" LKK, at 736. It is significant that the Court in LKK interpreted RSA 75:8 as incorporating the concept of proportionality. Proportionality is a concept not only explicitly included within RSA 75:8 – it is a constitutional requirement. Rollins v. Dover, 93 N.H. 448 (1945). The taxpayer in LKK made no constitutional claim at the trial court – his case in the Superior Court was limited to his assessment, and he did not

argue or appeal that the trial court's finding in that regard was erroneous. LKK, at 738.

RSA 75:8 does not give the Town the authority to correct "errors," and the trial court misinterpreted that statute.

B. The Statutory Scheme of Mandatory Revaluations Prohibits Random Spot Reassessments.

RSA 75:8 explicitly deals with the circumstances in which an assessment can be changed so as to maintain proportionality and it must be considered in conjunction with the statutes that authorize reappraisals. RSA 74:1 (Add. at 102) and RSA 75:1 (Add. at 103) are merely general statutes directing selectmen to make an annual inventory of the estate liable to be taxed, and that direction is circumscribed by more specific statutory procedures.

The reappraisal of all real estate at least every fifth year is mandated by RSA 75:8-a. Add. at 105. Other than such reappraisals, if a municipality intends to appraise real estate annually at market value, the procedures are governed by RSA 75:8-b (Add. at 106), which provides:

> Except when assessing real estate under RSA 75:8-a, any municipality with a population over 10,000 [far exceeded by Merrimack] . . . 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.

The Town authorized no such action here. In enacting RSA 75:8-b the Legislature recognized that annual appraisals "at market value" were not to be pursued randomly, at the whim of an assessor. Such appraisals require formal action by the Selectmen and public hearings. RSA 75:8-b undercuts the trial court's ruling that RSA 75:1 permits reappraisal at any time.

The Town can point to no instance in which a court has permitted a municipality to change its methodology for only one property. That this arbitrary action is actionable was recognized by the trial court early in these proceedings when it denied the Town's first Motion to Dismiss:

> 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. [Court footnote: Although the Town contends that there are no similar properties in the Town, that factual issue cannot be resolved in the context of a motion to dismiss.] The plaintiffs contend that the Town did not take such an action, but simply engaged in "spot zoning [presumably "assessment"]" 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.

RSA 75:8, 8-a, 8-b, read together, both mandate and limit the appraisal and reappraisal processes. Once proportionality is achieved by the "5-year" town-wide reappraisal, that proportionality can only be modified when there has been a change in a property within the express terms of RSA 75:8; otherwise, if a municipality is permitted to pick one property to reassess, proportionality is destroyed. If the Property was proportionately assessed in the tax year 2016 town-wide reappraisal in which the Town applied valuation parameters and methodologies to classes of retail properties, it could not have been proportionately assessed after the Town applied a different appraisal methodology only to it. It has been recognized that a flawed methodology can lead to a disproportionate tax burden. Appeal of Johnson, 161 N.H. 419, 424 (2010) (RSA 75:9, dealing with the appraisal of non-adjoining land, controls over RSA 75:1).

The specific statutes dealing with the specific subject matter of 5-year reappraisal, annual appraisals, and changes to a property permitting reassessment, control over the more general statute, RSA 75:1. Johnson, at 425.

The trial court's ruling that the Property could be reappraised in the absence of any change is erroneous as a matter of law and must be reversed.

C. Even If The Town Had The Authority To Reassess The Property Under RSA 75:8, It Could Not Do So In A Discriminatory Way.

Even if it is ruled that a reassessment is permitted in the absence of the change factors enumerated in RSA 75:8, the inquiry into the Town's action is not concluded. The focus would then shift to whether the Town used its statutory authority in a non-discriminatory manner. That is the question posed by the trial court in its March 13, 2018 Order discussed above – if the assessor's assessment of the Property for tax year 2016 was wrong, did the Town investigate whether similar errors were made in the assessment of other properties? The Town has produced no evidence that it did so, and has admitted that the assessments of no other retail or shopping center properties were changed. Apx. I at 36 (Town's Answer, ¶10).

While perhaps more relevant to the Taxpayer's constitutional argument, the decision in Valley Forge Towers Apartments N, LP, et al v. Upper Merion Area School District, et al, 163 A. 3d 962 (Pa. 2017) is instructive on the issue of whether taxing powers, even when authorized by statute, may nonetheless be applied in an unconstitutionally discriminatory way. In that case, the Pennsylvania Supreme Court considered the issue of whether the uniformity clause of the Pennsylvania constitution permitted a taxing authority to appeal only the property tax assessments of commercial properties, while choosing not to appeal the assessments of other types of properties, most notably single-family homes. While noting that the taxing authority had the statutory right to appeal the assessments of only some properties, that statutory right could not, in a manner consistent with constitutional requirements, be utilized in a discriminatory way.

II. THE TRIAL COURT ERRED IN GRANTING THE TOWN'S MOTION TO COMPEL FURTHER ANSWERS TO INTERROGATORIES, WHERE THE FURTHER ANSWERS SOUGHT DOCUMENTS CONCERNING ONLY THE VALUE OF THE SUBJECT PROPERTY, AND THE VALUE OF THE SUBJECT PROPERTY IS NOT AT ISSUE.

The Town propounded various interrogatories directed to the value of the Property. Apx. I at 103 – Interrogatories 4, 5, 7, 8, 9, 10, 11, 12, 13, 15 and 16 (the "Value Interrogatories"). In granting, in part, the Town's Renewed Motion to Compel, and ordering the Taxpayer to provide more complete answers to the Value Interrogatories, the trial court stated:

> 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." Verizon New Eng., Inc. 156 N.H. at 631 (emphasis added). 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.

Add. at 70.

The trial court's Order on the Town's Renewed Motion to Compel is premised on the misconception that an undervaluation of the Property for

tax year 2016 would support the "reasonableness" of the Town's spot reassessment of the Property for tax year 2017. Whether or not the Property was undervalued is not material to the Taxpayer's claim.

First, as argued above (Argument I), the Town has no statutory authority to correct underassessments on a random basis.

Secondly, even if the Town had such statutory authority, it could not, consistent with constitutional requirements, change its methodology for only one property because it thought an unknown person, 4 years earlier, had appraised the Property at more than the Town's assessment that had been arrived at in the town-wide revaluation.

In ruling on the Town's first Motion to Dismiss (Add. at 45), the trial court had recognized that the Taxpayer's claims did not involve the amount of the assessment, holding that the Taxpayer's request for relief "is based on a question of law: specifically, whether the Town engaged in 'unconstitutional spot zoning (sic – meaning assessment)' in violation of plaintiff's constitutional rights, and whether the Town was statutorily authorized to reassess the Property when no intervening changes to the Property had taken place . . . The plaintiffs here question ' the legality of the assessment' . . . not the amount of the assessment."

The Taxpayer's objection to the Value Interrogatories had been clearly stated, and was, in fact, consistent with that Order of the trial court:

> Plaintiffs also object to Interrogatory No. 4 on the grounds that it seeks information not relevant to this case. In this proceeding, Plaintiffs contend that the assessment of the property for tax year 2017 should be $86,549,400, as established by Avitar Associates of NE, Inc. for the Defendant's town-wide revaluation for tax year 2016. The

> Defendant arbitrarily increased the assessment of the property at issue to $154,149,500 but did not (as admitted by the Defendant) increase the tax year 2017 assessments of the other shopping center and retail properties in the Town of Merrimack. Nor did the Town conduct a town-wide reassessment for tax year 2017. This case concerns whether the tax year 2017 reassessment of the property at issue is an unauthorized, illegal and unconstitutional spot assessment.

Apx. I at 126-127.

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." 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), cited in Verizon New England, Inc. v. City of Rochester, 156 N.H. 624, 630 (2007) ("Rochester III") (rights under the Fourteenth Amendment to the United States Constitution (Add. at 101) and the New Hampshire Constitution) (Add. at 99-100). In Rochester III, it was 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. Furthermore, this Court recognized in Rochester III that merely reducing a discriminatory tax to the "proportional level of taxation" is not the remedy.

In Northern New England Tel. Operations, LLC v. City of Concord, 166 N.H. 653 (2014), 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. That requirement is, by the Town's admission, met here.

In this case, the discussion of equal protection begins, and largely ends, with the Town's admissions that it did not increase the tax year 2017 assessments of other shopping center and retail properties (Apx. I at 36; Answer, ¶ 10); that the tax year 2017 reassessment of just the Property did not correct any clerical or mathematical errors in the tax year 2016 assessment; and that the change in the assessment did not result from changes in the real estate market or any segment thereof. The Town selected only one property -- the Property -- in the shopping center and retail classes, and changed its valuation methodology from a gross rent model to a net rent model. This selective change was made notwithstanding the fact that the 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 Taxpayer was singled-out for discriminatory treatment while other properties in its "same class" were intentionally ignored. See, Rochester III, at 630. If the tax year 2016 town-wide revaluation established proportionality, the tax year 2017 spot reassessment of the Property destroyed that proportionality. The Town has agreed that it is not possible that both the tax year 2016 assessments and tax year 2017 assessments are proportional. Apx. II at 8 (Trans. p. 4, lines 7-11).

This admittedly discriminatory treatment is not rationally related to a legitimate state interest, and cannot pass the rational basis test. See, Rochester III, at 630, citing Allegheny. The overriding state interest in property tax assessments is to ensure that assessments are proportional – that is the ultimate requirement. Duval v. Manchester, 111 N.H. 375, 376

(1971). There can be no legitimate state interest in singling-out the Taxpayer for disparate treatment only 1 year after a town-wide revaluation.

The Town has neither alleged nor proven that there was anything "unique" about the Property such that a spot reassessment was required to achieve, or maintain, proportionality in the Town. It simply defies credulity to suggest that there is a rational basis for the Property to be the only retail or shopping center property in Merrimack to be assessed on a triple net lease basis, and that is so regardless of the Property's income and expenses. If the Town felt obligated to adjust the Property's assessment, it was similarly obligated to maintain proportionality – and basic fairness – by treating similar properties in a similar manner. The Town did not even look for "Morningstar" information for other properties – because it did not have a subscription. Apx. I at 312. The market value of the Property has no relevance to this action. The trial court should not have allowed the Renewed Motion to Compel.

III. THE TRIAL COURT ERRED IN DISMISSING THE TAXPAYER'S CONSTITUTIONAL CLAIM WITH PREJUDICE AS A SANCTION.

The discovery dispute that ultimately led to the dismissal of the Taxpayer's equal protection claim had its genesis in the trial court's Order of November 21, 2019 (Add. at 70) granting in part and denying in part the Town's Renewed Motion to Compel answers to interrogatories. The relevance of the information sought in those interrogatories is addressed elsewhere in this Brief. Argument II, supra. Even if the trial court is not

reversed on that basis, the dismissal of the Taxpayer's equal protection claim as a discovery sanction cannot stand.

As part of the trial court's Order on the Renewed Motion to Compel, the parties were directed to work together in good faith to reach an agreement on an appropriate protective order to cover any confidential information. The trial court's dismissal must be viewed in the context of the dispute that took place over preserving the Taxpayer's confidential commercial information.

Counsel for the Taxpayer and counsel for the Town corresponded by email in January 2020 regarding the Taxpayer's responses to the discovery requests. That correspondence was attached to the Taxpayer's Objection to the Town's Motion for Sanctions. Apx. II at 170, 176-177. In that correspondence the Town's attorney informed the Taxpayer's attorney that "[i]f the Town does not have the information the court ordered by Monday, January 27, it will return to court with a Motion for Sanctions and to default [the Taxpayer] for non-compliance." Apx. At 176-177.

On January 29, 2020, counsel for the Taxpayer e-mailed to counsel for the Town a Confidentiality Agreement. In that same e-mail, the Town was advised that the response to the Town's interrogatories, with documents, would be available in a Sharefile on January 31, 2020, subject to the Taxpayer's receipt of the signed Confidentiality Agreement. On January 30, 2020, counsel for the Taxpayer e-mailed counsel for the Town a follow-up e-mail, stating that the responses would be available on January 31, 2020, and that a signed Confidentiality Agreement was necessary for their release. On January 31, 2020, counsel for the Taxpayer sent counsel for the Town an e-mail confirming that the responses were in a Sharefile,

and that access would be provided on receipt of the signed Confidentiality Agreement. Apx. II at 181.

On January 31, 2020, counsel for the Town acknowledged receipt of the Confidentiality Agreement, stating that he would discuss the Confidentiality Agreement with his client early in the week of February 3, 2020, and would then respond to the Taxpayer's attorney. Apx. II at 183. On February 4, 2020, a different attorney for the Town sent counsel for the Taxpayer an e-mail objecting to the Confidentiality Agreement on various grounds, including the argument that "[t]here can be no precondition to the Town's receipt of this [confidential] information." Apx. II at 197. The Town had never before taken that position. In that same e-mail, the second Town attorney objected in general to a Confidentiality Agreement, stating that he would review and consider only a Protective Order. That position is directly contrary to the position previously taken by the Town's first attorney who, after reviewing a draft Confidentiality Agreement sent to him by counsel for the Taxpayer in July 2018, stated that he had "no problem with such [confidentiality] agreements." Apx. II at 186. Counsel for the Taxpayer and for the Town thereafter exchanged additional correspondence, but were unable to agree to the terms of a Confidentiality Agreement or Protective Order.

