THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0538

APPEAL OF KEITH R. MADER 2000 REVOCABLE TRUST ET AL

RULE 10 APPEALS FROM THE N.H. BOARD OF TAX AND LAND APPEALS

BRIEF FOR APPELLANTS

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(Oral argument by Attorney Cooper)

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QUESTIONS PRESENTED

Question 1 – Was the decision by the BTLA unreasonable and unlawful in denying relief "for reasonable cause and not willful neglect" from preclusion under Tax 203.02(d) when justice required a far different result? Rule 10 Appeal ("R10A") pp. 141–42.

Question 2 – Was the adoption by the BTLA of the Application for Abatement and Tax 203.02(d) unlawful and without authority by establishing a jurisdictional threshold to enforce the BTLA's interpretation of RSA 76:16(III)(g) to prevent attorneys from filing random and insubstantial appeals without the knowledge and consent of the taxpayers in hope of a contingency fee or other remuneration. R10A pp. 142-45.

Question 3 - Was the adoption by the BTLA of the Application for Abatement and Tax 203.02(d) unlawful and without authority when RSA 76:16(III) did not abrogate the common law relative to an attorney being the agent of the taxpayer client and the Tax Abatement Applications to the Town of Bartlett included all the necessary information to process such a request and a N.H. attorney-at-law signed the application on behalf of his clients certifying that there was a good faith basis for the application and all the information provided was true? R10A pp. 145-47.

Question 4 – Did the BTLA violate the N.H. Constitution guarantee of equal protection of the law by interpreting Tax 203.02(d) to preclude attorneys-

at-law from signing and certifying on behalf of their clients when clients may appoint an attorney-in-fact to do so? RSA 564-E:204(5)(c). R10A pp. 147-48.

STATEMENT OF FACTS

On February 7, 2018, Randall F. Cooper, an attorney at law in the State of New Hampshire, and Of Counsel with the firm of Cooper Cargill Chant, P.A., was informed of a telephone call from James Rader, the principal of the developer, Association president, and owner at Bearfoot Creek requesting assistance with tax abatements for the completed condominium units at Bearfoot Creek. R10A p. 87.

Bearfoot Creek Condominium is a "land" condominium, in which the unit is a building area upon which the unit owner has a right to construct a residence. As of April 1, 2017, Bearfoot Creek Condominium consisted of twenty-four units, eleven unimproved units (building sites) assessed by the Town of Bartlett at $300,000 each, and thirteen improved units assessed between $1,410,000 and $2,309,800. R10A p. 17.

Attorney Cooper had past experience with tax abatements and had a general understanding of the substantive issues and procedural requirements for filing an abatement application in a timely manner. Attorney Cooper reviewed *RSA 76:16* to determine the last possible filing date given his pending long-planned vacation overseas to determine if he could represent Bearfoot Creek and is members. R10A p. 88

Attorney Cooper contacted Mr. Rader by email (Exhibit 2, R10A p. 36), disclosing that he was leaving in two days on a international trip, but subject to that he was willing to represent the Association and its members and believed it should not be a problem to file applications by March 1, 2018. R10A p.36. Attorney Cooper based upon representations made by Mr. Rader, and his initial review of material on the Town of Bartlett website, and his experience, believed, although there was a substantial increase in assessments, in order to best meet the evidentiary requirements of disproportionality that fair market value appraisals were going to be required and they would take some time. R10A pp. 88-9.

Prior to leaving on vacation and until his return to the office on February 27, 2018, Attorney Cooper had no recollection or knowledge of the taxpayer signature requirement in Section H of the Abatement Application or Tax 203.02, and nor did he review the Board of Tax and Land Appeals ("BTLA") Rules or the form Abatement Application or investigate those requirements until he was formally engaged by Bearfoot Creek and returned from vacation. R10A p. 89.

As evidenced by Exhibit 3 (R10A p. 37), the attorney was not engaged by Bearfoot Creek for its members until February 20, 2018. He returned from vacation on the evening of February 26, 2018, and he took up the drafting of the abatement applications on February 27, 2018. It was only on February 27, 2018, after he downloaded the Abatement Application form from the BTLA's website that he looked at and focused on the Taxpayer signature requirement. At that point, with only two days

to the statutory deadline, Attorney Cooper realized that it was impossible for him to complete the applications and obtain the signatures of the 13 owners, 12 of whom were out-of-state, and 1 of whom was in Florida in time to file the applications on time. R10A p. 89.

As Attorney Cooper affirmed under oath, there was no way, whatsoever; that he would risk the substantive rights of his clients to obtain relief in order to pursue at their expense some unspecified agenda regarding the rights of attorneys. If he could have reasonable obtained their signatures in a timely manner after having discovered that requirement, he would have done so. R10A pp. 89-90.

Attorney Cooper obtained all of the factual information required for the completion of the application (all of which was of public record) and made an independent judgment of the good faith basis of the applications. Specifically, Attorney Cooper compared the 2016 and 2017 assessed values of the Taxpayers' properties (see Exhibit 4, R10A p. 43) and determined that there had been a 25% to 63% increase in assessed value, which in his opinion constituted good faith grounds to seek abatements, to be subsequently confirmed by appraisal, and which was consistent with his obligation under Tax 203.02(b)(4) and N.H Professional Conduct Rule 3.1. R10A p. 18.

Since there appeared to be nothing within the application that required the personal knowledge of the clients, and with the additional belief that as an engaged attorney he had the right to do so, he signed and certified on behalf of the clients as their attorney. As he attested to at

that time, all of the information contained in the applications was accurate and true, and he was of the opinion that a good faith basis for abatement existed at that time. R10A p.84; Exhibit 1, R10A pp. 23-35.

The appraisals obtained and submitted by Attorney Cooper confirmed the over assessment of the Taxpayers' properties, which was an average overassessment of $567,133 per unit. (Exhibit 5, R10A, p. 44). Moreover, the research revealed an unexplained $1,000,000 Extra Features addition to each unit's assessment, when similar trail side units were only assessed $275,000. Exhibit 6, R10A, p. 45.

