THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0289

APPEAL OF ELEONORA POROBIC

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

BRIEF FOR APPELLANT

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STATUTES AND RULES

21-J:14-b Powers and Duties of the BTLA. –

I. The assessing standards BTLA shall recommend standards and appropriate legislation relative to:

(c) **The establishment of standards for revaluations based on the most recent edition of the Uniform Standards of Professional Appraisal Practice (USPAP).** The department of revenue administration shall in its assessment review process incorporate these standards and report its findings to the assessing standards BTLA and the municipality, in accordance with RSA 21-J:11-a, II. These standards shall be reported to the assessing standards BTLA for all reviews conducted on or after the April 1, 2006 assessment year. These standards shall be incorporated in the assessment review process for all reviews conducted on or after the April 1, 2007 assessment year.

516:29-a Testimony of Expert Witnesses. –

I. A witness shall not be allowed to offer expert testimony unless the court finds:

(a) Such testimony is based upon sufficient facts or data;

(b) Such testimony is the product of reliable principles and methods; and

(c) The witness has applied the principles and methods reliably to the facts of the case.

II. (a) In evaluating the basis for proffered expert testimony, the court shall consider, if appropriate to the circumstances, whether the expert's opinions were supported by theories or techniques that:

(1) Have been or can be tested;

(2) Have been subjected to peer review and publication;

(3) Have a known or potential rate of error; and

(4) Are generally accepted in the appropriate scientific literature.

(b) In making its findings, the court may consider other factors specific to the proffered testimony.

Asb 301.55 “Uniform standards of professional appraisal practice (USPAP)” means the generally accepted and recognized standards of appraisal practice printed by The Appraisal Foundation as authorized by Congress as the source of appraisal standards and appraiser qualifications.

Asb 301.56 “USPAP-compliant report” means an appraisal report based upon the standards established by the ASB pursuant to RSA 21-J:14-b, I, (c).

Asb 302.01 Assessing Services Contracts and Agreements.

(a) Assessing services contracts and agreements shall be in accordance with RSA 21-J:11 and the applicable Rev 600 rules.

Rev 601.33 "Mass appraisal" means the utilization of standard commonly recognized techniques to value a group of properties as of a given date, using standard appraisal methods, employing common data and providing for statistical testing.

Rev 601.44 “Uniform standards of professional appraisal practice (USPAP)” means the generally accepted and recognized standards of appraisal practice printed by The Appraisal Foundation as authorized by Congress as the source of appraisal standards and appraiser qualifications.

Rev 601.45 “USPAP compliant report” means an appraisal report based upon the standards established by the ASB pursuant to RSA 21-J:14-b, I, (c.)

Rev 603.04 Full Revaluation and Full Statistical Revaluation Contract Services. For a full revaluation and a full statistical revaluation contract the following services shall be performed and provided by the contractor:

(h) Appraisal reporting and appraisal manuals shall be completed as follows:

(1) The contractor shall provide a USPAP compliant appraisal report in accordance with the ASB standards and the report shall contain, at a minimum, the following: ....

Tax 201.30 Evidence.

(a) Pursuant to RSA 71-B:7 the BTLA shall not be bound by the strict rules of evidence adhered to in the superior court.

(b) In ruling on objections to evidence presented, the BTLA shall give due regard to the principles behind the rules of evidence and the BTLA's statutory function and purpose.

(c) The BTLA shall exclude irrelevant, immaterial and unduly repetitious evidence in accordance with RSA 541-A:33, II.

Evid. Rule 401. Test for "Relevant Evidence"

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Evid. Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

the United States or New Hampshire Constitution;
a statute;
these rules; or
other rules prescribed by the Supreme Court.
Irrelevant evidence is not admissible.

Evid. Rule 702. Testimony by Expert Witnesss

A witness who is qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

QUESTIONS PRESENTED

Question 1 – Was it unlawful for the BLTA to consider for any purposes the unlawful and unreliable View Factor assessment values created by Avitar in its computer assisted mass appraisal effective April 1, 2017, and as applied to the subject property as of April 1, 2018? Rule 10 Appendix ("Apx") pp. 400-410, 426-427, 649-656[1].