The Taxpayer's inability to provide the requested responses at an earlier date was caused by extenuating circumstances. The delays were caused by the following:

a) As the Court's Order directed the disclosure of confidential information, it was necessary for the Taxpayer to confer with in-house counsel as to the disclosure of that information. Given the

various holidays after the Court's Order, this process continued into January 2020.

b) The Taxpayer's Vice President of Property Tax and Credits & Incentives (Michael D. Larson) was unexpectedly required to attend a hearing in California that was supposed to have been continued by mutual request of the parties, which resulted in him not being available for a three-day period in late January 2020, thus causing a delay in the data collection and review effort for the information sought in discovery.

c) During January 2020, Mr. Larson was working on discovery responses in 3 other cases (each involving multiple years), in addition to this case.

Apx. II at 172.

After consideration of the Town's Motion for Sanctions, and the Taxpayer's Objection thereto, the trial court issued an Order dated April 23, 2020 (Add. at 83). That Order sanctioned the Taxpayer by ordering it to compensate the Town for its expenses incurred in enforcing the trial court's November 21, 2019 Order. Notwithstanding that the Town had, in essence, waived the "10 day" rule of Sup. Ct. R. 29(f) by the communications of its attorney in late January and early February 2020, the parties agreed on the amount and it was paid by the Taxpayer. In that same Order the trial court ordered the Taxpayer to provide answers to the interrogatories by May 4, 2020.

Subsequent to the trial court's April 23, 2020 Order, counsel for Taxpayer emailed counsel for the Town, on April 28, 2020, a clean version

of the Town's own draft of a Protective Order (as contemplated by the Court in its April 23, 2020 Order), and requested that counsel confirm that the version attached to the email was the correct version, and asked for the names and addresses of the persons who would have access to the Sharefile through which the confidential information would be accessed. Apx. III at 8. On April 29, 2020, counsel for the Taxpayer emailed counsel for the Town a draft Assented-To Motion for Protective Order, which would be filed together with the Court together with the Town's version of the Protective Order. Apx. III at 19. In light of the deadline, the Taxpayer had agreed to produce the confidential and proprietary information subject to the Town's own version of the Protective Order.

On April 30, 2020, the Taxpayer's attorney emailed to the Town's attorney the Plaintiffs' Further Answers to Interrogatories (Apx. III at 25), and filed a Motion for Partial Reconsideration of the Court Order dated April 23, 2020. Apx. III at I.

In response, the Town filed a Second Motion for Sanctions (Apx. III at 34), the Taxpayer filed an Objection (Apx. III at 41), and the Town field a Reply (Apx. III at 61). The trial court granted, in part, the Town's Second Motion for Sanctions and dismissed the case with prejudice. Add. at 90.

The Taxpayer filed a Motion for Reconsideration of the trial court's June 5, 2020 Order (Apx. III at 73); the Town filed an Objection (Apx. III at 89), and the Taxpayer filed a Reply. Apx. III at 98. The Motion for Reconsideration was denied on July 14, 2020. Add. at 97.

Among the factors the trial court failed to consider in determining what remedy, if any, was appropriate, was the degree to which the Town acted in bad faith in the protective order/confidentiality agreement discussions mandated by the trial court in its November 21, 2019 Order. Add. at 70.

The Town claimed (Apx. III at 34, 37) that as a "gesture of good will" it offered to decide, itself, whether to make public confidential information. The Town's offer (which is so unrealistic that it could only have been submitted for strategic reasons), the Taxpayer's Objection, and the Town's Reply, are found at Apx. III at 41, 61.

The Town's "good will" offer was untenable, as it provides, by its terms, the Town with "complete discretion" to disseminate and publicize what is, without dispute, confidential information regarding tenant leases and property-level specific financial information. In an attempt to move this matter forward, the Taxpayer suggested, in its response to the Town's offer (Apx. III at 52), that it would provide to the Town's attorney samples of the rent rolls and financial statements that would be produced subject to the Town's own version of the Protective Order. A redacted copy of a detailed rent roll was provided, and it shows the type of information the Taxpayer would have provided subject to the Town's own Protective Order.

The Town's "good will" is further put into question by its suggestion that it would use the discovery material to increase the Property's assessment even more. Apx. II at 120 (Trans. p. 16), thus compounding its discriminatory treatment of the Taxpayer.

The Town's dissemination of the confidential business information would provide the Taxpayer's competitors, and each tenant at the Property, with the complete terms and conditions, including operational and financial details of every other tenant's lease, as well as information regarding the Property's economic performance, thereby substantially impairing not only the Taxpayer's, but also its tenants' business interests. There is no doubt that the documents sought contain confidential commercial information.

The Town's request that it be permitted to disseminate the confidential business information would decidedly prejudice the Taxpayer's prosecution of this case, which has nothing to do with valuation, but everything to do with the Town's illegal and discriminatory assessment.

The Town made no claim, and the trial court did not find, any prejudice to the Town resulting from a Protective Order in the form provided by the Town.

The discovery dispute should have been resolved by a remedy short of dismissal – the trial court could have ordered the Taxpayer to produce the requested discovery subject to the Town's Protective Order. The Town would not have been prejudiced. The Town had not been harmed, and the Taxpayer should be given an opportunity to pursue its constitutional claims. The Town had indicated that it would accept the Taxpayer's discovery responses on January 27, 2020. The Further Answers were available on January 31, 2020, subject to a confidentiality agreement, and the Town's attorney stated that he would discuss that request with his client the following week. A second attorney for the Town then objected to a

confidentiality agreement, resulting in an exchange of various drafts, and ultimately no agreement was reached.

The trial court's dismissal is predicated on a finding that the Taxpayer "failed to provide answers to the interrogatories by that date [May 4, 2020." This statement is not correct. The Taxpayer did, in fact, file Further Answers to Interrogatories on April 30, 2020. As the Taxpayer did file its Further Answers prior to the May 4, 2020 deadline, the Taxpayer did not seek an extension of that deadline or stay of the Court's April 23, 2020 Order.

While the Taxpayer recognizes that the Town, and apparently the trial court, deem the Further Answers inadequate, even if that were the case, dismissal is not the appropriate remedy. The Taxpayer filed its Further Answers before the May 4, 2020 deadline, and those Answers contained responses to Interrogatories 3, 4, 5, 7, 9, 11, 12 and 15.

There is a recognized distinction between a failure to answer – which did not occur here – and responses that may be deemed inadequate. In American Express Travel v. Moskoff, 144 N.H. 190 (1999), this Court reviewed the trial court's entry of a final default judgment against a defendant based on the trial court's finding that the defendant's answers to the plaintiff's interrogatories were "woefully inadequate." In American Express, a conditional default had been entered against the defendant; the defendant filed responses and moved to strike the conditional default. The issue before the Court was whether the defendant "answered" the interrogatories; the plaintiff arguing that the responses were substantially too inadequate to constitute "answers." In reversing the final default judgment that had been entered by the trial court, this Court held that the

rule only required that the defaulted party answer. "The threshold to satisfy Rule 36 is minimal: a party need only answer in good faith pursuant to the rule's general requirement that a party avoid conduct that is frivolous or taken for the purpose of delay." Id., at 192-193. Where the defendant had answered every question, and when objecting, stated the grounds of his objection, he showed sufficient good faith. The trial court here did not address these distinct concepts.

In these circumstances the remedy of dismissal is inappropriate and grossly disproportionate. That drastic remedy is reserved for cases where a party evidences a clear intention to disregard a court order. See, e.g., Miller v. Basbas, 131 N.H. 332 (1988). "Dismissal as a sanction runs counter to dismissal policy favoring the disposition on the merits." Afreedi v. Bennett, 517 F. Supp. 521, 526-527 (D. Mass. 2007), citing Velazquez-Rivera v. Sea-Land Serv., Inc., 920 F.2d 1072, 1075-1076 (1st Cir. 1990). There was no intention to disregard a court order here. There was a bona fide dispute as to a protective order/confidentiality agreement. The less drastic remedy was to impose a Protective Order, even in the form proposed by the Town.

IV. THE TRIAL COURT ERRED IN DENYING THE TAXPAYER'S FIRST MOTION IN LIMINE (WHICH SOUGHT TO EXCLUDE FROM EVIDENCE THE SUBSTANTIVE CONTENT OF A HEARSAY DOCUMENT CONTAINING OPINIONS.

Taxpayer by allowing into evidence the opinion of an unknown person, having no known qualifications. The Town's assessor knew absolutely nothing about the Morningstar Document, or its author.

In its Order denying the Taxpayer's First Motion In Limine (Add. at 61), the trial court ruled that the Morningstar Document would be admissible pursuant to N.H.R. Evid. 803 (17) as a document within the category of "market quotations, lists, directories, or other compilations that are generally relied on by the public or persons in particular occupations." Add. at 61. The Morningstar Document does not so qualify. It is a compilation of opinions, not facts.

The case relied on by the trial court, Lee v. Holoubek, No. 06-15-00041-CV, 2016 WL 2609294 (Tex. App. May 6, 2016) is inapposite. That decision, from an intermediate appellate court, did not address the type of "Morningstar" report here at issue. The "Morningstar" report in Lee was a report of annualized average returns of funds that had been invested, which report had been provided to a party in the case by the investment company where the funds had been invested. The trial court, in that divorce action, used that rate of return to compute the opposing party's share of the retirement funds.

By contrast, the Morningstar Document here at issue contains an unsubstantiated opinion of the "Appraised Value" of the Property as of June 4, 2013. Subjective data, such as that contained in the Morningstar Document, is not within the scope of Rule 803 (17). For example, in JIPC Management, Inc. v. Incredible Pizza Co., 2009 U.S. Dist. LEXIS 133019, 2009 WL 8591607, at *24 (C.D. Cal. 2009), the court addressed the admissibility of certain "sponsor reports" documenting the amount of exposure achieved by sponsors during a televised event. The court explained that Rule 803 (17) applies to "objective compilations of easily

ascertainable facts," not reports containing "conclusions reached after analysis by a specialized marketing company." Similarly, in In re Dual-Deck Video Cassette Recorder Antitrust Litigation, 1990 U.S. Dist. LEXIS 19207, 1990 WL 126500, at *4 (D. Ariz. 1990), the court noted that the rule applies to compilations of objective facts and does not apply, without more, to "publications upon which persons in a particular trade rely but which do not necessarily compile only objective facts." Compare, United States v. Masferrer, 514 F. 3d 1158, 1162 (11th Cir. 2008) (Bloomberg market price quotes for various markets admissible).

Rule 803 (17), which is identical to its Federal cognate, is a narrow exception to the hearsay rule, which applies by its terms to "market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations." That enumeration suggests that the exception is designed to include compilations of information such as reports of stock market prices, telephone directories, and sales information for products. The courts have generally taken a narrow view of the scope of 803 (17), applying it to compilations of data, not to narrative or "potentially subjective assessments, in either general or specialized publications." Bianco v. Globus Medi, Inc., No. 12-CV-00147-WCB, 2014 U.S. Dist. LEXIS 3430 at 2-3 (U.S.D.C. E. Dist. Texas 2014). The difference between objective facts and opinions is well-recognized. It is difficult to think of something more subjective than an undefined "Appraised Value."

The Morningstar Document is hearsay, and must not be admitted at trial for the truth of any statements therein.

CONCLUSION

The Taxpayer respectfully requests that this honorable Court:

A. 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;

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

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

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

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

REQUEST FOR ORAL ARGUMENT

The Taxpayer requests oral argument by its attorney, Anthony M. Ambriano, before the full court.

RESPECTFULLY SUBMITTED,

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

By its attorney:

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February 12, 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 9,003 words exclusive of pages containing the table of contents, table of authorities, text of pertinent statutes, and addendum; and Rule 26(7) because, on this 12th day of February 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: February 12, 2021

By: /s/ Anthony M. Ambriano

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ADDENDUM TABLE OF CONTENTS

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Southern District
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Nashua NH 03060

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NOTICE OF DECISION

FILE COPY

Case Name: **Merrimack Premium Outlets, LLC, et al v Town of Merrimack**
Case Number: **226-2017-CV-00636**

Please be advised that on March 13, 2018 Judge Colburn made the following order relative to:

ORDER ON DEFENDANT'S MOTION TO DISMISS

March 14, 2018

Marshall A. Buttrick
Clerk of Court

(293)

C: Anthony M. Ambriano, ESQ; Matthew R. Serge, ESQ; Matthew H. Upton, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DISTRICT

SUPERIOR COURT
No. 226-2017-CV-00635

Merrimack Premium Outlets, LLC and Merrimack Premium Outlets Center, LLC

v.