On June 18, 2018, the Town denied the abatement application. The town did not cite the absence of the taxpayers' signatures as a reason for denial. Appendix Page 40.

STATEMENT OF THE CASE

The Taxpayers filed RSA 76:16-a Appeals with the BTLA on August 27, 2018. Order, R10A 65. Each of those appeals raised two issues; the first being a substantial difference between the fair market value of each unit as established by appraisal as adjusted by the equalization ratio and the Town's assessed value. In the second issue, the Taxpayers questioned a $1,000,000 Extra Features Valuation:

> "The Town in completing its mandated assessment update for all properties, included in all assessed valuations for each completed unit at Bearfoot Creek an Extra Features Valuation of $1,000,000 for "Bearfoot Creek". This Extra Features Valuation is disproportionate as compared to the $272,000 Extra Feature Valuation for "Mtnside

> at Attitash" for the abutting trail side condominium units at Mountainside at Attitash and there is no rational basis for such an Extra Features Valuation, particularly when the undeveloped unit sites at Bearfoot Creek are assessed for $300,000."

R10A p. 82.

By letter dated October 10, 2018, the Clerk for the BTLA requested written proof that each taxpayer signed the abatement applications filed with the Town in compliance with Tax 203.02(b)(4). R10A p. 14. Since the applications had been signed and certified by Attorney Cooper, the Motion to Allow Exception for Taxpayer Signature Pursuant Tax 203.02(d) or In the Alternative Rule that Tax 203.02(d) Does Not Apply to an Appeal Signed by a New Hampshire Attorney At Law dated October 24, 2018 was filed with the BTLA. R10A p. 16. Attached and incorporated in that motion were nine (9) exhibits. R10A pp. 23-61. The Town of Bartlett objected on November 13, 2018. R10A p.62. The BTLA issued its adverse decision on December 3, 2018. R10A p. 63.

A Motion for Rehearing with Affidavit and Exhibit dated December 17, 2018 was filed in a timely manner. R10A p. 63. The BTLA Order denying the Motion for Rehearing was issued on January 10, 2018. R10A p. 93. A Rule 10 Appeal followed, resulting in the matter being remanded to the BTLA by Opinion of June 5, 2020. Appeal of Keith R. Mader 2000 Revocable Trust et al, 173 N.H. 362 (2020).

By Order dated July 10, 2020, the BTLA directed the parties to state in writing their recommendations as to how the remand issue should be resolved, including the possibility of a remote hearing or proceeding on

written submissions, noting that the record is quite extensive with largely undisputed facts. R10A p. 107

By Response dated July 31, 2020, the Taxpayers stated, that for the purposes of remand, the Taxpayers believe, as so noted by the Supreme Court, that the uncontested facts already of record under the standard outlined by the Supreme Court compel a finding that there "was reasonable cause and not willful neglect" in this matter, and thus no further hearing or factual submissions are required. R10A p. 110.

The Town forwarded a letter, which is quoted by the BTLA in is Decision on Remand, in which the Town specifically states that the Attorney for the Taxpayers should be held to a higher standard, and rather than focusing on whether there was reasonable cause and not willful neglect by the Applicants, improperly focused on the Town's state of mind:

> "The Town has no way of knowing if all of those Taxpayers had even hired him at this point, which is why the signature is important. There were issues previously with other matters from other towns before the BTLA regarding acceptance without signature, which is why the rule was enacted, and failure to abide by this rule will affect the entire State and should not be allowed."

R10A p. 114.

The BTLA issued its Decision on Remand under Clerk's Certification dated October 9, 2020. R10A p. 115 et seq. A Motion for Rehearing was filed on October 19, 2020. R10A p. 139 et seq. The BTLA Order denying

the Motion for Rehearing was issued on November 20, 2020 R10A p. 150 et seq. This Rule 10 Appeal followed.

SUMMARY OF ARGUMENT

In this property tax abatement matter involving thirteen similarly situated tax abatement requests, counsel for the Appellant taxpayers executed the original abatement applications himself having insufficient time to include the signatures of the thirteen individual applicants. Doing so was a violation of a BTLA Rule, which requires the applicants' signature, and precludes appeal unless failure to submit such signatures "was due to reasonable cause and not willful neglect." Tax 203.02(d) (emphasis added). The circumstances of this matter, where counsel was on a pre-planned out-of-the-country vacation in the month leading up to the application deadline before he was engaged to represent the clients and the fact that this involved 13 separate taxpayers (12 out of state), dictate that it was unjust and unreasonable to preclude the Taxpayers' appellate rights.

Alternatively, and additionally, the BTLA Rule, Tax 203.02(d) if interpreted to preclude the attestation of a licensed attorney at law to the good faith of a property tax abatement application, is a unlawful and ultra vires exercise of the BTLA's rule making function as it was intended to implement a purpose not supported by statute and abrogates the common law by invading the attorney-client relationship and the special

authority allowed licensed attorneys-at-law in the State of New Hampshire.

Finally, if such rule is upheld, on these circumstances and in this case, such Rule, as applied, violates the Appellants' rights to the equal protection guarantee of the N.H. Constitution, subjecting such Appellants to disparate treatment based upon their use of an attorney-at-law.

ARGUMENT

I. THE BOARD OF TAX AND LAND APPEALS ERRED BY FAILING TO GRANT AN EXCEPTION TO TAX 203.02(d) PRECLUSION WHEN THE UNCONTROVERTED EVIDENCE ESTABLISHES THAT SUCH A RESULT WAS UNJUST AND UNREASONABLE.

The standard for review of BTLA decisions is statutory. See RSA 541:1; RSA 71–B:12. The BTLA's findings of fact are deemed prima facie lawful and reasonable. This Court will not set aside or vacate a BTLA decision "except for errors of law, unless [it is] satisfied, by a clear preponderance of the evidence before [the Court], that such order is unjust or unreasonable." RSA 541:13; Appeal of Town of Charlestown, 166 N.H. 498, 499 (2014).

A. In its Decision on Remand, the BTLA Purposely Failed to Follow this Court's Regulatory Interpretation of Tax 203.02(d).