Question 2 – Was it unreasonable and unlawful for the BTLA to allow into evidence the exhibits prepared by and direct testimony of the Municipal Consultant (Avitar) that were unreliable and dependent upon the unlawful and unreliable View Factor assessment values and were not disclosed in properly conducted discovery by the Taxpayer and as required by RSA 516:29-b? Apx. pp. 400-410.

Question 3 - Was it unlawful and unreasonable for the BTLA to not accept the fair market value as opined by the Taxpayer's appraiser, having found

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[1] This reference is to the Memorandum of Law filed with the BTLA the day after the hearing and before the Order of April 30, 2021 to establish the fact that the issue was not raised for the first time in the Motion for Rehearing. *See Appeal of Keith R. Mader 2000 Revocable Trust ___ N.H. ____ (10/8/2021)*.

that the Taxpayer had sustained her burden of proof, and instead compromised that amount based upon consideration of the unlawful and unreliable testimony and exhibits offered by the municipal representative? Apx. pp. 427-434, Apx. 644, 649-656[2]

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[2] See Footnote 1.

STATEMENT OF FACTS

Nora Porobic, the Taxpayer, is the owner of a second home at 33 Karwendal Strasse (Tax Map 2LNDRH, Lot 225) in the Linderhof subdivision within the Town of Bartlett which she purchased on September 30, 1996. See Exhibit 1, Tax Map 2 LNDRH, Apx. p. 23 and Exhibit 15, Sales History, Tax Card Subject Property, Apx. p. 83. The Linderhof subdivision is constructed on the westerly side of Thorn Hill, with the terrain being fairly steep in the location of the Taxpayer's home and that of her neighbors, giving them a view to the west. Exhibit 2, Topographic Map, Apx. p. 24.

At the time the Taxpayer acquired the property, she had a similar view to that which is the subject of this appeal. Over time trees would begin to obstruct it and which the Taxpayer had removed on multiple occasions to maintain the view. Apx. 452. The latest cutting occurred in the summer of 2017. Transcript, Apx. p. 452. During that summer as well, the Taxpayer constructed an addition to the chalet

The year before the Town of Bartlett (the "Town") engaged Avitar Associates of NE, Inc. ("Avitar") to appraise all taxable property within the

Town as of April 1, 2017 by Revaluation/Update Agreement executed by the Town on August 31, 2016, and Avitar on September 8, 2016. Exhibit 20, Section I(b), Apx. p. 102, Apx. 535.

Under certification dated October 10, 2017 (Apx. p. 98) by David Woodward, the Certified Property Assessment Supervisor assigned to the Town's revaluation, the Bartlett, NH 2017 Full Update of Values, April 1, 2017 (the "Manual") was delivered. All parts of the Manual pertinent to this appeal are attached as Exhibit 20, Apx. pp. 92 – 299, Apx. 536.

Avitar sent to the Taxpayer a notice dated October 11, 2017 (Exhibit 7, Apx. p. 29) with the new tax assessment values for her property, and in the case of the Taxpayer a Land Value of $102,900, and a Buildings-Features Value of $103,100. Unbeknownst to the Taxpayer at that time, Avitar had failed to visit her property at all in 2017. Exhibit 15, Listing History, Tax Card Subject Property, Apx. p. 83. The Taxpayer received a tax bill accordingly for the taxes assessed as of April 1, 2017 (Exhibit 8, Apx. p. 30), which she paid.