Town of Merrimack

ORDER ON THE DEFENDANT'S MOTION TO DISMISS

The plaintiffs, Merrimack Premium Outlets, LLC (the "Owner"), and Merrimack Premium Outlets Center, LLC (the "Operator") (collectively, the "plaintiffs"), bring this action against the defendant, the Town of Merrimack (the "Town"), seeking preliminary and permanent injunctive relief and a declaratory judgment. The Town has filed a motion to dismiss. The plaintiffs object. For the following reasons, the defendant's motion to dismiss is GRANTED IN PART and DENIED IN PART.

Standard of Review

In ruling on a motion to dismiss, the Court considers "whether the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery." Cluff-Landry v. Roman Catholic Bishop of Manchester, 168 N.H. 670, 672 (2016) (citation omitted). The Court must "assume the well pleaded allegations of fact in the [complaint] to be true, and construe all reasonable inferences from them in the plaintiff's favor," but "need not [] assume the truth of statements in the pleadings that are merely conclusions of law." Cao v. Lorenzo, 164 N.H. 717, 721 (2013) (citation omitted). The Court may also consider any "documents the authenticity of which are not disputed by the parties." Id. (citation omitted). "If the facts do not constitute a basis for legal relief," the Court should grant the motion to dismiss. Lamy v. Shaker Reg'l Sch.

Dist., 168 N.H. 47, 49 (2015) (citation omitted).

Facts

Consistent with the above described standard of review, for the purposes of ruling on the pending motion to dismiss, the Court assumes that the following facts (which are derived from the complaint and other relevant pleadings) are true. See Ojo, 164 N.H. at 721. The Owner owns a large piece of property located at 80 1 Premium Outlets Boulevard in Merrimack, New Hampshire (the "Property"). The Operator leases the Property from the Owner, and operates a retail outlet shopping mall therefrom. The Operator leases storefronts within the Property to approximately 191 tenants. Under the Property lease between the Owner and the Operator, the Operator is responsible for paying all real estate taxes and assessments attributable to the Property. This case centers on a dispute over the Town's valuation of the Property for tax purposes.

A revaluation for all property within the Town was completed in 2016. Pursuant to that revaluation, the Property was assessed at $95,549,400. Based upon the 2016 tax rate of $22.79 per thousand dollars of value, the Town billed the Operator $1,972,451 in real estate taxes for the Property for the 2016 tax year. The Town subsequently became aware of an online annual report published by the plaintiffs' parent company, Simon Property Group.[1] This report claimed that the Property's market value was $154,149,500. Based on this claim, the Town increased the Property's assessed value to $154,149,500 for the 2017 tax year. The Town did not increase the 2017 tax year assessments of any other similar properties in the Town.[2]

[1] The Town has not provided the Court with any greater detail regarding the information contained within the annual report.

[2] The Town believes that the Property is unique, and if so there are no comparative properties within the Town.

After re-assessing the Property and notifying the plaintiffs of the change, the Town issued the plaintiffs a tax bill for the first half of the 2017 tax year based on the updated assessment of $154,149,500.[7] The Town calculated the first-half tax bill for the Property using the updated assessed valuation and half of the 2016 tax rate ($11.39 per thousand). The Property's first-half tax bill for the 2017 tax year was thus $1,755,763. The Operator paid that bill, but did so "under protest." The plaintiffs thereafter initiated this action on November 9, 2017.

Since then, the Town issued the Property's second-half tax bill for the 2017 tax year, wherein it calculated the total 2017 tax bill for the Property based upon the $154,149,500 assessment value. The final tax rate for tax year 2017 was set at $23.37 per thousand, making the Property's total property tax bill for the 2017 tax year $3,602,474. The Operator has paid that amount in full as well.

<u>Analysis</u>

The plaintiffs seek a declaratory judgment that the first-half tax bill for the 2017 tax year is illegal and void. The plaintiffs contend that the Town violated RSA 76:15-a, I by using the higher 2017 assessment value when calculating the amount due under the first-half tax bill for the Property. The plaintiffs further contend that they are entitled to an immediate refund, together with interest, of the Operator's payment of that bill. In addition, the plaintiffs seek to enjoin the Town (1) from issuing a tax bill for the remainder of the 2017 tax year based upon the new assessed value of $154,149,500,

[7] RSA 76:15-a, I specifies the process for municipalities to collect taxes on a semi-annual basis: "Taxes shall be collected in the following manner in towns and cities which adopt the provisions of this section in the manner set out in RSA 76:15-b. A partial payment of the taxes assessed on April 1 in any tax year shall be computed by taking the prior year's assessed valuation times ½ of the previous year's tax rate; provided, however, that whenever it shall appear to the selectmen or assessors that certain individual properties have physically changed in valuation, they may use the current year's appraisal times ½ the previous year's tax rate to compute the partial payment."

and (2) from engaging in a collection action with respect to the first-half tax bill for the 2017 tax year. The Town contends, inter alia, that the plaintiffs are procedurally barred from litigating their claims because they did not first pursue an abatement action, that the plaintiffs' claims are moot, and that the plaintiffs are otherwise not entitled to their requested relief. The Court will first address the Town's procedural argument concerning the abatement process, and will then address the remaining arguments raised in the Town's motion to dismiss with respect to each of the plaintiffs' claims, in turn.

I. Abatement

The Town argues that the plaintiffs' claims must be dismissed because the plaintiffs' "exclusive remedy is the statutory tax abatement process." (Def.'s Mot. Dismiss at 5.) The Court disagrees. RSA 76:16 states, in pertinent part:

> Any person aggrieved by the assessment of a tax by the selectmen or assessors and who has complied with the requirements of RSA 74, may, by March 1 following the date of notice of tax under RSA 76:11-a and not afterwards, apply in writing, on the form set out in paragraph III, to the selectmen or assessors for an abatement of the tax.

RSA 76:16, I(b). "The New Hampshire tax abatement statutes are remedial in nature. They provide the exclusive remedy available to a taxpayer dissatisfied with an assessment made against his property." LSP Assocs. v. Town of Gilford, 142 N.H. 369, 374 (1997) (citations omitted). However, "[a] party is not required to exhaust administrative remedies where the issue . . . is a question of law rather than a question of the exercise of administrative discretion." Pheasant Lane Realty Trust v. City of Nashua, 143 N.H. 340, 342 (1999) (quotation omitted). "The true line of demarcation between what can and cannot be taken advantage of in an abatement proceeding is

whether the petitioner is unlawfully or unjustly taxed as between him and the other taxpayers." Porter v. Town of Sandwich, 153 N.H. 175, 177 (2006) (quotation omitted) (explaining that "the issue in an abatement proceeding is whether the government has taxed the plaintiff out of proportion to other property owners in the taxing district" (citations omitted)).

In Town of Sandwich, the plaintiffs "argued that the Town's increased assessment violated both [their contract with the Town] and RSA chapter 79-D." Id. The trial court dismissed the plaintiffs' complaint, "concluding that [they] sought a tax abatement and that the trial court lacked subject matter jurisdiction." Id. at 176. The supreme court reversed, however, finding that the plaintiffs were arguing "issues of contractual and statutory law," the interpretation of which is a question of law. Id. at 178 (citations omitted). The supreme court explained, "[t]he issues of law that the [plaintiffs] raised posed threshold questions as to the legality of the assessment not issues of proportionality or inability to pay." Id. In other words, the supreme court determined that the plaintiffs were challenging the "legality of the assessment" itself, not merely the amount of the assessment. The latter circumstance would have been only a request for abatement, and thus would not properly have been in front of the courts.

In this case, the plaintiffs' request for a declaratory judgment contends that the Town has violated RSA 76:15-a. This claim centers on the proper "interpretation" of RSA 76:15-a, which is "a question of law." The LLK Trust v. Town of Wolfeboro, 159 N.H. 734, 736 (2010) (citation omitted). Likewise, the plaintiffs' request for injunctive relief is based upon a question of law, specifically, whether the Town engaged in "unconstitutional spot zoning" in violation of the plaintiffs' constitutional rights, and

whether the Town was statutorily authorized to reassess the Property when no intervening changes to the Property had taken place. Like the plaintiffs in Town of Sandwich, the plaintiffs here question "the legality of the assessment," 163 N.H. at 176, not the amount of the assessment. While the plaintiffs question whether the Town was authorized to alter the Property's assessment value based on the Simon Property Group's online annual report, they do not appear to argue that the assessment value, based on that report, was factually inaccurate. Thus, the claimants were not obligated to go through the abatement process before bringing their claims in this Court.

Accordingly, the Court will not dismiss the plaintiffs' claims on that basis, but will now assess the balance of the arguments raised in the Town's motion to dismiss relative to each individual claim, in turn.

I. Declaratory judgment

As noted above, the plaintiffs seek a declaratory judgment that the first-half tax bill for the 2017 tax year "is illegal and void." (Compl. ¶ 18.) Specifically, the plaintiffs contend that the Town was required to use the Property's 2016 assessed value when calculating the first-half tax bill for the 2017 tax year, see RSA 76:15-a, I, because the Property did not undergo a "physical change," see id. According to the plaintiffs, absent such a physical change, the Town was statutorily barred from using the 2017 assessed value when calculating the first-half tax bill. As damages, the plaintiffs seek "an immediate refund" of the Operator's payment of that bill, "together with interest."

"Where a plaintiff seeks a declaratory judgment, he is not seeking to enforce a claim against the defendant, but rather a judicial declaration as to the existence and effect of a relation between him or her and the defendant." N. Country Envtl. Servs., Inc. v. Town of Bethlehem, 150 N.H. 592, 821 (2004) (quotation omitted). "The remedy of declaratory judgment affords relief from uncertainty and insecurity with respect to rights, status or other relations existing between the parties, particularly for controversy relief must be sought from courts to act in effectuate the evident purpose of the law." Patrick v. N.H. Ins. Guar. Ass'n, 161 N.H. 560, 564 (2011) (quotation omitted).

(Compl. ¶ 19.) The Town asserts that this claim is moot because it has already issued, and the Operator has already paid, both the first-half and second-half tax bills for the 2017 tax year. (Def.'s Mem. 3.) Furthermore, the Town asserts that even if the Court rules in the plaintiffs' favor, the plaintiffs would not be entitled to their requested relief but rather would only be able to receive "a credit toward the amount of the taxes eventually assessed against the [P]roperty." (Id.)

"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." Pheasant Lane, 149 N.H. at 143 (quotation and citation omitted). "As such, [n]uisance property tax valuations can be corrected only through legislatively authorized remedies." Id. Thus, in order to resolve the plaintiffs' claims, the Court must construe the pertinent statutes to determine whether the statutes permitted the Town to apply the 2017 assessed value when calculating the Property's first-half tax bill for the 2017 tax year.

"The interpretation of a statute is a question of law." Town of Wolfeboro, 159 N.H. at 736 (citation omitted). Courts "are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole." Id. (citation omitted). Courts "first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." Id. (citation omitted). Courts "construe all parts of a statute together to effectuate its overall purposes and avoid an absurd or unjust result." Id. (citation omitted). "Moreover, [courts] do not consider words and phrases in isolation, but rather within the context of the statute as a whole." Id. (citation omitted). Courts "will consider legislative history only if the statutory language is ambiguous." Premium Research Servs. v. N.H. Dep't of Labor, 162 N.H.

741, 749 (2011) (citation omitted).

In Town of Wolfeboro, the supreme court explained the methodology of the semi-annual tax collection under RSA 76:15-a:

> The Town collects taxes semi-annually pursuant to RSA 76:15-a, which allows a town to collect taxes assessed on April 1 in two installments, the first due on July 1 and the second due on December 1. The first installment may be based upon the prior year's assessed valuation times ½ of the previous year's tax rate. If, however, it shall appear to the selectmen or assessors that certain individual properties have physically changed in valuation, they may use the current year's appraisal times ½ the previous year's tax rate to compute the partial payment. Upon receipt of the July payment, the tax collector must credit it toward the amount of the taxes eventually assessed against the property. A payment of the remainder of the taxes assessed April 1, minus the payment due on July 1 of that year, shall be due and payable December 1.

156 N.H. at 797 (quotations omitted, emphasis added); see also RSA 76:15-a, I ("Provided, however, that whenever it shall appear to the selectmen or assessors that certain individual properties have physically changed in valuation, the Town may use the current year's appraisal times ½ the previous tax year's tax rate to compute the partial payment." (emphasis added)).

The plaintiffs assert that the language "physically changed in valuation" means that the Town may only use the current year's appraisal to calculate the first half tax bill when a property has undergone a physical change between the last tax year and the current tax year.[5] The Town argues that the legislature's use of the words "in valuation" in addition to "physical change" in the statute means that any change in the valuation enables the Town to use the updated assessed valuation to calculate the first half tax bill. The Court finds that the relevant statutory language supports the plaintiffs' view.

---

[5] It is undisputed that the property has not undergone any material physical changes between tax year 2016 and tax year 2017. Thus, if the plaintiffs' interpretation of RSA 76:15-a is correct, they were forced to pay a significant amount of money much earlier than otherwise would have been required.