BTLA's rule, Tax 203.02(d) provides:

> The taxpayer shall sign the abatement application. An attorney or agent shall not sign the abatement application for the taxpayer. An attorney or agent may, however, sign the abatement application along with the taxpayer to indicate the attorney's or agent's representation. The lack of the taxpayer's signature and certification shall preclude an RSA 76:16-a appeal to the board **unless it was due to reasonable cause and not willful neglect**. Appeal of Wilson, 161 NH 659 (2011) (emphasis added).

This Court in its Opinion of June 5, 2020 construed Tax 203.02(d) "reasonable cause and not willful neglect" exception as allowing an appeal without the taxpayer's signature and certification:

> "if the taxpayer can show that, despite exercising ordinary business care and prudence, it was not reasonably possible to submit the application with the taxpayer's signature and certification, and can further show that he or she was not recklessly indifferent to the signature and certification requirement in preparing the application."

Mader, 173 N.H. at 370. Additionally, this Court remanded this matter to the BTLA stating:

> "We trust that the BTLA will give appropriate weight to the circumstances in this case that bear on the objective reasonableness for the omitted signatures and certifications. Those circumstances include, but are not necessarily limited to, the following: the petitioners sought representation; the representation agreement was not signed until Cooper was away on vacation; Cooper had approximately three days to complete and file the abatement applications after returning from vacation; all but one of the petitioners were located out of state; and the Town did not reject the applications for the lack of signatures."

Mader, 173 N.H. at 371.

In its decision on remand dated October 9, 2020, the BTLA rejects this Court's authority and jurisdiction to construe administrative rules as a

matter of law. See, Appeal of Cook, 170 N.H. 746 (2018). It paid lip service to this Court's opinion stating:

> "Although not further defined in any New Hampshire statue or rule, the reasonable cause and not willful neglect standard has a plain meaning that is consistent with the board's understanding of the Supreme Court Opinion and the New Hampshire and other authorities cited in that ruling."

R10A p. 118. It then went on to determine render its own opinion on how and why the rule should be applied as a jurisdictional test which is the subject matter of Section II below.

B. It was not Reasonably Possible for the Attorney Upon his Return to the Country to Submit the Applications with the Taxpayer's Signature and Certification.

The clear preponderance of the evidence before this Court establishes that denying relief from the taxpayer signature requirement was both unjust or unreasonable. The BTLA ignored uncontroverted evidence, and applied its own standard when it determined that the Taxpayers did not exercise ordinary business care and prudence by apparently doing nothing between the December 1, 2017 tax bills and when Mr. Rader, "presumably on their behalf" contacted Attorney Cooper. R10A p. 119-20.

Both the BTLA and the Town by innuendo and directly imply that Attorney Cooper did not have the authority to act on behalf of his clients (albeit the BTLA are very prepared to rule any adverse actions by Attorney Cooper are binding upon his clients). The BTLA (and the Town of Bartlett)

continue to ignore the uncontroverted sworn statement by Mr. Rader (R10A p. 50) and the sworn statements by all of the other owners (R10A pp. 51- 61) which were filed with the original Motion, as well as the Affidavit by Attorney Cooper (R10A p. 87).

Uncontroverted evidence before the BTLA is normally sufficient to meet its burden of proof. See, New Hampshire College v. Town of Hooksett, BTLA Docket Nr. 0214-80 (8/14/91); 1981 WL 12157. The law in New Hampshire is the trier of fact is not required to believe uncontroverted evidence, but usually such issues arise in the context of weighing the testimony and relative credibility of witnesses. Brent v. Paquette, 312 N.H. 415, 418-9 (1989). In the case at hand, however, there was no hearing in which credibility could be at issue, and, nor did either of the decisions by the BTLA suggest that it found that the statements by the attorney or the taxpayers as not credible.

As each of the owners stated in their sworn statements that in the interim between the tax bills being sent to the various taxpayers at their out of state address and the beginning of February, in discussions with Mr. Rader and each learned that the substantial increase in taxes was consistent with the experience of the other owners, and then communicated with Mr. Rader to authorize the Association to engage an attorney on their collective behalf. R10A pp. 50-61. And there is no evidence that at any time the taxpayers knew of the application requirement for their signature.

Ordinary business care and prudence does not require Taxpayers themselves to learn and determine that the Application form as prescribed by the BTLA pursuant to RSA 76:16, I included a requirement that it be signed by the Taxpayers personally unless the Taxpayers planed on filing the application themselves. Ordinary business care and prudence, particularly when dealing with the amounts at issue and the common interests of the taxpayers, would permit, if not obligate, the Taxpayers to seek representation by attorney-at-law admitted to the bar of the State of New Hampshire.

The collective actions of the mostly out-of-state Taxpayers, after receiving tax bills dated December 1, 2017, dealing with the Holiday season, and determining that the large increase in valuation per condominium unit was probably systemic with a fairly consistent increase in assessed value and taxes, did not violate the norms of ordinary business care and prudence by not contacting an attorney until February 7, 2020. Under these circumstances, it is impossible to state that the Taxpayers did not exercise ordinary business care and prudence.

Contrary to the legal opinion of the BTLA on the negligence of Attorney Cooper[1], ordinary business care and prudence did not require Attorney Cooper, in this case, to undertake any action until engaged, and until he returned from vacation. From the outset, the Attorney's engagement was conditioned upon his return from that vacation. The

[1] The BLTA believed that Attorney Cooper admitted negligence when he did not recall the personal signature requirement and did not investigate the law until February 27, 2018. See Footnote 14 of the BTLA decision at R10A p. 126.

discussions that took place on February 7, 2018, established the conditions of that representation: the intervening event of the planned vacation to Morocco and the requirement of an executed representation agreement. R10A p. 36-42. A representation agreement was sent and accepted on February 20, 2018. By its terms, "Neither representation nor any work on Client's behalf can or will commence until the Firm has received both an executed version of this Agreement...." Exhibit 3, ¶2, R10A p. 38. It was the particular facts and circumstances of this case that gave rise to the need for relief.