The first time Avitar visited property was on August 14, 2018. That visit was by Mr. Woodward. Exhibit 15, Listing History, Tax Card Subject

Property, Apx. p. 83; Exhibit 21, Answers to Interrogatories, Answer to #5, Apx. p. 305. As a result of that visit, the Tax Card for the subject property was amended to increase building value by $43,000 from $102,100 to $145,100 and increase land value by $153,000 from $102,900 to $260,900. The $153,000 increase in land value appeared on the Tax Card to be for View – Mountains, Average, Top 75, Distant , Condition 90, Notes SSNL/OBST. Exhibit 15, Land Valuation, Tax Card Subject Property, Apx. p. 83. The Taxpayer learned of this increase when received her tax bill for 2018 in December, 2018. Exhibit 10, Apx. p. 32.

STATEMENT OF THE CASE

After discovering her taxes had more than doubled, the Taxpayer's only recourse was to apply for an abatement from the BTLA of Selectmen, which she did on February 14, 2019. Apx. p. 4*. LSP Assoc. v. Town of Gilford, 142 N.H. 369, 374 (1997)*. As a part of that application, the Taxpayer offered her opinion that the market value of the property as of April 1, 2018 was $270,000 and attached the Stone-Hayes single-property appraisal later provided to the BTLA. Apx. p. 6; Exhibit 14, Apx. p. 55. The Taxpayer did not meet with the Selectmen, but with David Woodward of Avitar. Apx. p 457. The abatement application was denied. Apx. p. 11 .

On July 22, 2019, the Taxpayer appealed to the BTLA of Tax and Land Appeals (hereinafter referred to as the "BTLA"). Apx. p. 12. Attached to that appeal was the Stone-Hayes single-property comparative land sales appraisal for the subject property, opining that the subject property's fair market value as of April 1, 2018 was $270,000. Exhibit 15, Apx. p. 82.

Taxpayer, pursuant to Tax 201.09 and Superior Court Rule 23 propounded on January 13, 2020, certain Interrogatories with

Incorporated Request for Production of Documents to the Town of Bartlett, which were answered by Mr. Woodward of Avitar on March 5, 2020. Exhibit 21. Apx. p. 300. Interrogatory 3 requested the identity of all experts to be called at trial, and disclosure of expert opinions etc. The Answer was simply "N/A" which indicated that no independent appraiser was being engaged. Interrogatories 12 sought the derivation and/or calculation of the View factors for the View Codes at p. 581. Apx. p. 308. The answer only referred to the portion of the Manual which was the View narrative (Apx. p.136).

The Taxpayer filed on April 7, 2020, a Motion to Clarify, or If Necessary, Amend the RSA 78:16-a Appeal Document to assure that she had the ability to challenge the methodology and documentation of the same by Avitar used to assess view. Apx. p. 16. That motion was granted on April 20, 2020.

As required by Tax 201.33, the parties exchanged their exhibits on February 17, 2021. The Town included Exhibit A, Comparable Property Report Adjustment Details, and Exhibit B Comparable Property Report prepared by Avitar. Apx. pp. 369 and 372.

The Taxpayer filed a Motion in Limine on February 22, 2021 to exclude all exhibits offered by the Town as inadmissible as failing to be disclosed in the discovery process; to exclude Exhibits A and B (and others) as inadmissible as the hearsay product of an undisclosed expert witness; and that the Avitar representative not be permitted to offer expert testimony not having made the necessary disclosure required by RSA 516:29-b and that any such testimony relating to View factors of the CAMA appraisal was required to meet the reliability criteria of RSA 516:29-a. Apx. p.400 Avitar objected on February 23, 2021. Apx. p. 411. The BTLA denied the Motion in Limine on March 12, 2021: “The Motion is denied for the reasons stated in the Objection.”

A remote four-hour hearing was held by the BTLA on April 13, 2021. The Taxpayer and her appraiser, Nanci Stone Hayes, testified, and as permitted by the denial of the Motion in Limine, David Woodward of Avitar testified by narrative to the process he followed in preparing Exhibits A and B. Apx. 532-34.

Subsequently the BTLA issued its Decision on April 30, 2021. Apx. p. 418. The Taxpayer filed her Motion for Rehearing on May 24, 2021. Apx.

p. 425. The Town objected on June 2, 2021. Apx. p. 435. The BLTA denied the Motion for Rehearing by Order dated June 11, 2021. Apx. p. 436. This Rule 10 Appeal followed.