RSA 76:16-a, I states that municipalities "shall" compute a property's first-half tax bill "by taking the prior year's assessed valuation times 50 of the previous year's tax rate," unless the property has "physically changed in valuation."[4] The New Hampshire Supreme Court has not expressly interpreted the phrase "physical change in valuation." However, the Court finds that the phrase "physical change in valuation" unambiguously requires an actual physical change in order for a town to calculate a first-half tax bill based upon the current year's valuation. There are no commas, semicolons, or other grammatical signals indicating that those four words should not be read together. Moreover, "an ambiguous tax statute will be construed against the taxing authority rather than the taxpayer." Pheasant Lane, 143 N.H. at 143 (quotation omitted). Thus, even if the Court found the phrase "physical change in valuation" ambiguous, see RSA 76:16-a, the Court would be required to construe any such ambiguity against the Town, not the plaintiffs.

Consistent with the foregoing, the Court finds that the Town violated RSA 76:16-a by using the 2017 assessed valuation to calculate the Property's first-half tax bill for the 2017 tax year. There is no indication in the record that the Property underwent a "physical change in valuation," see RSA 76:16-a, and thus the Town should have calculated the first-half tax bill for the 2017 tax year based upon the 2016 assessed valuation. Although the Town argues that this issue is moot because the plaintiffs have now paid their second-half tax bill for the 2017 tax year (which, in their view, was lawfully

[4] As the supreme court explained in Town of Wolfeboro, if there is a change in the property's assessed valuation between tax years, the property's first tax bill at the end of the year will be the same regardless of which assessed value is used to compute the first-half tax bill, because the town will calculate the second-half tax bill based on the updated valuation and will credit the amount of the first-half tax payment toward the amount of taxes eventually assessed against the property using the updated valuation. Town of Wolfeboro, 169 N.H. at 737.

In addition, the legislative history of RSA 76:16-a is consistent with reaching this result.

calculated based upon the 2017 assessed valuation for the Property, the Court disagrees.

"Generally, a matter is moot when it no longer presents a justiciable controversy because issues involved have become academic or dead." Londonderry Sch. Dist. SAU #12 v. State, 157 N.H. 734, 736 (2008) (quotation and ellipses omitted). Here, if the Town had calculated the first-half tax bill at issue using the 2016 assessed value, the first-half tax bill would have been $985,786 ($88,549.40 times $11.39, rounded to the nearest dollar) rather than $1,795,793 ($154,149.50 times $11.39, rounded to the nearest dollar). In other words, the plaintiffs were forced to pay an additional $710,008 on the date when the first-half bill came due, whereas they otherwise would not have had to make that payment until the second-half tax bill came due (at the earliest).[5]

Accordingly, the plaintiffs were improperly deprived of the use of those funds for a period of time. Thus, even if the Town could have lawfully calculated the Property's second-half tax bill for the 2017 tax year based upon the new 2017 assessed value, the plaintiffs would be entitled, at a minimum, to receive interest on the amount of their early prepayment.[6] If, on the other hand, the plaintiffs prevail on their legal challenge to the 2017 revaluation of the Property, then the plaintiffs would equitably be entitled to interest on the above-described overpayment from the date that the overpayment was made (or the date on which the first-half tax bill for the 2017 tax year was due, whichever is later) through the date of such a judgment, plus additional relief to correct the overpayment.

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[5] If, as the plaintiffs claim, the Town unlawfully revalued the Property in 2017, then the second-half tax bill for the 2017 tax year likewise could not properly be based on the 2017 assessment value. Thus, the plaintiffs would not presently have been required to pay the additional $710,008 on the date that the second-half tax bill came due, either.

[6] Specifically, the plaintiffs would be entitled to interest on the $710,008 overpayment from the date on which the first-half tax bill at issue came due, or the date on which the Operator paid that bill, whichever is later, until the date on which the second-half tax bill came due, or the date on which the Operator paid the second-half tax bill, whichever is earlier.

itself.[14] In light of the foregoing, the Town's motion to dismiss is DENIED relative to the plaintiffs' declaratory judgment claim.

ii. Injunctive Relief

The plaintiffs request that the Court issue two injunctions: one barring the Town from issuing the remainder of the 2017 tax bill using the updated Property assessment value, and a second barring the Town from taking up a collection action against the plaintiffs for the first-half tax bill for the 2017 tax year. The Town asserts that these requests are moot because it has already issued, and the plaintiffs have already paid, both the first- and the second-half tax bills for the 2017 tax year. That the plaintiffs have already paid the full 2017 tax bill is not in dispute. Rather, the plaintiffs assert that the requests are not moot because they "ha[ve] every reason to believe that the Town will continue to single [] out the [plaintiffs] for disparate, illegal, and unconstitutional treatment in the future," considering the Town's "blatantly discriminatory treatment of them." (Obj. Mot. Dismiss at 8.)

As an initial matter, it is unclear to the Court how the Town could initiate a collection action relative to a bill which has been paid in full. As noted above, the Operator has paid the first-half tax bill on the Property for the 2017 tax year, albeit "under protest." (Compl. ¶ 12.) Accordingly, the Court agrees that the plaintiffs' request for an injunction barring the Town "from taking a collection action with respect to the first-half tax year 2017 tax bill issued by the [Town]" is moot. The Town's motion to

[14] The Court takes no position at the present time on the issue of whether such relief would be in the form of a refund of the overpayment, or a credit in that amount towards the 2018 tax liability for the Property. Moreover, although the Court is unaware of any legal authority which would entitle the plaintiffs to a refund of their entire payment (including the amount that would have been due if the Town had calculated the first-half tax bill based upon the Property's 2016 assessed value), as opposed to a refund of just the overpayment, the Court will defer ruling on that issue until it has been fully briefed by both parties.

dismiss is therefore GRANTED with respect to this request.

Turning to the plaintiffs' second request for injunctive relief—wherein they seek to enjoin the Town "from issuing a tax bill for tax year 2017 with an assessment higher than the assessment for tax year 2016"—the Court will first address the merits of that request before determining whether it has been rendered moot. The Town contends that the final tax bill on the Property for the 2017 tax year was valid, because the Town lawfully reassessed the Property based upon the information learned in the aforementioned online annual report published by the plaintiffs' parent company.

The process of assessing properties for tax purposes is governed by RSA 75:8, which states, in relevant part:

> 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.
>
> 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.

RSA 75:8.

The plaintiffs cite to Tennessee Gas Pipeline Co. v. Town of Hudson for the proposition that RSA 75:8 previously included language permitting assessors to "correct all errors that they find in the then existing appraisal." 148 N.H. 599, 604 (2002) (quoting RSA 75:8). The plaintiffs appear to argue that because the legislature has

since removed that language from the statute, it intended that municipalities should no longer be permitted to consider errors in a property's most recent appraisal when determining whether to adjust that property's assessment value. (Pls.' Mem. 5.) However, the Town has not meaningfully addressed this argument, contending only that "if a property's assessment must be adjusted to reflect its market value, it is not disputed that the Town can do this on the final tax bill." (Def.'s Mem. 5.) Because the parties have not fully litigated this issue, the Court declines to reach it at this juncture. Cf. State v. Rice, 169 N.H. 783, 802 (2017) ("Because the parties have not fully briefed this issue, we decline to address it now."). Rather, the Court will limit its analysis to the plaintiffs' claim that the Town violated their constitutional equal protection rights by engaging in spot zoning.

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—of which the Town asserts it had not previously been aware—and the Town thereafter came to believe that it had grossly undervalued the Property. As the Court noted at the outset, in ruling on a motion to dismiss, the Court must "assume the well pleaded allegations of fact in the [complaint] to be true, and construe all reasonable inferences from them in the plaintiff's favor." Ojo, 164 N.H. at 721. Applying this standard of review, the Court concludes that the plaintiffs have alleged sufficient facts to survive the pending motion to dismiss.

The Town separately credits 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.[1] The plaintiffs contend that the Town did not take such an action, but simply engaged in "spot zoning" 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 these inferences and survive a motion to dismiss.

The Court further finds that the plaintiffs' request for injunctive relief is not moot. While it is uncontroverted that one or more of the plaintiffs has have already paid the 2017 tax bill for the Property in full, the question of the propriety of the 2017 assessment is not moot because the Town will continue to calculate the Property's taxes using that higher assessed valuation going forward, unless it is determined that the assessment was illegal. In light of this consideration, the Court cannot conclude that the issues raised by the plaintiffs are academic or dead. See Londonderry Sch. Dist. SAU #12, 157 N.H. at 738. Accordingly, the Town's motion to dismiss is DENIED with respect to

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[1] Although the Town contends that there are no similar properties in the Town, that factual issue cannot be resolved in the context of a motion to dismiss.

the plaintiffs' request for injunctive relief barring the Town from issuing a tax bill for tax year 2017 with an assessment higher than the assessment for tax year 2016.

Conclusion

Consistent with the foregoing, the Town's motion to dismiss is GRANTED with respect to the plaintiffs' request for injunctive relief barring the Town from taking a collection action with respect to the first-half tax year 2017 tax bill issued by the [Town], but DENIED with respect to the plaintiffs' declaratory judgment claim AND the plaintiffs' request for injunctive relief barring the Town from issuing a tax bill for tax year 2017 with an assessment higher than the assessment for tax year 2016.

So ordered.

Date: March 13, 2018

Hon. Jocelyn A. Colburn,
Presiding Justice

THE STATE OF NEW HAMPSHIRE
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NOTICE OF DECISION

File Copy

Case Name: **Merrimack Premium Outlets, LLC, et al v Town of Merrimack**
Case Number: **226-2017-CV-00636** ***226-2018-CV-00464***

Enclosed please find a copy of the court's order of June 14, 2019 relative to:

COURT ORDER

June 17, 2019

Marshall A. Buttrick
Clerk of Court

(293)

C: Anthony M. Ambriano, ESQ; Matthew R. Serge, ESQ; Matthew H. Upton, ESQ; Demetrio F. Aspiras, III, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
No. 2017-CV-00636
No. 2018-CV-00464

Merrimack Premium Outlets, LLC & Merrimack Premium Outlets Center, LLC

v.

Town of Merrimack

ORDER

The plaintiffs, Merrimack Premium Outlets, LLC and Merrimack Premium Outlets Center, LLC, have filed this action challenging a property tax assessment issued by the defendant, the Town of Merrimack (the "Town"). On October 5, 2018, the parties requested that the Court address certain legal issues that will hopefully allow the parties to resolve this matter. The parties thereafter filed legal briefs outlining their respective arguments. After the Court received the briefs, it held a status conference on April 23, 2019. The parties agreed that the issues could be resolved on the pleadings without oral argument. Based on its review of those pleadings, the record, and the applicable law, the Court finds and rules as follows.

Background

For the purposes of this order only, the Court draws the following relevant facts from the record. The plaintiffs own a large commercial shopping center in the Town of Merrimack known as the Merrimack Premium Outlets (the "Outlets"). In 2016, the Town performed a revaluation of all taxable property within the municipality, including the Outlets. Pursuant to that evaluation, the Outlets were assessed at a value of $86,549,400. However, 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 assessed at a value of $220,000,000. This information was contained in document referred to as a "Morningstar Report." Believing that it had severely undervalued the Outlets for taxation purposes, the Town subsequently reappraised the Outlets at a value of $154,149,500 for the 2017 tax year.

The plaintiffs have brought this action challenging the Town's ability to increase the appraised value of the Outlets for the 2017 tax year.[1] The plaintiffs contend that the Town lacked the statutory authority to increase the appraised value of the Outlets absent a physical, zoning, or ownership change, none of which occurred. They further contend that the Town's actions amounted to "an unconstitutional spot assessment." (Pls.' Br. at 9.) The parties also disagree as to whether the Morningstar Report would be admissible at trial and whether certain discovery is appropriate. The Court will address each issue in turn.

Analysis

I. Statutory Authority for Reappraisals

The plaintiffs first argue that the Town lacked the statutory authority to reappraise the value of the Outlets for the 2017 tax year, and therefore the "reassessment is invalid." (Id. at 5.) In response, the Town contends that it has the authority to reappraise the value of any property at any time, so long as it only has a prospective effect. In other words, the Town contends that, "while a municipality may not issue a new or revised assessment during a tax year simply because it discovers it had under-

[1] The Town initially applied the newly assessed value retroactively to the 2016 tax year. However, it has since agreed that doing so was error. See generally Pheasant Lane Realty Trust v. City of Nashua, 143 N.H. 140 (1998) (holding that City could not retroactively increase appraised value within same tax year and supplemental tax bill issued within same tax year was invalid). The parties agree that this is no longer an issue as the Town has provided an appropriate refund to the plaintiffs based on that error.

assessed the property, it is entitled to increase the assessed value of the property in ensuing years." (Town's Br. at 8.) The Court agrees with the Town.