With respect to the actions of Attorney Cooper upon his return to the office on February 27 (not the 26th)[2], with two days to complete and file the applications, it cannot be said that that is was reasonably possible to file the applications with the Taxpayers signatures when "Cooper had approximately three days to complete and file the abatement applications after returning from vacation; all but one of the petitioners were located out of state; and the Town did not reject the applications for the lack of signatures." Mader, 173 N.H. at 371.

C. The Actions of the Attorney Upon Filing the Applications without the Taxpayer's Signatures was Not with Reckless Indifference to That Requirement.

[2] The BTLA thought it was significant, that Attorney Cooper determined within that period entirely on his own that good faith grounds existed by comparing the assessments between the subject year and the previous year. R.10A pp 120-21. That which is sufficient to meet the good faith requirement of the application is merely a "brief explanation of the reason or reasons the taxpayer seeks an abatement…." GGP Steeplegate, Inc. v. City of Concord, 150 N.H. 683, 686 (2004). The BTLA misplace its reliance on an irrelevant issue. For while the Town of Bartlett may have ruled that the applications for abatement were insufficient for denial, that was not the case and was never in issue on appeal to the BTLA, which were detailed on each appeal.

Other than its opinion of negligence in footnote 14 (R10A 126), the BTLA's decision on remand was devoid of any analysis with respect to the second part of the regulatory interpretation by this Court. In establishing the reckless indifferent standard to what constitutes "willful neglect" this Court noted that of significance is whether compliance was reasonable possible under the circumstances, and that the failure was not the result of carelessness, reckless indifference, or intentional failure. Mader, 173 N,H, at 370.

There were no facts upon which the BTLA could find that the attorney, by awaiting until his return from vacation and being actually hired to research the form and requirements of the application, constituted reckless indifference. The attorney certainly thought and had good reason based upon the language of the representation agreement and the email communications, to believe that he had no obligation to look into anything further until his return from vacation. Even if this Court should disagree and determine the attorney had a legal duty on February 7, 2019 to investigate those requirements, under these facts, there is no evidence that the attorney knowingly and purposely chose to ignore such a duty or actually knew of and ignored the board's rule. To the contrary the affidavit affirms the opposite. Affidavit ¶9, R10A pp. 89-90.

II. THE BTLA ACTED UNLAWFULLY AND WITHOUT AUTHORITY WHEN IT ADOPTED THE APPLICATION FOR ABATEMENT AND TAX 203.02(d) TO ESTABLISH A JURISDICTIONAL REQUIREMENT IN

KEEPING WITH ITS OWN DETERMINATION OF THE LEGLISLTIVE PURPOSE OF RSA 76:16 (III) .

RSA 76:16 (III) establishes that the abatement application form "shall be prescribed by the board of tax and land appeals. The form shall include the following and such other information deemed necessary by the board." And among those items to be included was Sub-Paragraph (g): " A place for the applicant's signature with a certification by the person applying that the application has a good faith basis and the facts in the application are true."

The application form as prescribed by the BTLA did correctly include such a place for the signature and certification within Section H of the application, but included as well:

a. Within the Instructions, "SECTION H. The applicant(s) must sign the application even if a representative (e.g. Tax Representative, Attorney, or other Advocate) completes Section I." R10A p. 132.

b. Within Section H, "Pursuant to BTLA Tax 203.02(d), the applicant(s) MUST sign the application." R10A p. 135.

And the BTLA also adopted Tax 203.02(d).

There is no doubt that the BTLA has the authority to "make reasonable rules and regulations for carrying out its functions … not inconsistent with the provisions of this chapter." RSA 71-B:8. While the legislature may delegate to administrative agencies the power to

promulgate rules necessary for the proper execution of the laws, this authority "is designed only to permit the board to fill in the details to effectuate the purpose of the statute. Thus, administrative rules may not add to, detract from, or modify the statute which they are intended to implement. Moreover, agency regulations that contradict the terms of a governing statute exceed the agency's authority." In re Wilson, 161 N.H. 659, 662 (2011).

This Court in Wilson in interpreting Tax 203.02(d) ruled that it constituted a reasonable rule for carrying out the BTLA's function, which in that case was to ensure that towns received the necessary information to process the request and certifying that the information was true. 161 N.H. at 663-4. Apparently for the first time and unknown to the Wilson court, however, in its decision on remand, the BTLA discloses the unlawful reasoning behind the rule specifically not allowing an attorney to sign the application.

The BTLA in its decision in interpreting Tax 203.02(d) relies heavily on Arlington American, Sample Book Company v. Board Of Taxation, 116 N.H. 575 (1976) and Belmar v. City of Nashua, BTLA Docket Nr. 21109-04PT the relevant portions of that Belmar decision were attached to the Decision on Remand. R10A p. 128-131. These quotes and its analysis establish an underlying misperception of the law by the BTLA, when it rules that the failure to of a Taxpayer to sign and certify an application in

the manner dictated in Tax Rule 203.02(d) is akin to failing to file within the statutory time limit, i.e., a jurisdictional issue requiring dismissal.

This Court has previously and clearly rejected Tax 203.02(d) as establishing a jurisdictional threshold. In Henderson Holdings at Sugar Hill, LLC v. Town of Sugar Hill, this Court ruled that the failure to provide the information as required by RSA 76:16, III is not a jurisdictional issue, i.e. that the statue concerns only what is required before the Board of Selectmen, and not the terms upon which an appeal may be heard or decided. 164 N.H. 36, 38 (2012) Apparently unbeknownst to the Court, both then and now, the BTLA still considers compliance with Tax 203.02(d) as jurisdictional when it writes at Page 10 of its decision (R10A p. 124) that the dismissal of appeals is appropriate, notwithstanding the availability of lesser sanctions, and referring to multiple other instances noted in the 2006 Belmar decision some 6 years before Henderson.

As well, on Page 10 of its decision (R10A p. 124), the BTLA clearly identifies the BTLA's understanding of the policy reasons for RSA 76:16(III)(g) (e.g. "A place for the applicant's signature with a certification by the person applying….") to justify its adoption of Tax 203.02(d).