SUMMARY OF ARGUMENT

This appeal seeks reversal of a BTLA abatement decision, and remand for entry of an order finding that the fair market value of the Taxpayer's property was $270,000.00 and granting an abatement based upon a $138,400.00 over-assessment of her Property by the Town.

The assessment of NH property for real estate taxes has two different legal requirements: the assessment must be at fair market value and must be proportional. Given the realities of cost, the assessment of real estate is completed by Computer Assisted Mass Appraisals ("CAMA"), which by their nature cannot replicate with consistent accuracy the actual market value of all properties in a town, which necessarily results in some properties being assessed higher than market value and some lower.

Given the remedial nature of the tax abatement system, a taxpayer, who believes his or her property has been over assessed, has only one remedy - to seek an abatement. He or she, however, does not have an disprove or challenge how the CAMA assessed his or her property but only must offer admissible evidence of the fair market value of the property.

At this day and age, the only factual issue before the Board of Tax and Land Appeals is the fair market value of the property at issue. An abatement is required if the fair market value is less than the assessed value adjusted by the proportionality factor set by the NHDRA .

The subject property was assessed by Avitar in its CAMA at a value of $408,400. The CAMA attributing $156,000 of that amount through its model of assessing view factor value as a separate factor and apart from the base per acre value of real estate. This “view tax” is controversial and was first addressed in any depth by the BLTA in an RSA-B:16 petition for reassessment in the Town of Orford case. In that case, the contract assessor was Avitar as well. The BTLA found itself very dissatisfied with Avitar’s lack of documentation on how it was assessing views, but also found itself having to choose between two bad choices. The BTLA decided to allow the Avitar CAMA, but demanded additional document using the USPAP standards in established what was needed. A legislator was present and also chair of the Assessing Standards Board, and as a result legislation and administrative rules were adopted mandating compliance with the USPAP by assessors.

The difficulty with the Avitar CAMA in the instant case is its unexplained and undocumented model resulting in an attempt to objectify the subjective, thereby creating a system with more than 3,000 possible permutations to determine how the view may be assessed for a particular property. The permutation system, and its lack of explanation, did not comply with the USPAP, and thus is contrary to NH statutes and rules. While it may still be allowed to assess and proportion taxes, it is certainly not admissible for any reason in the determination of the fair market value of the property.

One of the interesting phenomena of current NH assessment system, is the CAMA assessment contractors become the sole point of contact between the taxpayers and the selectmen, making recommendations to the selectmen, and then representing the town before the BTLA. And in this case the Avitar representative was allowed to present over objection by Motion in Limine evidence and testimony dependent upon the non-compliant sections of the CAMA, which resulted in the taxpayer's fair market value appraisal being discounted.

While the taxpayer clearly disagreed with evidence and the result, she produced a fair market value appraisal that met her burden of proof. At that point given the remedial nature of the tax abatement system, the burden of moving forward and probably the burden of proof should have shifted to the town, for the assessed value of the property was no longer the issue. What is required in this appeal is a clear statement that the law requires reliable evidence of fair market, that if presented must be countered by similar evidence. In reality what should occur is that Taxpayer makes a cost-benefit analysis for obtaining an appraisal in the time frame necessary to file an abatement petition. Once submitted, the Town may choose to grant the abatement or negotiate a compromise, or it makes a cost benefit analysis to obtain its own appraisal to deny the abatement. If there is a concern with the mounting number of abatement requests, or cost of litigation, or even complicating what is supposed to be an uncomplicated system, such a ruling would actually simplify the process and move it back to the Selectmen to make a real decision.

ARGUMENT

I. THE BTLA OF TAX AND LAND APPEALS ERRED AS A MATTER OF LAW IN CONSIDERING AVITAR'S INCLUSION OF VIEW FACTOR VALUATION AS RELEVANT OR RELIABLE IN DETERMING FAIR MARKET VALUE IN THIS TAX ABATEMENT APPEAL.