"Pursuant to RSA 76:2, a tax year runs from April 1 to March 31." LLK Trust v. Town of Wolfeboro, 159 N.H. 734, 736 (2010). "Taxes are assessed based upon the value of property located in a town as of April 1." Id. (citation omitted). Consequently, the selectmen of each town must "take an inventory of all estate liable to be taxed in such town as of April 1." RSA 74:1; see also White v. Lee, 124 N.H. 69, 76 (1983) ("Assessment of the tax is performed annually by each city and town, based upon their property inventory as of April 1."). To ensure "that all assessments are reasonably proportional within that municipality," 75:8, I, "the Town must adjust assessments annually." LLK Trust, 159 N.H. at 736 (emphasis added)[2]; see also Trefethen v. Town of Windham, No. 19009-2001PT, 2003 WL 21381464, at *3 (N.H.B.T.L.A. June 6, 2003) (town's duty to annually "review property and correct any errors that it finds" was "not a discretionary function of the Town; it is mandated by the statutes"). These annual adjustments to assessed values may be made for any number of reasons, including if a property is mistakenly undervalued in a prior tax year.[3] As aptly put by one treatise frequently cited by the supreme court:

> In April of each year, assessors or selectmen are required to examine all real estate in the municipality and re-appraise such real estate as changed

[2] In addition to these permitted annual changes, Part II, Article 6 of the New Hampshire Constitution states that "there shall be a valuation of the estates within the state taken anew once in every five years." Therefore, "[t]he 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." RSA 75:8-a.

[3] See Tenn. Gas Pipeline Co. v. Town of Hudson, 145 N.H. 595, 605 (2000) (town could revalue property after learning of higher appraisal under prior version of RSA 75:8; such reappraisal was not an illegal spot assessment); Mills v. Town of Hopkinton, No. 21087-04PT, 2007 WL 3343164, at *3 (N.H.B.T.L.A. Sept. 12, 2007); Trefethen, 2003 WL 21381464, at *3; Tremblay v. City of Keene, No. 19058-2001PT, 2003 WL 21381472, at *2 (N.H.B.T.L.A. May 20, 2003) ("The City can and should correct the assessments on other properties, if they are below market value, and apparently did so in the next tax year.").

> in value and to correct all errors that they find in the existing appraisal. The corrected appraisal must be made part of the inventory of the municipality, and must be sworn to[.]

16 P. Loughlin, New Hampshire Practice: Municipal Taxation and Road Law § 20.09, at 20-13 (2008).

To the extent the plaintiffs contend that a property must undergo some type of physical, ownership, or zoning change in order to warrant a reappraisal, the Court disagrees. It is true that when a property experiences certain types of changes in between town-wide revaluations, the Town "shall consider" adjusting the tax assessment for that property. RSA 75:8, III. These changes include when a property has "had a material physical change"; "undergone zoning changes"; "undergone changes to exemptions, credits or abatements"; "undergone subdivision, boundary line adjustments, or mergers"; or "undergone other changes affecting value." Id. However, there is nothing in the plain language of the statutory scheme that limits a reappraisal to these circumstances, and the Court "will not consider what the legislature might have said or add language that the legislature did not see fit to include." In re Carrier, 165 N.H. 719, 721 (2013) (citation omitted).

Moreover, allowing a municipality to correct undervaluations from prior tax years is harmonious with the other provisions of the statutory scheme. See id. (court should "construe all parts of a statute together to effectuate its overall purpose") (citation omitted). For instance, after the inventory of property is completed each year, the selectmen and assessors must swear under oath "that in making the inventory for the purpose of assessing the [ ] taxes[,] all taxable property was appraised to the best of our knowledge and belief at its full value, in accordance with state appraisal standards."

RSA 75:7 (emphasis added). Thus, if the Town becomes aware that a property was undervalued in a prior tax year, the selectmen and the assessors must update the appraised value in order to comply with their statutorily-mandated oath.

In fact, if the Town were required to allow an undervaluation to stand until the next town-wide revaluation as the plaintiffs suggest, it would result in other taxpayers within the municipality paying a disproportionate amount of tax for the same period of time. See Mills, 2007 WL 3343164, at *3 (town had authority to change assessed value of properties where "[t]he correction, when implemented, resulted in more proportionate taxation throughout the Town"). Not only would this be unfair to the other taxpayers in the municipality, it would also result in a large windfall to the owner of the underassessed property. That is precisely why, "[s]ince 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, 145 N.H. 384, 392 (2001) (emphasis added). For these reasons, the Court finds that the Town had the legal authority to adjust the appraised value of the Outlets for the 2017 tax year despite the fact that there were no physical, zoning, or ownership change to the property following the 2016 town-wide revaluation.[4]

II. Constitutional Challenge

To the extent the plaintiffs raise a constitutional challenge to the Town's decision to reappraise the Outlets for the 2017 tax year, the Court finds that such an argument is

[4] See also Regent Care Ctr., Inc. v. Hackensack City, 828 A.2d 332, 337 (N.J. Super. Ct. App. Div. 2003) (rejecting argument that a change in valuation "that is not directly related to a change in the zoning or legal status of a property or to a change in the property itself (an added assessment) or, for example, to correct an obvious mathematical or clerical error, per se constitutes a prohibited spot assessment").

presently underdeveloped to warrant judicial review. While the plaintiffs cited to three provisions of the State Constitution in their complaint, (see Compl. ¶ 35), they have not developed any argument under those specific provisions in their brief. See State v. Chick, 141 N.H. 503, 504 (1996) (holding that "passing reference to 'due process,' without more, is not a substitute for valid constitutional argument"). Moreover, the plaintiffs have not cited or discussed the relevant United States Supreme Court cases on this issue, see, e.g., Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty., 488 U.S. 336 (1989); Nordlinger v. Hahn, 505 U.S. 1 (1992), nor have they analyzed their claim under the two leading New Hampshire cases on equal protection and taxation, see, e.g., N. New Eng. Tel. Operations, LLC v. City of Concord, 166 N.H. 653 (2014); Verizon New Eng., Inc. v. City of Rochester, 156 N.H. 624 (2007). The plaintiffs have further failed to articulate the standard of review the Court should use, but see Verizon New Eng., Inc., 156 N.H. 624 (holding that rational basis scrutiny was appropriate), and consequently, did not apply that standard to the facts of this case. Simply put, if the plaintiffs wish to prevail on their constitutional claim(s) at the merits hearing, they will have to provide the Court with significantly more legal analysis. Mere generic references to "unequal" or "discriminatory" treatment will simply not suffice.[5]

III. Admissibility of the Morningstar Document

Assuming that the plaintiffs intend on proceeding with an equal protection claim at trial, the Court finds that the Morningstar Document will likely be admissible. In order

[5] The Court notes, however, that most so-called "spot assessments" are only found unconstitutional when they are based on a recent sale of the property. See, e.g., Allegheny Pittsburgh Coal Co., 488 U.S. 336. Absent a reappraisal based solely on the sale of the property, there is case law from other jurisdictions suggesting that "[a] municipality may revise assessments in years other than years of municipal-wide revaluation for legitimate reasons" without violating constitutional principles. Twp. of W. Milford v. Van Decker, 676 A.2d 581, 585 (N.J. 1996); see also Mountain View Crossing Invs. LLC v. Twp. of Wayne, 20 N.J. Tax 512, 520 (2003) (explaining that "a prohibited spot assessment occurs only when the assessor has no basis for revising the assessment other than a sale of the property") (emphasis added).

for the plaintiffs to prevail on an equal protection claim, they must prove "that the[ir] selection [for reappraisal] is arbitrary or without some reasonable justification." N. New Eng. Tel. Operations, LLC, 166 N.H. at 657 (quotation omitted). In addition, they must also negate "every conceivable basis which might support the[ir] selection, whether or not the basis has a foundation in the record." Id. (quotation omitted). Here, the Town's discovery of the Morningstar Document is what led to its decision to reappraise the property. Thus, the document is clearly relevant to the proceedings as it purportedly provides the Town's justification for its actions. See N.H. R. Evid. 401. Moreover, to the extent the plaintiffs contend that the document is hearsay, the Court agrees with the Town that the document is nonetheless admissible pursuant to New Hampshire Rule of Evidence 803(17). See Lee v. Holoubek, No. 06-15-00041-CV, 2016 WL 2609294, at *5 (Tex. App. May 6, 2016) ("The Morningstar report clearly constitutes a document within the category of '[m]arket quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.' Tex. R. Evid. 803(17). Therefore, the trial court correctly ruled that it fell within the category of documents identified in Rule 803(17)'s exception to the hearsay rule and overruled Lee's general hearsay objection.").

IV. Discovery Dispute

The plaintiffs refused to answer several of the Town's interrogatories on the basis that this case did not request a tax abatement, but rather only challenged the legality of the Town's actions. However, since that time, this case has been consolidated with the plaintiffs' tax abatement action. (See Court Index #29 ¶ 1.) In addition, it is unclear on which theory (or theories) the plaintiffs will proceed as a result of this order.

Consequently, the Court finds that the parties shall attempt to resolve the pending discovery dispute in light of this decision and the pending tax abatement action. If the parties are still unable to agree on an amicable arrangement after conferring with each other, the Town may renew its motion to compel.

So ordered.

Date: June 14, 2019

Hon. Jacalyn A. Colburn,
Presiding Justice

THE STATE OF NEW HAMPSHIRE
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NOTICE OF DECISION

File Copy

Case Name: **Merrimack Premium Outlets, LLC, et al v Town of Merrimack**
Case Number: **226-2017-CV-00636** ***226-2018-CV-00464; 226-2019-CV-00608***

Enclosed please find a copy of the court's order of November 21, 2019 relative to:

ORDER ON PENDING MOTIONS

November 21, 2019

Marshall A. Buttrick
Clerk of Court

(293)

C: Anthony M. Ambriano, ESQ; Matthew R. Serge, ESQ; Matthew H. Upton, ESQ; Demetrio F. Aspiras, III, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
No. 2017-CV-00636
No. 2018-CV-00464
No. 2019-CV-00608

Merrimack Premium Outlets, LLC & Merrimack Premium Outlets Center, LLC

v.

Town of Merrimack

ORDER ON PENDING MOTIONS

The plaintiffs, Merrimack Premium Outlets, LLC and Merrimack Premium Outlets Center, LLC, have filed these actions challenging property tax assessments issued by the defendant, the Town of Merrimack (the "Town"). Currently pending before the Court are: (1) the Town's motion to dismiss the complaint for declaratory judgment and injunctive relief complaint in Docket No. 226-2017-CV-00636, to which the plaintiffs object; (2) the Town's motion to dismiss the plaintiffs' statutory abatement appeal in Docket No. 226-2018-CV-00464, to which the plaintiffs object; and (3) the Town's renewed motion to compel answers to interrogatories, to which the plaintiffs object. The Court held a hearing on these motions on September 18, 2019. After considering the record, the arguments, and the applicable law, the Court finds and rules as follows.

Analysis

I. Motion to Dismiss Complaint in Docket No. 226-2017-CV-00636

A. Factual and Procedural Background

For the purposes of this order only, the Court draws the following relevant facts from the record. The plaintiffs own a large commercial shopping center in the Town of Merrimack known as the Merrimack Premium Outlets (the "Outlets"). In 2016, the Town

performed a revaluation of all taxable property within the municipality, including the Outlets. Pursuant to that evaluation, the Outlets were appraised at a value of $86,549,400. However, 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. This information was contained in a document referred to as a "Morningstar Report." Believing that it had severely undervalued the Outlets for taxation purposes, the Town reappraised the Outlets at $154,149,500 for the 2017 tax year. The Town then used this increased appraisal value for the entire 2017 tax year, including the "first-half" tax bill. The plaintiffs thereafter initiated a two-count complaint for declaratory and injunctive relief, which the Town now moves to dismiss. The Court will address the Town's motion by analyzing each count in turn.

B. Count I for Declaratory Judgment

In the first count of the complaint, the plaintiffs sought a declaration that "[t]he first-half tax year 2017 bill for the [Outlets] is illegal and void." (Compl. ¶ 18.) The plaintiffs asserted that that the Town should not have used the new 2017 appraisal amount in calculating the first-half tax bill for the 2017 year and sought a refund. (Id. ¶ 20.) In a previous order, the Court agreed with that argument, finding "the Town violated RSA 76:15-a by using the 2017 assessed valuation to calculate the Property's first-half tax bill for the 2017 tax year." (Mar. 13, 2018 Order at 9.) Consequently, in October 2018, "the Town agreed to refund interest and overpayment for the first-half tax year 2017 bill, which was calculated using the 2017 assessment rather than the 2016 assessment." (Town's Mot. Dismiss at 3.) Because the Town has issued the requested refund, the Court agrees that Count I of the complaint is now MOOT. See Real Estate

Planners, Inc. v. Town of Newmarket, 134 N.H. 696, 701 (1991) ("A petition for declaratory judgment becomes moot when any event occurs after the petition is filed which terminates the adverse claim." (citation omitted)). The Town's motion to dismiss this count is therefore GRANTED. See id. ("Once a petition for declaratory judgment is moot, the trial court may, in its discretion, dismiss the petition.").