> "The Policy reasons for the Legislature to require taxpayer signatures and certifications on all abatement applications are self-evident in many respects. Some of them are stated by the Town selectmen in their response letter response. Other municipalities appearing before the board have expressed substantially similar concerns regarding why the taxpayer signature requirement are important. Clearly the Legislature chose to draft the statute so that

> each taxpayer is required to understand and warrant the good faith basis when the taxpayer decides to challenge a property tax assessment with an abatement application. **This requirement prevents attorneys and/or tax representatives from possibly filing random and insubstantial appeals without the knowledge and consent of each taxpayer (in the hope of a contingency fee or other remuneration resulting if an abatement is eventually granted).** In other words, a legislative concern for taxpayer accountability and closer regulation of the abatement process is evident in the statutory signature and certification requirement." (emphasis added).

The BTLA is adding words to the statute that are just not there. The BTLA admits that its adopting Tax 203.02(d) not only to ensure that towns received necessary information and proper certification but as well to regulate what it perceived as improper actions of lawyers and non-lawyer representatives. This latter motive, and its result, is a far cry from the plain language of RSA 76:16(III)(g) and is certainly not reasonable rule for carrying out the BTLA's function.

> We first look to the language of the statute and, where possible, ascribe to the language its plain and ordinary meaning. We examine the statute's legislative history only if the statutory language is ambiguous. We neither consider what the legislature might have said, nor add language that the legislature did not see fit to include.

Antosz v. Allain, 163 N.H. 298, 300 (2012).

When the legislature adopted RSA 71-B:7-a, allowing non-attorneys to commonly represent taxpayer before the BTLA, the perception by the BTLA of the need to protect municipalities understandable particularly

given the limitations of the system as discussed below. Notwithstanding the problem of non-lawyers representatives, the BTLA adopted Tax 203.02(d) to address what the BTLA created from thin air as a legislative concern for closer regulation of the of lawyers and non-lawyer representatives to lessen the burden on municipalities, creating a jurisdictional threshold resulting in virtually automatic dismissal, which is "the kind of narrow, unforgiving approach that we have consistently rejected in the past. " Henderson, supra

III. THE BTLA ACTED UNLAWFULLY AND WITHOUT AUTHORITY WHEN IT ADOPTED THE APPLICATION FOR ABATEMENT AND TAX 203.02(d) TO PRECLUDE A N.H. ATTORNEY FROM SIGNING AND CERTIFYING AN ABATEMENT APPLICATION ON BEHALF OF A CLIENT.

A. As Officers of the Court, Attorneys have a Special Place in the Common Law, supervised by this Court and regulated in their Professional Conduct, and having Certain Common Law Rights to Act on Behalf of Their Clients Including Before the BTLA.

While the BTLA perceived it needed some means to lessen the burden on municipalities, the Board had no justification to lump attorneys at law into the same category as non-lawyer representatives. The BTLA from the outset has relied on Wilson as having held that Tax 203.02(d) upholding that inclusion of lawyers into being precluded from signing an abatement application on behalf of his or her client. This Court in Mader, noted that it did not view the decision in Wilson as necessarily determinative on the issue of allowing the dismissal of an appeal on the

sole basis of the Taxpayers' attorney signed and certified the application and addressing only the non-attorney portion. 170 N.H. at 371.

In both Wilson, supra. and Henderson Holdings, supra., this Court specifically limited its holdings to the "agent" portion of the Rule 203.02(d), e.g. "The taxpayer shall sign the abatement application. An attorney or agent shall not sign the abatement application for the taxpayer. " The BTLA defines "agent" as "a taxpayer's or condemnee's representative who is not an attorney." Tax 102.03**Error! Bookmark not defined.**.

The BTLA requires such a non-attorney in his/her/its appearance to state that he/she/it has the party's authority to appear and act on the party's behalf and state that a copy was sent to the taxpayer. Tax 201.08(b). Other than that statement, the BTLA had no other means of protecting either the municipality or the taxpayer from the unauthorized application for a tax abatement by such a non-lawyer, short of the signature of the taxpayer.

There are many and significant differences, however, between a non-attorney representative and an attorney at law. Among those is the creation of an "agency" relationship. An agency relationship, or lack thereof, does not turn solely upon the parties' belief that they have or have not created one. VanDeMark v. McDonald's Corp., 153 N.H. 753, 756 (2006).

> "Rather, the necessary factual elements to establish agency involve: (1) authorization from the principal that the agent shall act for him

> or her; (2) the agent's consent to so act; and (3) the understanding that the principal is to exert some control over the agent's actions."

Id. at 760-61. Other than the statement by the non-attorney representative in the appearance, there is no other factual evidence to meet any of the VanDeMark requirements or to govern issues that should arise between the so-called "agent" and the taxpayer.

On the other hand, the rights and obligations of attorneys at law to their clients have been established for centuries by the common law of New Hampshire. This Court in a 26,500-word opinion in 1890 admitted a woman to the practice of law justifying in part the right to do so by distinguishing "officers of the court" from public officers, in which the latter may be limited by the then current differences between the constitutional rights of men and women. With respect to the former, however, attorneys as "officers of the court" were a creation of common law, and subject to the supervision by this Court. In Re Ricker, 66 N.H. 207, 29 A. 559 (1890). Pertinent to this case, the common law history of attorneys at law was explored in Ricker, with initially the attorney at law physically appeared in place of the plaintiff or defendant.

> Attorney, in English law, signifies, in its widest sense, any substitute or agent appointed to act in 'the turn, stead, or place of another.' The term is now commonly confined to a class of qualified agents who undertake the conduct of legal proceedings for their clients. By the common law the actual presence of the parties to a suit was considered indispensable;

Ricker, 29 A. at 565. In New Hampshire, relationship between an attorney and his or her client and its authority to act on behalf of the client has been so recognized as early as Alton v. Gilmington, 2 N.H. 520, (1823).

It is settled law in the State of New Hampshire that the judicial branch of government retains ultimate authority to regulate the practice of law. Petition of N.H. Bar Ass'n, 110 N.H. 356, 357 (1970) ("The power and authority of the supreme court to supervise and regulate the practice of law has been recognized and acknowledged from an early date by custom, practice, judicial decision and statute.") "Attorneys are officers of the court.... Consequently regulating the practice of law is a core function of the judicial branch." In re Petition of New Hampshire Bar Ass'n, 151 N.H. 112, 116-17 (2004). "When the actions of one branch of government defeat or materially impair the inherent functions of another branch, such actions are not constitutionally acceptable." Id.