The standard for review of BTLA decisions is statutory. See *RSA 541:1*; *RSA 71–B:12*. While the BTLA's findings of fact are deemed prima facie lawful and reasonable, this Court may aside or vacate a BTLA decision for errors of law, where 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)*.

"The tax abatement scheme is written to make the proceedings free from technical and formal obstructions. It should be construed liberally, in advancement of the rule of remedial justice which it lays down." *GGP Steeplegate, Inc. v. City of Concord, 150 N.H. 683, 686 (2004)*. The purpose of remedial legislation is to promote justice and advance the public welfare and important and beneficial public objects. *In re Franklin Lodge of Elks No. 1280 BPOE, 151 N.H. 565, 567 (2004)*.

A. THE FACTUAL ISSUE IN THE TAX ABATEMENT HEARING WAS THE FAIR

MARKET VALUE OF THE SUBJECT PROPERTY WHICH IS NOT THE ASSESSED VALUE OF THE SUBJECT PROPERTY.

"The selectmen shall appraise... all other taxable property at **its market value**." *RSA 75:1*. [emphasis added]. In the case at hand the Taxpayer asserted that the change in the assessed value of her property exceeded the market value of the property, agreeing that her market value increased due to the improvements made, believing that inclusion of specific view factors exceeded market value. Apx. p. 458.

> "Abatement requests fall into three broad categories, physical description errors, damaged buildings and valuation opinion differences. .... Valuation opinion differences are more subtle and may require more extensive research. **Depending on the level of experience of the assessing staff, some property specific appraisal work may be required. For some complicated properties, a supplemental appraisal may be required to be performed, sometimes by an outside contractor.**

Understanding NH Property Taxes, The Official Assessing Reference Manual, NH Assessing Standards BTLA, 3rd Edition – Jan. 2019, p. 9-3, Apx. p. 640.

When valuation is the issue, in keeping with remedial nature of the proceedings, while the "legal" issue is whether the taxpayer is paying

more than her proportionate share of taxes, the factual issues are limited to the taxpayer to proving: (1) the fair market value of her property; and (2) the proportionality factor. *Duval v. City of Manchester, 111 N.H. 375, 376 (1971)*.

> Generally speaking, fair market value refers to the price which in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy, taking into account all considerations that fairly might be brought forward and reasonably given substantial weight in such bargaining.

Ventas Realty Limited Partnership v. City of Dover, 172 N.H. 752, 755 (2020).

These two factual issues have not changed in the last fifty years, but the specific need to prove the "proportionality factor" has been eliminated by the N.H. Department of Revenue Administrations Equalization Surveys, see Exhibits 23 (Bartlett 2017 Equalization Ratio – 97.5) and 24 (Bartlett 2018 Equalization Ratio - 89.6) , Apx. pp. 319 and 320. *RSA 21-J:3, XIII*.

In *Ventas*, as in many cases, the issue before the court was "fair market value" with experts differing greatly in their opinions of fair market value. *Supra*. Not specifically at issue in an abatement matter is whether the Town employed a flawed method of assessment, the Taxpayer must

produce evidence of fair market value. *Porter v. Town of Sanbornton*, *150 N.H. 363, 368 (2003)*

On the other hand, the assessed value of the real estate is by its very nature not evidence of fair market value. Towns appraise real estate for tax assessment purposes by mass appraisal.

> "Mass appraisal refers to methods that have been developed to solve large scale valuation problems, such as when properties must be appraised for the same purpose, often as of the same date and at low per-property cost.

International Association of Assessing Officers, Fundamentals of Mass Appraisal (2011) p. 1.