C. Count II for Injunctive Relief

In the second count of the complaint, the plaintiffs assert that "[t]here were no changes in the [Outlets] from tax year 2016 to tax year 2017 that justif[ied] the increase in the [valuation] from $86,549,400 to $154,149,500." (Compl. ¶ 5.) As such, they maintain that "the [revaluation] is void and illegal." (Id. ¶ 33.) In making that argument, the plaintiffs first contend that the Town lacked the authority to increase the appraised value of the Outlets because there were no physical changes to the Outlets, the Outlets were not sold, and the newly appraised value did not correct a clerical or mathematical error. (Id. ¶¶ 29–32.) The plaintiffs also claimed that the increase in the appraised value from $86,549,400 to $154,149,500 amounted to an "unconstitutional 'spot' assessment" in violation of their "rights to equal protection and due process." (Id. ¶¶ 34, 35.) As a result, the plaintiffs seek an injunction prohibiting the Town from "issuing a tax bill for tax year 2017 with an assessment higher than the assessment for tax year 2016." (Id. Req. Relief ¶ B(1).)

i. Lack of Authority to Increase the Appraised Value in 2017

This Court scheduled a bench trial on this matter in October 2018. At the final pre-trial conference held on October 5, 2018, the parties asked the Court to resolve certain legal issues, which they represented would narrow the issues for trial. One of

those issues was whether the Town had the legal authority to adjust the appraised value of the Outlets for the 2017 tax year despite the fact that there were no physical, zoning, or ownership changes to the property following the 2016 town-wide revaluation. After looking at the statutory scheme, the Court held that the Town had not only the authority, but the obligation, to increase the appraised value. (See June 14, 2019 Order at 5.) Thus, to the extent the plaintiffs seek relief under Count II on the basis that the Town lacked the authority to change the assessed value, the complaint fails to state a claim for which relief may be granted for the reasons stated in its June 14th Order.

ii. Constitutional Equal Protection Claim

a. Failure to State a Claim

The plaintiffs also argue under Count II that the Town's actions constituted an "unconstitutional 'spot' assessment" in violation of their "rights to equal protection and due process." (Compl. ¶¶ 34, 35.) On December 28, 2017, the Town moved to dismiss this claim, arguing that the plaintiffs "failed to state a claim that the Town's assessment is somehow unconstitutional . . . or that it violates the [p]laintiffs' equal protection . . . rights." (Town's Memo. Law Supp. Dec. 28, 2017 Mot. Dismiss at 6 (Court Index #9).) On March 13, 2018, the Court issued an order addressing that argument. The Court held that "the plaintiffs have alleged sufficient facts to survive a motion to dismiss" regarding that claim. (Mar. 13, 2018 Order at 13.) Despite the Court's ruling, the Town again moves to dismiss this claim on the same basis—that the plaintiffs' complaint "fails to state a claim for an equal protecti[on] violation." (Town's Aug. 7, 2019 Mot. Dismiss at 8.) Because the Court has already ruled that the plaintiffs have stated a viable equal protection claim, the Court will not readdress that issue at this stage in the proceedings,

nor will it address any of the Town's new arguments related to that issue. To the extent the Town seeks reconsideration of the Court's March 13, 2018 Order, the time for doing so has long since passed. See Super. Ct. Civ. R. 12(e) (motions to reconsider must be filed within ten days of the clerk's notice of decision).

b. Mootness

Next, the Town argues that the plaintiffs' "request for an injunction against [the] issuance [of the 2017 tax bill] is moot." (Town's Aug. 7, 2019 Mot. Dismiss at 3.) In making this argument, the Town correctly notes that plaintiffs initially sought an injunction "to enjoin the Town from issuing a tax bill for 2017 with an assessment higher than the assessment for tax year 2016." (Id.) Because the Town has already issued its 2017 tax bills, the Town claims that the Court "cannot enjoin that which has already happened." (Id.) The Court agrees that it cannot enjoin completed acts, and it will not do so if the plaintiffs prevail on their equal protection claim. See Thurston Enters. v. Baldi, 128 N.H. 760, 764 (1986) (noting that injunctions "look to prevent future conduct rather than to remedy past conduct"); 4 G. J. MacDonald, Wiebusch on New Hampshire Civil Practice and Procedure § 19.06, at 19-5 (4th ed. 2014) ("The court will not grant [an injunction] against a threat . . . which has already passed.").

However, it does not follow that the plaintiffs' entire case is moot or subject to dismissal. "The doctrine of mootness is designed to avoid deciding issues that have become academic or dead." LeBaron v. Wight, 156 N.H. 583, 585 (2007) (quotation omitted). As the Court noted in its March 13, 2018 Order in which it rejected a similar mootness argument, "the Town will continue to calculate the [Outlets'] taxes using [the 2017] higher assessed valuation going forward, unless it is determined that the

assessment was illegal." (Mar. 13, 2018 Order at 14.) Indeed, based on the plaintiffs' most recent abatement action, see Docket No. 226-2019-CV-00608, it appears that the Town has continued to use the 2017 assessed value for the 2018 tax year. As such, the issues surrounding the use of the 2017 reappraisal are far from "academic or dead," as they remain unresolved to this day. LeBaron, 156 N.H. at 585. And, notwithstanding the title of Count II ("Injunctive Relief"), if the plaintiffs ultimately prevail on their equal protection claim, the Court may consider various types of relief, such as requiring the Town to issue a refund for the 2017 tax year or enjoining the Town from using of the 2017 valuation in future tax bills. (See generally Compl. Req. Relief ¶ D (requesting the Court to "[g]rant such other and further relief as is just and equitable").) For these reasons, the Town's motion to dismiss Count II on mootness grounds is DENIED.

D. Conclusion

To summarize, the only issues remaining under the Docket No. 226-2017-CV-00636 complaint are: (1) whether the Town violated the plaintiffs' equal protection rights[1] when it increased the appraised value of the Outlets for the 2017 tax year; and (2) if so, the appropriate remedy. All other claims and requests for specific injunctive/declaratory relief have either been dismissed or are otherwise moot.

II. Motion to Dismiss the Statutory Abatement Complaint

In Docket No. 226-2018-CV-00464, the Outlets allege that the Town's newly appraised value for tax year 2017 "and the tax assessed thereon were illegal, excessive in amount and unconstitutional" and therefore "just cause exists for the abatement of a portion of the taxes[.]" (Compl. ¶ 4.) As a result, the plaintiffs seek an order refunding

[1] Although the plaintiffs made a passing reference to a due process claim in the complaint, they no longer appear to be pursuing it.

"so much of the taxes assessed against it on account of said Property as of April 1, 2017 as exceeds the taxes that would have been assessed if the Property had not been subject to an unauthorized, illegal, and unconstitutional sport assessment." (Id. Req. Relief ¶ A.) The Town now moves to dismiss, arguing that the complaint fails to state a viable basis for an abatement. In response, the plaintiffs contend that the Town violated their equal protection rights, and such violation amounts to "good cause" for abatement.

Pursuant to RSA 76:16, I, "[s]electmen or assessors, for good cause shown, may abate any tax, including prior years' taxes, assessed by them or by their predecessors, including any portion of interest accrued on such tax." (Emphasis added). "If the selectmen neglect or refuse so to abate," the taxpayer may "apply by petition to the superior court in the county, which shall make such order thereon as justice requires." RSA 76:17. "The superior court's jurisdiction in an abatement proceeding is appellate, and it has the power to review the municipality's decision to determine if an abatement is warranted. The superior court may abate taxes for any cause that would justify an abatement by the selectmen." LSP Ass'n v. Town of Gilford, 142 N.H. 369, 374 (1997).

Otherwise put, the superior court may only abate taxes "for good cause shown" as that phrase is used in RSA 76:16. Despite the broad import of the phrase "for good cause shown," there are only limited circumstances in which abatements are generally granted. Indeed, for over 150 years, the New Hampshire Supreme Court had "never affirmed an abatement for anything other than disproportionate assessment or inability to pay." Barksdale v. Epsom, 136 N.H. 511, 515 (1992).[2] Because abatements may only be granted in those limited situations, the supreme court has suggested that claims

[2] However, in a recent case, the supreme court held that an abatement may be appropriate if the property is destroyed by fire during the tax year. Carr v. Town of New London, 170 N.H. 10, 15 (2017).

outside of those circumstances relating to the propriety of a tax should not be resolved through the abatement process. For example, a claim "that the assessment was illegal as a whole" is not a proper issue in an abatement action. Bretton Woods Co. v. Carroll, 84 N.H. 428, 431 (1930); see also Pheasant Lane Realty Trust v. City of Nashua, 143 N.H. 140, 141 (1998) (taxpayer not required to file abatement petition in order to challenge legality of assessment). Likewise, "an abatement petition is not the proper remedy" to address the constitutionality of a tax. Duncan v. Jaffrey, 98 N.H. 305, 306 (1953); Tyler Rd. Dev. Corp. v. Town of Londonderry, 145 N.H. 615, 619 (2000) ("The plaintiff asserts that its declaratory judgment petition was the proper vehicle by which to challenge the constitutionality of the town's taxation method. We agree with this limited conclusion[.]"); cf. Sirrell v. State, 146 N.H. 364 (2001) (plaintiffs used declaratory judgment petition to bring as-applied constitutional challenge to tax). Rather, "a plaintiff raising a question of law" can instead litigate the issue(s) through a complaint for declaratory and injunctive relief, much like the plaintiffs have done in Docket No. 226-2017-CV-00636. Porter v. Town of Sandwich, 153 N.H. 175, 177–78 (2006) ("The issues of law that the Porters raised posed threshold questions as to the legality of the assessment, not issues of proportionality or inability to pay" and therefore were not subject to abatement procedure); see also Signal Aviation Servs. v. City of Lebanon, 164 N.H. 578, 583–84 (2013) ("[T]o the extent that Signal's breach of contract claim sought relief from 'unequal treatment,' . . . Signal may pursue this claim without complying with the tax abatement statutory process."). Thus, the Court agrees with the Town that the plaintiffs' abatement petitions are not the proper procedural mechanisms in which to raise their equal protection challenge.

In addition, one of the main differences between an abatement proceeding and a declaratory judgment proceeding is the need to show disproportionality. That is, "proof that the taxpayer paid more than his or her fair share of a tax is an essential element in any abatement case." Gail C. Nadeau 1994 Trust v. City of Portsmouth, 155 N.H. 810, 813 (2007); see also Verizon New Eng., Inc. v. City of Rochester, 151 N.H. 263, 272 (2004) (explaining that taxpayer was "only entitled to a tax abatement if it carries its burden of proving disproportionality by establishing 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"). Thus, if a taxpayer chooses to attack a tax "through the abatement process," the taxpayer retains "the burden of showing individual disproportionality." Gail C. Nadeau 1994 Trust,, 155 N.H. at 812–13. However, in a declaratory judgment action challenging the constitutionality of a tax, the taxpayer is relieved of that obligation. See id.; Verizon New Eng., Inc. v. City of Rochester, 156 N.H. 624, 629 (2007) ("Rochester III") (rejecting argument that disproportionality analysis applied to taxpayer's equal protection claim). Here, the plaintiffs have repeatedly asserted that they need not demonstrate disproportionality,[3] and as the Town notes, they have not even alleged disproportional taxation in their abatement petitions. This only reinforces the Court's conclusion that the plaintiffs' abatement petitions are improper mechanisms in which to raise their equal protection claim.

In sum, it is clear that the plaintiffs are seeking abatements based solely on the same alleged constitutional equal protection violation that they raised in the complaint in Docket No. 226-2017-CV-00636. For the reasons discussed above, such claims are

[3] Indeed, the plaintiffs expressly stated at the hearing that they have "no intention of presenting a valuation case" under their abatement complaints. (Sep. 18, 2019 H'rg at 12:00 p.m.)

better pursued through the declaratory judgment action pending in Docket No. 226-2017-CV-00636. Accordingly, the Town's motion to dismiss the plaintiffs' abatement petition in Docket No. 226-2018-CV-00464 is GRANTED. It logically follows that the plaintiffs' abatement request for the 2018 tax year, see Docket No. 226-2019-CV-00608, which similarly seeks an abatement on equal protection grounds, should be dismissed for the same reason.

III. The Town's Renewed Motion to Compel (Court Index #36)

Michael D. Larson, a vice president of Simon Tax, answered the Town's interrogatories on behalf of the plaintiffs. The Town contends that many of his answers were inadequate and it renews its motion to compel the plaintiffs to answer certain interrogatory questions. The Court will address each disputed question in turn.

A. Interrogatory #2

The Town asked the plaintiffs to "identify the individual(s) who assisted you in providing responses to these interrogatories," including those individuals' contact information and educational backgrounds. The plaintiffs responded: "The Plaintiffs object . . . to the extent it seeks privileged attorney/client communications and attorney work-product. Subject to the foregoing Objection, I was assisted and/or received documents from Juan C. Paz, Director, property Tax, Simon Property Group, L.P." The Town challenges this answer, arguing that "the identity of the persons answering interrogatory or assisting in providing responses is not privileged and is not work-product." (Town's Mot. ¶ B.) The Court disagrees. See Weiss v. Nat'l Westminster Bank, PLC, 242 F.R.D. 33, 62 (E.D.N.Y. 2007) (denying motion to compel a response to a similar interrogatory "because it seeks information regarding individuals who assisted

plaintiffs' counsel with the preparation of their interrogatory responses, which is protected work product"). The motion to compel as to Interrogatory #2 is thus DENIED.