And while the legislature codified issues the practice of law in RSA Chapter 311, the inherent common law power of this Court to supervise the practice of law was confirmed, including the right to suspend an attorney from practice "before any court, magistrate, or **elsewhere**;…" (emphasis added). RSA 311:10.

The relationship between attorneys and clients is established both by statute and common law. First, in addition to RSA 311:1, the attorney at law has a specific statutory right to appear in tax appeals. RSA 76:16-a,III e.g. ("The applicant and the town or city shall be entitled to appear by

counsel, may present evidence to the board of tax and land appeals and may subpoena witnesses.") This Court through its admission procedure takes steps to ensure lawyers are of good character and fitness, and are sufficiently educated to assist the public. Sup.Ct. Rule 42 and Sup.Ct. Rule 42B. The obligations and liabilities of attorneys are a matter of common law in the State of New Hampshire. See, Moore v. Grau, 171 N.H. 190, 196 (2018) (e.g. "As the foregoing implies, an action for legal malpractice is a claim ... for liability unique to and arising out of the rendition of professional services.") . Furthermore, this Court by its adoption of the Rules of Professional Conduct, and Sup.Ct.Rule 37 and Sup.Ct.Rule 37A, holds its attorneys to standards keeping with the profession:

> The right to practice law in this State is predicated upon the assumption that the holder is fit to be entrusted with professional matters and to aid in the administration of justice as an attorney and as an officer of the court. The conduct of every recipient of that right shall be at all times in conformity with the standards imposed upon members of the bar as conditions for the right to practice law.
>
> Acts or omissions by an attorney individually or in concert with any other person or persons which violate the standards of professional responsibility that have been and any that may be from time to time hereafter approved or adopted by this court, shall constitute misconduct and shall be grounds for discipline whether or not the act or omission occurred in the course of an attorney-client relationship.

Sup.Ct. Rule 37(1)(c) There are no such continuous professional responsibility or ethical requirements for non-attorney representatives or "agents".

As incorporated by Tax Rule 201.09, N.H. Rules of Professional Conduct Rule 3.1 requires all claims to have a basis in law and fact. N.H. Rules of Professional Conduct Rule 3.3 requires candor to the tribunal prohibiting all false statements of law and fact, and N.H. Rules of Professional Conduct Rule 3.4 requires fairness to opposing party and counsel. Furthermore, to the extent, an RSA 76:16 consideration of an abatement application by the Board of Selectmen is a nonadjudicative proceeding, N.H. Rule of Professional Conduct Rule 3.9 applies all of the applicable portions of Rules 3.3 and 3.4 to such a nonadjudicative proceeding. It is of particular significance that every N.H. lawyer upon his admission to the practice of law "solemnly swear[s] or affirm[s] that you will do no falsehood[3]...." RSA 311:6 .

Additionally, this Court's has disciplinary authority over the BTLA itself. The BTLA enabling legislation placed it within the jurisdiction of the judicial system and this Court, by giving the Court the authority to appoint and remove members of the BTLA. RSA 71-B:2 and 3. BTLA Tax abatement appeals are quasi-judicial proceedings. Paras v. City of Portsmouth, 115 N.H. 63, 68 (1975). So consistently the common law rights and obligations of attorney to his her client have been held to be part of a BTLA proceeding. "An attorney is the agent of the client, provided his acts are within the scope of his authority. [A taxpayer] is,

[3] The undersigned has known past members of the NHBA when stepping into the witness box stating that they are already under oath given their oath of admission.

therefore, bound by the acts of his [or her] attorney, including acts of omission or neglect." Paras, 115 N.H. at 67.

B. The Special Place of attorneys in the Common Law, including the Right to Act on Behalf of Their Clients Was Not Abrogated by RSA 76:16 (III) and As Such the Adoption of Tax 203.02(d) was Ultra Vires.

In the beginning there was the common law. It arose out of the Magna Carta and "offers consistency and flexibility backed by courts that carry a global guarantee of independence, impartiality and enforceability…. But over the years, legislation has been adapted and improved to reflect changing circumstances." Wilson, Why Magna Carta Remains A Foundation of Our Common Law Inheritance, UK Foreign & Commonwealth Office (2005). But any such legislation must be intended to change the common law. .

As this Court has often stated, "[W}e will not interpret a statute to abrogate the common law unless the statute clearly expresses that intent." State v. Elementis Chem., 152 N.H. 794, 803, (2005) *;* see also State v. Hermsdorf, 135 N.H. 360, 363, (1992) ("In enacting legislation, the legislature is presumed to be aware of the common law: we will not construe a statute as abrogating the common law unless the statute clearly expresses such an intention.")

> Statutes which impose duties or burdens or establish rights or provide benefits not recognized by the common law have frequently been held subject to strict, or restrictive, interpretation. Where there is any doubt about their meaning or intent they are

> given the effect which makes the least, rather than the most, change in the common law. "

State v. Etienne, 163 N.H. 57, 74 (2011)

On this question the common law is clear: "An attorney being in court, instead of his client, or 'in his place and turn,' may make any disposition of the suit, and any admission of facts, which the party himself could make." Alton v. Gilmington, 2 N.H. 520, (1823). "An attorney is the agent of the client, provided his acts are within the scope of his authority. [A taxpayer] is, therefore, bound by the acts of his [or her] attorney, including acts of omission or neglect." Paras, 115 N.H. at 67.

In this case, the attorney signed and certified each application for abatement specifically on behalf of each client. Leaving aside the general authority of attorneys at law, the actual and specific authority of the attorney was confirmed in the representation agreement executed on February 20, 2018. R10A pp. 37-42. In Section 1, the scope of representation included representing the Association and its members, through the abatement process including "applying for abatement with the Town of Bartlett...." R10A p. 37. Albeit, after the fact, each of the individual taxpayers confirmed the common engagement via the Association, including the authorization of the attorney to execute all documents on his/her/its behalf. Rule10A pp. 49-61. Both generally, due to the special relationship between attorneys and clients, and specifically

as allowed by the representation agreement, the attorney was authorized to sign and certify the abatement applications on behalf of the appellants.

The issue is whether RSA 76:16 (III) clearly expressed an intent to abrogate the right of an duly authorized attorney-at-law within the scope of his or her authority to sign and certify an abatement application on behalf of his or her clients. RSA 76:16 (I)(b) provides that "Any person aggrieved by the assessment of a tax by the selectmen or assessors…may… apply in writing on the form set out in paragraph III." RSA 76:16 (III) requires the form to be include : "A place for the applicant's signature with a certification **by the person applying** that the application has a good faith basis and the facts in the application are true." RSA 76:16 (III)(g). (emphasis added). The highlighted phrase above could have been dropped from that sentence, and thus must have some meaning.

When interpreting statutes, "we are the final arbiters of the legislature's intent, as expressed in the words of the statute considered as a whole." Petition of Sawyer, 170 N.H. 197, 203, (2017) . "We first examine the language of the statute, and, where possible, ascribe the plain and ordinary meanings to the words used." Id.. "Our goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme."

For over a century, the statutory scheme proscribing the tax abatement procedures were intended to be "free from technical and formal obstructions. It should be construed liberally, in advancement of

the rule of remedial justice which it lays down." *Arlington Mills, 83 N.H. at 154; GGP Steeplegate, 150 N.H. at 687*

While this Court in Wilson in addressing the statutory scheme noted:

> While under RSA 76:16, IV the "[f]ailure to use the form" described in RSA 76:16,III "shall not affect the right to seek tax relief," the information required by RSA 76:16, III, including the taxpayer's signature and certification that the information is true, affects the right to seek tax relief. To construe the statutory scheme otherwise would allow a taxpayer to apply for a tax abatement **without providing either a town or the BTLA with the necessary information to process such a request and without certifying that the information provided is true.** This would render the statute a virtual nullity, which we will not do. (Emphasis added.)

161 N.H. at 663-4.

The importance of the substance of the "certification" as compared to the form of "who or what signed" was reemphasize by this Court:

> RSA 76:16, III(g) requires the taxpayer to certify that he or she has a good faith basis for applying for an abatement and that the facts in the application are true. **Neither Lutter's signature nor the signed agent authorization form complied with this requirement.** (Emphasis added).

161. N.H. at 665.

In applying the plain and ordinary meaning of the words, there is no clear intent to abrogate the common law rights of attorneys-at-law from so signing and certifying that the information provided is true. As such

Tax 203.02(d) improperly added to and modified the statute, contradicting its terms in light of the common law is such ultra vires. Wilson, 162 N.H. at 669.

The uncontested facts establish in this case that when the attorney returned from vacation, he fully completed the applications providing all of the information required and signed each application on behalf of each client, with his signature appearing above the typed name of each client as follows "[client name] by his/her/its attorney, Randall F. Cooper". R10A pp. 23-35. Even in those instances, when multiple taxpayers were involved, the attorney signed multiple times on behalf of each individual. R10A pp. 25, 29, 31, 33 and 35. In each and every such instance, the attorney, on behalf of the client, "certifies (certify) under penalties of RSA ch. 641 the application has a good faith basis and the facts as stated are true to the best of my/our knowledge." R10A pp. 23-35.

In the cases at hand the attorney signed on behalf of the clients and provided the proper certifications on each application. At least with respect to the "substantive" issue, all the required information was provided and was certified as being true, and the applications included certifications of a good faith basis as well. This fact in itself should and could be significant enough of a distinguishing factor to require a different result.

IV. THE APPELLANTS ARE BEING DENIED THE EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE N.H. CONSTITUTION WHEN

THEIR ABATEMENT APPLICATIONS SIGNED UPON THEIR BEHALF BY THEIR ATTORNEY AT LAW RESULT IN A DISMISSAL OF THEIR APPEALS.

A. Tax 203.02(d) By Treating Differently Those Persons Engaging an Attorney at Law to Sign and Certify an Abatement Applications on their Behalf from those Persons Appointing an Attorney in Fact pursuant to RSA 564-E:204(5)(c) to do so is Subject to Intermediate Scrutiny under the N.H. Constitution.

As discussed above, Tax 203.02(d) does not permit an attorney-at-law to sign on behalf of the client to initiate the tax abatement application with the municipality, irrespective of the terms of the relationship between the attorney and client, and the authorization the attorney obtained. As a result, as occurred in this case, the BTLA will dismiss the appeal unless the applicant can establish reasonable cause and not willful neglect. On the other hand, attorneys-in-fact, with a power of attorney granting only general authority with respect to real property, are authorized to "manage or conserve an interest in real property... including... paying, assessing, compromising, contesting taxes or assessments or applying for and receiving refunds in connection with them....: RSA 564-E:204, 5, C. A classification exists between similarly situated persons: applicants for tax abatement represented by attorneys at law, and those applicants for tax abatement represented by attorneys in fact. These similarly situated classes are treated differently: the former must sign the tax abatement application themselves irrespective of distance, convenience or authority to allow the attorney at law to sign

application; and, the latter whose attorney in fact can handle all of the abatement issues on behalf of the principal.

The equal protection guarantee is essentially direction that all persons similarly situated should be treated alike. Part I, Article 14, N.H. Const.; Lennartz v. Oak Point Associates, P.A., 167 N.H. 459, 462 (2015). Such a difference in classification must reasonably promote some proper object of public welfare or interest. Id. The possible review standards are commonly known as strict scrutiny, intermediate scrutiny, and the rational basis test. Id. Classifications involving important substantive rights are subject to intermediate scrutiny. In re Sandra H., 150 N.H. 634, 638 (2004). In order to provide some substantive distinction between intermediate scrutiny and the rational basis test, this Court held in 2007:

> [T]hat intermediate scrutiny under the State Constitution requires that the challenged legislation be substantially related to an important governmental objective. The burden to demonstrate that the challenged legislation meets this test rests with the government.... To meet this burden, the government may not rely upon justifications that are hypothesized or invented post hoc in response to litigation, nor upon overbroad generalizations.