B. Interrogatory #3

The Town asked the plaintiffs to "state the purchase price and date of purchase for each property you own in the Town of Merrimack, and attach copies of all deeds." The plaintiffs objected "on the grounds that it seeks information not relevant to this case. Subject to the foregoing Objection, neither Plaintiff has acquired any real estate in the Town of Merrimack since 2009. To the extent the Defendant is asking for deeds, any deeds are a matter of public record." The Court finds this answer to be inadequate. The plaintiffs shall produce copies of deeds for any properties they own in the Town.

C. The Remaining Interrogatories (##4, 5, 7, 8, 9, 10, 11, 12, 13, 15, and 16)

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." Verizon New Eng., Inc., 156 N.H. at 631 (emphasis added). 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. As such, the plaintiffs are ORDERED to provide more complete answers to Interrogatories ##4, 5, 7, 8, 9, 10, 11, 12, 13, 15, and 16. To the extent necessary, the parties shall work together in good faith to reach an agreement on an appropriate protective order to cover any confidential information.

Conclusion

To summarize, the Town's motion to dismiss the complaint in Docket No. 226-2017-CV-00636 is GRANTED IN PART and DENIED IN PART consistent with this order. The plaintiffs' equal protection claim is all that remains. The Town's motion to dismiss the tax abatement petition in Docket No. 226-2018-CV-00464 is GRANTED. Count I in Docket No. 226-2019-CV-00608 is DISMISSED sua sponte. The Town's renewed motion to compel is GRANTED IN PART and DENIED IN PART consistent with this order.

Finally, the Court notes that this case has been pending for over two years. The Court originally scheduled a bench trial for October 2018. The Court continued that trial date and addressed the parties' pre-trial briefs because the parties indicated that the Court's rulings on those briefs would narrow the issues for trial. Unfortunately, it appears that the opposite occurred, as the Court has now had to address additional dispositive motions. Given this procedural history, the Court will not entertain any further dispositive motions prior to trial. The Court expects the parties to now prepare for trial and will not permit any further continuances unless for good cause shown.

So ordered.

Date: November 21, 2019

Hon. Jacalyn A. Colburn,
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Southern District
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NOTICE OF DECISION

File Copy

Case Name: **Merrimack Premium Outlets, LLC, et al v Town of Merrimack**
Case Number: **226-2017-CV-00636** ***226-2018-CV-00464; 226-2019-CV-00608***

Enclosed please find a copy of the court's order of April 23, 2020 relative to:

ORDER ON PENDING MOTIONS

April 24, 2020

Marshall A. Buttrick
Clerk of Court

(293)

C: Anthony M. Ambriano, ESQ; Matthew R. Serge, ESQ; Matthew H. Upton, ESQ; Demetrio F. Aspiras, III, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
No. 2017-CV-00636

Merrimack Premium Outlets, LLC & Merrimack Premium Outlets Center, LLC

v.

Town of Merrimack

ORDER ON PENDING MOTIONS

The plaintiffs, Merrimack Premium Outlets, LLC and Merrimack Premium Outlets Center, LLC, has filed this action challenging property tax assessments issued by the defendant, the Town of Merrimack (the "Town"). Currently pending before the Court are: (1) the Town's motion for sanctions, to which the plaintiffs object; (2) the plaintiffs' motion for leave to file a surreply to that motion, to which the Town objects; and (3) the plaintiffs' motion for a protective order, to which the Town objects. After considering the record, the arguments, and the applicable law, the Court finds and rules on each motion as follows.

I. The Town's Motion for Sanctions (Court Index #45)

In an order dated November 21, 2019 and issued by the clerk that same day, the Court granted the Town's renewed motion to compel answers to certain interrogatories. As the Court did not specify a specific deadline in which the plaintiffs had to respond, the answers were due by December 2, 2019. See Super. Ct. R. 29(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."); see also Super. Ct. R. 2 (when deadline established by rules falls on weekend, deadline is extended to next business

day). The plaintiffs, however, failed to provide the answers to the interrogatories by that date. In fact, the plaintiffs still have not provided the answers even though it has been several months since the Court's order. Consequently, the Town now moves for dismissal of this action and an award of attorney's fees based on the plaintiffs' failure to comply with the Court's order on its renewed motion to compel. The plaintiffs object, arguing that they were unable to comply with the order for various reasons.

"Sanctions are appropriate in part to deter parties from disregarding discovery requests, and to compensate others for costs associated with a party's failure to act in accordance with such requests." Daigle v. City of Portsmouth, 131 N.H. 319, 326 (1988) (citations omitted). Thus, while "[i]t is important that cases be decided on their merits," such a policy "does not diminish the obligation of parties to comply with discovery rules." Am. Express Travel v. Moskoff, 144 N.H. 190, 193 (1999) (citations omitted). "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) (authorizing superior court to impose sanctions for discovery abuse, including dismissal). Dismissal is considered an extreme sanction, and before ordering dismissal, the Court should first consider less drastic alternatives. See Gill v. Walker, No. 218-2012-CV-00660, 2013 WL 8743302, at *3 (N.H. Super. Nov. 06, 2013) ("Dismissal is and should be a last resort remedy only."); see also DeButts v. LaRoche, 142 N.H. 845, 847 (1998) (trial court abused its discretion by ordering dismissal without considering other sanctions).

Based upon its review of the procedural history of this case, including the court file and the detailed history provided in the Town's motion, (see Town's Mot. Sanctions

¶¶ 4–35), the Court finds that the plaintiffs have willfully disregarded the Court's order in which it granted the Town's renewed motion to compel. The plaintiffs' proffered justifications for non-compliance simply do not survive scrutiny. For instance, the plaintiffs first claim that, following the Court's order, "it was necessary . . . to confer with in-house counsel as to the disclosure of [the] information." (Pls.' Obj. Town's Mot. Sanctions ¶ 9(a).) However, the plaintiffs have not indicated why that process could not have occurred earlier, or, more importantly, why that communication took nearly two months to complete. The plaintiffs' second "excuse" fares no better. The plaintiffs assert that their Vice President of Property Tax and Credits & Incentives, Michael Larson, was "unexpectedly required to attend a hearing in Los Angeles County . . . which resulted in him not being available for a three-day period in late January, 2020." (Id. ¶ 9(b).) However, the Court's order was issued on November 21, 2019. The plaintiffs have not claimed—and nor could they credibly do so—that Mr. Larson was unavailable for the entire two-month period between November 21, 2019 and "late January, 2020." Third, the plaintiffs note that Mr. Larson was "working on discovery responses in 3 other cases" in January 2020. (Id. ¶ 10(c).) Again, the Court's order was issued in November 2019, and the responses were due by December 2, 2019. It is immaterial what cases Mr. Larson was working on in January of 2020, as the responses were due in December. It is also not clear if or why Mr. Larson was the only individual that could provide the compelled discovery. Finally, it is worth noting that the plaintiffs never reached out to the Town or to the Court to request an extension or to explain any of these circumstances. Rather, the Town had to reach out to the plaintiffs to request an update after the plaintiffs failed to timely provide the answers.

Despite the Court's frustration with the plaintiffs' behavior, the Court will not order dismissal at this juncture. Rather, the Court finds that a lessor sanction—an award of attorney's fees—is appropriate to compensate the Town for its expenses in connection with the enforcement of the Court's November 21, 2019 Order. See DeButts, 142 N.H. at 847. The Town shall submit an affidavit of attorney's fees within twenty days of the clerk's notice of decision detailing these amounts.[1] The plaintiffs may file an objection to the extent they find the amount unreasonable. After the Court approves the amount of the award, the plaintiffs shall pay it within ten days of the clerk's notice of decision. In addition, the plaintiffs are again ORDERED to provide answers to the interrogatories discussed in the November 21, 2019 Order by May 4, 2020. The Town may renew its motion for a dismissal sanction if the plaintiffs fail to provide answers by that date.

II. The Plaintiffs' Motion to File a Surreply (Court Index #50)

This motion is DENIED for the reasons stated in the Town's objection, (see Court Index #51). Simply put, this a relatively straightforward discovery issue. It does not require a surreply. The Court also notes that it did not dismiss this action as a sanction as requested by the Town, which further negates the need for a surreply. To the extent the plaintiffs believe they have additional information that may warrant a different result on the Town's motion for sanctions (discussed in the previous section), they may file a motion to reconsider that decision.

III. The Plaintiffs' Motion for a Protective Order and For Hearing (Court Index #52)

The plaintiffs move for a protective order related to the responses it must provide in response to the Town's interrogatories. After careful consideration of the record, this

[1] The fees shall not include any amounts related to discovery issues pre-dating the Court's November 21, 2019 Order. In addition, any award must be reasonable.

motion is DENIED. Pursuant to Superior Court Rule 29(b), "motions for a protective order relating to . . . 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 ten days of an order of production of records." As discussed above, the Court granted the Town's renewed motion to compel on November 21, 2019. See Super. Ct. R. 2 & 29(b). Consequently, any request for a protective order related to that discovery should have been filed by December 2, 2019. The plaintiffs, however, did not move for a protective order until March 10, 2020.

Moreover, while the Court has the authority to waive any deadline for good cause, see Super. Ct. R. 1(d), the Court does not find that relief to be appropriate here. It is clear to the Court, based on the correspondence in the record, that the plaintiffs did not even begin to discuss the parameters of a confidentially agreement with the Town until late January 2020, and those conversations only came to fruition after the Town repeatedly pushed the plaintiffs to provide the interrogatory responses ordered by the Court. The Court acknowledges that it directed the parties to work together to mutually agree on a protective order in its November 21, 2019 Order "[t]o the extent necessary." (Nov. 21, 2019 Court Order at 12.) However, having waited nearly two months after the issuance of that order to begin working out the details of a confidentiality agreement with the Town, the Court cannot find that the plaintiffs were acting in good faith. Rather, it appears that the plaintiffs 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. Further, given the plaintiffs' lackadaisical approach and their non-compliance with the court rules

regarding protective orders, it is questionable whether even they believe that such an order is "necessary." For all of these reasons, the plaintiffs' motion for a protective order is DENIED.[2]

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.

So ordered.

April 23, 2020
Date

Judge Jacalyn A. Colburn

[2] As the Court has denied the plaintiffs' motion for a protective order on timeliness grounds, the Court does not find that a hearing regarding the scope of the protective order, as requested by the plaintiffs, would be helpful or necessary. Consequently, the plaintiffs' request for oral argument is also DENIED.

THE STATE OF NEW HAMPSHIRE
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NOTICE OF DECISION

File Copy

Case Name: **Merrimack Premium Outlets, LLC, et al v Town of Merrimack**
Case Number: **226-2017-CV-00636** ***226-2018-CV-00464; 226-2019-CV-00608***

Enclosed please find a copy of the court's order of June 05, 2020 relative to:

ORDER ON PENDING MOTIONS

June 05, 2020

Amy M. Feliciano
Clerk of Court

(293)

C: Anthony M. Ambriano, ESQ; Matthew R. Serge, ESQ; Matthew H. Upton, ESQ; Demetrio F. Aspiras, III, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
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ORDER ON PENDING MOTIONS

The plaintiffs, Merrimack Premium Outlets, LLC and Merrimack Premium Outlets Center, LLC, has filed this action challenging property tax assessments issued by the defendant, the Town of Merrimack (the "Town"). Currently pending before the Court are: (1) the plaintiffs' motion for partial reconsideration, to which the Town objects; and (2) the Town's second motion for sanctions, to which the plaintiffs object. After considering the record, the arguments, and the applicable law, the Court finds and rules on each motion as follows.

I. The Plaintiffs' Motion for Partial Reconsideration (Court Index #57)

On April 23, 2020, the Court issued an order denying the plaintiffs' request for a protective order regarding discovery. The Court found that their request for a protective order was untimely as it should have been made by December 2, 2019, which was ten days after the Court granted the Town's motion to compel production of that discovery. The plaintiffs, however, did not move for a protective order until March 10, 2020. Consequently, the Court denied their motion for a protective order, reasoning that:

> It is clear to the Court, based on the correspondence in the record, that the plaintiffs did not even begin to discuss the parameters of a confidentially agreement with the Town until late January 2020, and those conversations only came to fruition after the Town repeatedly pushed the plaintiffs to provide the interrogatory responses ordered by the Court. The

> Court acknowledges that it directed the parties to work together to mutually agree on a protective order in its November 21, 2019 Order "[t]o the extent necessary." (Nov. 21, 2019 Court Order at 12.) However, having waited nearly two months after the issuance of that order to begin working out the details of a confidentiality agreement with the Town, the Court cannot find that the plaintiffs were acting in good faith. Rather, it appears that the plaintiffs 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.

(Apr. 23, 2020 Court Order at 5.) Now, the plaintiffs move for partial reconsideration of that decision. They ask the Court to instead enter a different protective order—one that the Town previously proposed as a compromise during negotiations prior to their March 10, 2020 motion.

At the outset, the Court notes that the plaintiffs' motion fails "to state, with particular clarity, points of law or fact that the court has overlooked or misapprehended." Super. Ct. Civ. R. 12(e). This is reason alone to deny the motion. In addition, the plaintiffs' current request for a protective order suffers from the same problem as their original request—it is extremely untimely as it should have been made by December 2, 2019. This too is a sufficient reason, in and of itself, to deny their current request for a protective order.

Aside from those two reasons, the Court further notes that the plaintiffs could have agreed to the Town's proposed protective order at the time the Town proposed it. Instead, the plaintiffs 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 plaintiffs for their refusal to compromise. Simply put, the plaintiffs have lost their right to

a protective order due to their failure to follow the deadlines established by the Court's rules. For these reasons, the plaintiffs' motion is DENIED.

II. The Town's Second Motion for Sanctions (Court Index #58)

In an order dated November 21, 2019 and issued by the clerk that same day, the Court granted the Town's renewed motion to compel answers to certain interrogatories. As the Court did not specify a specific deadline in which the plaintiffs had to respond, the answers were due by December 2, 2019. See Super. Ct. Civ. R. 29(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."); see also Super. Ct. Civ. R. 2 (when deadline established by rules falls on weekend, deadline is extended to next business day). The plaintiffs, however, failed to provide the answers to the interrogatories by that date. Consequently, the Town previously moved for dismissal of this action and an award of attorney's fees based on the plaintiffs' failure to comply with the Court's order on its renewed motion to compel.

In its April 23, 2020 Order, the Court found that "the plaintiffs have willfully disregarded the Court's order in which it granted the Town's renewed motion to compel." (Apr. 23, 2020 Order at 3.) However, notwithstanding its "frustration with the plaintiffs' behavior," the Court did not enter dismissal as a sanction at that time. The Court noted that "[d]ismissal is considered an extreme sanction, and before ordering dismissal, the Court should first consider less drastic alternatives." (Id. at 2.); see also Gill v. Walker, No. 218-2012-CV-00660, 2013 WL 8743302, at *3 (N.H. Super. Nov. 06, 2013) ("Dismissal is and should be a last resort remedy only."); DeButts v. LaRoche,

142 N.H. 845, 847 (1998) (trial court abused its discretion by ordering dismissal without considering other sanctions). As a result, the Court only ordered an award of attorney's fees "to compensate the Town for its expenses in connection with the enforcement of the Court's November 21, 2019 Order." (Apr. 23, 2020 Order at 4.) Of particular relevance here, the Court also stated "the plaintiffs are again ORDERED to provide answers to the interrogatories discussed in the November 21, 2019 Order by May 4, 2020. The Town may renew its motion for a dismissal sanction if the plaintiffs fail to provide answers by that date." (Id. (capitalization in original; underline added).)

The plaintiffs thereafter failed to provide all of the interrogatory answers to the Town by that date, and as far as the Court can discern, they still have not provided that the information as of the date of this order.[1] Rather than turn the information over by the deadline, the plaintiffs instead filed a motion for reconsideration regarding the decision on the protective order issue, which was addressed above in the previous section. In so doing, the plaintiffs again ignored the Court's rules. Specifically, Superior Court Rule 12(e)(3) states that, "[t]he 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." (Emphasis added). Here, the plaintiffs made no "specific written request" for a stay of the April 23, 2020 Order, nor did the Court order one. Thus, notwithstanding the fact that they filed a motion for reconsideration as to the protective order issue,[2] their interrogatory responses were still due by May 4, 2020.

[1] While the plaintiffs have the information sought by the interrogatories in their possession, they refuse to disclose it unless the Town agrees to a protective order. This is particularly rich considering that the plaintiffs previously litigated the protective order issue and the Court denied their request for one.

[2] Moreover, the plaintiffs' partial motion for reconsideration did not seek reconsideration of the May 4, 2020 deadline to answer interrogatories. It only sought reconsideration of the protective order issue.

Based on this conduct, the Court again finds that the plaintiffs have willfully ignored the Court's clear order on a discovery issue. The question then becomes the proper sanction for that behavior. See Daigle v. City of Portsmouth, 131 N.H. 319, 326 (1988) ("Sanctions are appropriate in part to deter parties from disregarding discovery requests[.]"). Here, the Town is understandably frustrated with the plaintiffs' failure to follow the Court's orders and rules. Such non-compliance has necessitated expensive and unnecessary litigation and delayed the resolution of this case. While the Court previously issued a lesser sanction of attorney's fees to compensate them for the expenses it incurred due to the plaintiffs' failure to adhere to the Court's November 21, 2019 Order, this type of sanction has apparently not deterred the plaintiffs from further non-compliance. Rather, the plaintiffs 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.

Under these circumstances, the Court is simply left with few other sanctions at its disposal other than dismissal. One sanction—the exclusion of evidence at trial—will not suffice in this case, as the Town is entitled to the requested information to help prepare its case. An "issue sanction," see Super. Ct. Civ. R. 21(d)(2)(B), is not readily applicable to this type of constitutional equal protection claim. The Court therefore concludes that dismissal is the most appropriate sanction. While "[i]t is important that cases be decided on their merits," such a policy "does not diminish the obligation of parties to comply with discovery rules." Am. Express Travel v. Moskoff, 144 N.H. 190, 193 (1999) (citations omitted). As such, "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. Civ. R. 21(d)(2)(D) (authorizing dismissal as sanction for discovery abuse).

Here, as outlined above, the Court finds that the plaintiffs have repeatedly flouted the Court's orders and the Court's rules. The Court further finds that lesser sanctions are not appropriate and/or would be ineffective. It is further worth noting that the Court put the plaintiffs on notice that dismissal may be warranted if they failed to comply with the Court's April 23, 2020 Order. Specifically, the Court stated that "the Town may renew its motion for a dismissal sanction if the plaintiffs fail to provide answers by [May 4, 2020]." (Apr. 23, 2020 Court Order at 4.) Having failed to provide the answers by that date, the plaintiffs cannot now complain of a dismissal sanction. In light of the foregoing, the Town's second motion for sanctions is GRANTED as to Prayer A only. This action is DISMISSED WITH PREJUDICE.

So ordered.

June 5, 2020
Date

Judge Jacalyn A. Colburn

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Southern District
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Nashua NH 03060

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NOTICE OF DECISION

FILE COPY

Case Name: **Merrimack Premium Outlets, LLC, et al v Town of Merrimack**
Case Number: **226-2017-CV-00636** ***226-2018-CV-00464; 226-2019-CV-00608***

Please be advised that on July 14, 2020 Judge Colburn made the following order relative to:

Plaintiff's Motion for Reconsideration of Court Order Dated June 5, 2020; MOTION DENIED

July 14, 2020

Amy M. Feliciano
Clerk of Court

(293)

C: Anthony M. Ambriano, ESQ; Matthew R. Serge, ESQ; Matthew H. Upton, ESQ; Demetrio F. Aspiras, III, ESQ

New Hampshire Constitution Part I, Article 12

[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.

New Hampshire Constitution Part II, Article 5

[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.

New Hampshire Constitution Part II, Article 6

[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.

United States Constitution, Fourteenth Amendment

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE V
TAXATION

CHAPTER 74
ANNUAL INVENTORY OF POLLS AND TAXABLE PROPERTY

Section 74:1

74:1 Annual List. – The selectmen of each town shall annually make a list of all the polls and shall take an inventory of all the estate liable to be taxed in such town as of April 1.

Source. RS 41:1. CS 43:1. GS 51:1. GL 55:1. PS 57:1. PL 62:1. RL 75:1. RSA 74:1. 1969, 23:1. 2003, 307:3, eff. July 1, 2003.

TITLE V
TAXATION

CHAPTER 75
APPRAISAL OF TAXABLE PROPERTY

Section 75:1

75:1 How Appraised. – The selectmen shall appraise open space land pursuant to RSA 79-A:5, open space land with conservation restrictions pursuant to RSA 79-B:3, land with discretionary easements pursuant to RSA 79-C:7, residences on commercial or industrial zoned land pursuant to RSA 75:11, earth and excavations pursuant to RSA 72-B, land classified as land under qualifying farm structures pursuant to RSA 79-F, buildings and land appraised under RSA 79-G as qualifying historic buildings, qualifying chartered public school property appraised under RSA 79-H, residential rental property subject to a housing covenant under the low-income housing tax credit program pursuant to RSA 75:1-a, renewable generation facility property subject to a voluntary payment in lieu of taxes agreement under RSA 72:74 as determined under said agreement, combined heat and power agricultural facility property subject to a voluntary payment in lieu of taxes agreement under RSA 72:74-a as determined under said agreement, telecommunications poles and conduits pursuant to RSA 72:8-c, electric, gas, and water utility company distribution assets pursuant to RSA 72:8-d, and all other taxable property at its market value. Market value means the property's full and true value as the same would be appraised in payment of a just debt due from a solvent debtor. 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.

Source. RS 42:1. CS 44:1. GS 52:1. 1872, 31:1. GL 56:1. PS 58:1. PL 63:1. RL 76:1. RSA 75:1. 1975, 197:1. 1977, 538:1. 2001, 158:51. 2008, 390:3, 4, eff. July 17, 2008. 2013, 203:3, eff. July 9, 2013. 2014, 277:3, eff. July 28, 2014. 2015, 266:3, eff. July 20, 2015. 2016, 208:4, eff. Sept. 1, 2016. 2019, 117:3, eff. Aug. 20, 2019; 266:5, eff. Aug. 20, 2019 at 12:01 a.m.

TITLE V
TAXATION

CHAPTER 75
APPRAISAL OF TAXABLE PROPERTY

Section 75:8

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.

Source. 1876, 27:1. GL 56:11. PS 58:7. PL 63:7. RL 76:8. RSA 75:8. 1969, 23:7. 2001, 158:53. 2003, 307:13, eff. July 1, 2003.

TITLE V
TAXATION

CHAPTER 75
APPRAISAL OF TAXABLE PROPERTY

Section 75:8-a

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.

Source. 2001, 158:54. 2003, 307:11. 2005, 119:1, eff. June 15, 2005.

TITLE V
TAXATION

CHAPTER 75
APPRAISAL OF TAXABLE PROPERTY

Section 75:8-b

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.

Source. 2004, 203:15, eff. June 11, 2004.

TITLE V
TAXATION

CHAPTER 75
APPRAISAL OF TAXABLE PROPERTY

Section 75:9

75:9 Separate Tracts. – Whenever it shall appear to the selectmen or assessors that 2 or more tracts of land which do not adjoin or are situated so as to become separate estates have the same owner, they shall appraise and describe each tract separately and cause such appraisal and description to appear in their inventory. In determining whether or not contiguous tracts are separate estates, the selectmen or assessors shall give due regard to whether the tracts can legally be transferred separately under the provisions of the subdivision laws including RSA 676:18, RSA 674:37-a, and RSA 674:39-a.

Source. 1903, 24:1. PL 63:8. RL 76:9. RSA 75:9. 1969, 23:8. 1995, 291:2. 1998, 39:2, eff. Jan. 1, 1999.

TITLE V
TAXATION

CHAPTER 76
APPORTIONMENT, ASSESSMENT AND ABATEMENT OF TAXES

Assessment

Section 76:15-a

76:15-a Semi-Annual Collection of Taxes in Certain Towns and Cities. –

I. Taxes shall be collected in the following manner in towns and cities which adopt the provisions of this section in the manner set out in RSA 76:15-b. A partial payment of the taxes assessed on April 1 in any tax year shall be computed by taking the prior year's assessed valuation times 1/2 of the previous year's tax rate; provided, however, that whenever it shall appear to the selectmen or assessors that certain individual properties have physically changed in valuation, they may use the current year's appraisal times 1/2 the previous year's tax rate to compute the partial payment.

II. For the purposes of this section, the lists of assessed property shall be committed by the selectmen with a warrant under their hands and seal directed to the collector of such town no later than May 15. The collector shall mail all the bills for this partial payment no later than June 15. Partial payment of taxes assessed under this section shall be due and payable on July 1. The collector shall receive such payments, give a receipt therefor, and credit the amount paid toward the amount of the taxes eventually assessed against the property, in the same manner as prepayments under RSA 80:52-a. A payment of the remainder of the taxes assessed April 1, minus the payment due on July 1 of that year, shall be due and payable December 1. Interest charged on all taxes not paid on or before the date they are due shall be as prescribed in RSA 76:13, except that, when bills for the partial payment under this section are mailed on or after June 1, interest shall not be charged until 30 days after the last bill is mailed.

III. (a) Notwithstanding the provisions of paragraphs I and II, any municipality affected by a change in adequate education grants or excess tax amounts, determined pursuant to RSA 198:41, may apply to the commissioner of revenue administration on forms prescribed by the commissioner to adjust the 1/2 of the previous year's tax rate by an amount sufficient to collect 1/2 of the estimated increase or decrease in the local school tax resulting from the change.

(b) The department of education shall certify, no later than November 15, to the commissioner of the department of revenue administration the difference in the amount of the adequate education grants and excess tax amounts between the current fiscal year and the forthcoming fiscal year for every municipality.

(c) Any municipality requesting an adjusted rate for the semi-annual bill shall submit such request to the commissioner of the department of revenue administration by April 1 prior to the issuance of the semi-annual bill.

Source. 1969, 497:2. 1971, 454:3. 1973, 128:1. 1981, 465:15. 1983, 157:1; 440:2. 2011, 262:1, eff. July 13, 2011.

New Hampshire 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.