Community Resources for Justice, Inc. v. City of Manchester, 154 N.H. 748, 762 (2007).

The tax abatement statutes are remedial in nature, and "provide the exclusive remedy available to a taxpayer dissatisfied with an assessment made against his property." LSP Ass'n, 142 N.H at 374. This exclusive right to apply for an abatement, and then to appeal that decision to either the BTLA or the Superior Court is an important substantive right

to protect of a right established by the N.H. Constitution.

> Taxes ... must, under our Constitution, be both proportional and reasonable.... Taxes must be not merely proportional, but in due proportion, so that each individual's just share, and no more, shall fall upon him.... What each is bound to contribute being a debt of constitutional origin and obligation, no part of the share of one can be constitutionally exacted of another. And as any one's payment of less than his share leaves more than their shares to be paid by his neighbors, his non-payment of his full share is a violation of their constitutional right.

Rollins v. City of Dover, 93 N.H. 448, 449-50 (1945). "Consequently, in petitions for abatement, justice requires, upon equitable principles, such an order that the plaintiff shall pay, as nearly as may be, precisely his share of the tax burden." 93 N.H. at 450.

B. The BTLA Cannot meet Its Burden under Intermediate Scrutiny to Establish that that the Differing Treatment is Substantially Related to an Important Government Interest.

Since the exclusive remedy to seek abatement of taxes is subject to intermediate scrutiny, the issue is whether that difference in treatment by the BTLA of taxpayers represented by attorneys-in-fact and taxpayers represented by attorneys-at-law is substantially related to an important government interest. The burden is on the BTLA to (1) identify the important government objective for the classification, and (2) establish how the classification, i.e. the difference in treatment, is substantially related to achieving that objective. Community Resources, 154 N.H. at 761-62.

The only submission in support of this burden is by the BTLA when it tangentially addresses the issue in one paragraph of its January 10, 2019 decision denying the original Motion for Rehearing. The BTLA noted: (1) there is no evidence that any of the Taxpayers had engaged any "attorney-in-fact"; (2) the representation agreement only engaged the attorney to "render professional services"; and, (3) the representation agreement does not satisfy the specific requirements for a valid power of attorney. R10A pp 82-3. In the best possible light, the BTLA's response is that attorneys at law in rendering "professional services" are in some manner not providing as sufficient service or protections as a properly appointed "attorney in fact".

There may be some government interest, albeit it not articulated, in determining that those representing taxpayers in initiating tax abatement procedures are actually authorized to do so, and the taxpayer has some protections such the duties and liabilities as prescribed for attorneys in fact. RSA 564-E: 114 and RSA 564-E:116. As discussed above, there is a substantial difference in the statues, rules and enforcement of those rules in tax abatement proceedings between non-attorney representatives and attorneys at law, particularly when the legislature for apparent political reasons allowed nonlawyers to commonly represent taxpayers in abatement matters. It is possible to understand that with respect to non-attorney representatives, there is certainly no means of ensuring that application for abatement when signed by the non-attorney representative is actually authorized before actually initiating the

abatement process Nor are there protections for the taxpayer or recourse by the municipality for extraneous abatement applications.

That is absolutely incorrect with respect to attorneys at law. In many respects, if not all, the duties imposed on an attorney-in-fact pursuant to RSA 564-E:114 are duties that are undertaken by attorneys at law in rendering professional services pursuant to both common civil law, fiduciary law, and the N.H. Rules of Professional Conduct. For as this Court articulated in <u>In re Wehringer's Case:</u>

> "[T]he relationship of the lawyer to the client and the court is one of fiduciary underpinnings.... The relationship of the lawyer to the client and the court is not determined by the rules governing the activities of the market place, but is determined by the higher standards provided in the Code and Rules.... A lawyer, because he or she is a member of a learned profession governed by a code of conduct reflecting human experience, may not be permitted to have ethical conduct measured against a lesser standard than that which this court has recently applied to others. The affairs of fiduciaries are viewed by this court against a narrow gauge.

130 N.H. 707, 720-21 (1988). Even without the formality of an executed power of attorney, the relationship and liability of attorney at law with his or her client is at least a similar if not higher standard than that of an attorney at fact. And the liability of attorney's is certainly equal to or greater than that of an attorney in fact. RSA 564-E:117 states that "[a]n agent that violates this chapter **may** be held liable, and an agent that knowingly, willfully, or recklessly violates this chapter **shall** be liable...." (Emphasis added). Attorneys are subject to civil liability for failing to

exercise reasonable professional care, skill, and knowledge in providing legal services to a client. Cabone v. Tierney, 151 N.H. 521, 527 (2004). Attorneys are also subject to discipline, including disbarment, for violating the Rules of Professional Conduct. Sup.Ct. Rule 37. Lastly, even municipalities have a remedy if an attorney at law is misbehaving in their opinion by being able to bring a grievance within that Attorney Discipline System. Id.

It is difficult at best to determine what if any is the government's objective in this classification no less its importance, and it is impossible to determine how the classification advances that objective one iota.

CONCLUSION

For the reasons articulated above, the taxpayers/appellants request this Court to reverse the decision of the BTLA and allow their RSA 76:16-a Appeals filed with the BTLA on August 27, 2018 to proceed on the merits.

Respectfully Submitted,
The Appellants,

By its Attorneys,
COOPER CARGILL CHANT, P.A.

Dated: March 9, 2021 By: _____

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Appellants request that Randall F. Cooper be allowed fifteen minutes for oral argument.

I hereby certify that on March 9, 2021 that a copy of the foregoing was forwarded to opposing counsel via the Supreme Court's electronic filing system.

I hereby further certify, pursuant to Supreme Court Rule 16(3)(i), that the appealed decision is in writing and is appended to this brief.

I hereby further certify that this brief complies with Supreme Court6 Rule 16(11) word limit as required by Supreme Court Rule 26(7).

Dated: March 9, 2021 By: _____

Randall F. Cooper
N.H. Bar No. 501