"The central idea of mass appraisals is the development of appraisal models that are then applied to groups of properties in a cadastral database[3] to produce estimates of value of all properties in the group." *Fundamentals of Mass Appraisal* p. 5. "[Mass a]ppraisals for property tax purposes essentially have two uses: (1) to apportion fairly property tax

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[3] "A modern map-based cadastre combines (1) large -scale cadastral maps the accurately depict parcel boundaries and other geographic features, (2) files or registers containing information about land parcels, buildings and taxpayers, and (3) a cadastral numbering system that links the parcel shown on maps with their related records. *Fundamentals of Mass Appraisal,* p. 33.

burdens according to values of individual properties and (2) ultimately to determine the size of the total tax base." *Supra*. at 7.

> **In mass appraisal, appraised [assessed] values should not be expected always equal independent indicators of market value** (sales prices or **independent appraisals**) but high and low ratios should balance, so that the typical ratio is near 100%. [emphasis added].

Supra at 198. In other words, it is expected that some properties will be assessed higher than market value, and others lower.

"Also, it is doubtful this market acts with such strict precision and consistency and that appraisers can truly replicate the market with such accuracy in the mass appraisal process." *Town of Orford, Docket Nr. 21473-2005RA (11/3/2005); 2005 WL 3663075 (N.H.Bd.Tax.Land.App.)*, Exhibit 28 (id), Apx. at 353.

This Court in upholding the statewide property tax discussed the N.H. Constitutional mandate of proportional and reasonable taxes.

> [I]n order for a tax to be proportional, all property in the taxing district must be valued alike and taxed at the same rate.... Taxes must not merely be proportional, but in due proportion, so that each individual's just share, and no more, shall fall upon him. Absolute mathematical equality is not obtainable in all respects if taxation is to be administered in a practical way.

Sirrell v. State, 146 N.H. 364, 370 (2001).

The balance between the constitutional mandate of proportionality and the statutory mandate of *RSA 75:1* creates a remedial standard in tax abatement cases to focus only on the market value of the specific property being appraised. That is sufficient enough of a challenge for a taxpayer to bear.

B. N.H. LAW REQUIRES THE AVITAR CAMA TO COMPLY WITH STANDARD 6 OF THE UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE.

The inclusion of view factors as separate and distinct valuation factor in mass appraisals for tax assessment was first addressed in detail by the BTLA in *Town of Orford*, *supra.*, Exhibit 28 (id), Apx. 347 The BTLA found that mass appraisal in *Orford*, "...as in many other municipalities, is lacking adequate and clear documentation of how the sales support the assignment of view factors...." Exhibit 28(id), Apx. p. 347. Specifically, the BTLA found:

> In the Revaluation Manual, Avitar has provided a few sales as examples to demonstrate the derivation of its base rate and view factor adjustments. However, those analyses are brief in nature,

> involving only a few of the sales that occurred, and they provide no discussion as to their correlation and application to the base rates **and adjustments used** in the assessments.

Id. at Apx. p. 350. And not withstanding legislative and regulatory mandates to the contrary since that date, Avitar continues to follow the same pattern of non-disclosure and obfuscation.

The BTLA had substantial concerns with Avitar but in its opinion had to choose between two bad choices. See *Orford*, Section I, Apx. 348 – 350. In its discussion, however, regarding the Avitar lack of documentation it explained:

> One must ask, if these CAMA systems are so state-of-the-art, why has the taxpayer outcry heard by the BTLA in recent years increased in countless reassessment and individual appeals? … those who carry out this function should document their analysis so that those who shoulder the burden, the taxpayers, can understand it. Such clear documentation is necessary to open the "black box" of any CAMA system so that taxpayers can follow the road map of how their assessments are linked to the market data analyzed by municipalities or its contract assessing firms. **Mere statements, as contained in the Revaluation Manual, that the analysis was performed are not adequate; that analysis must be shown.** (Emphasis added.)

Orford at Apx. 352.

The BTLA in the *Orford* decision referred to Uniform Standards of Professional Appraisal Practice ("USPAP") as the standard for documentation with respect to view factors in order that the "user and affected parties must have confidence that the process and procedures used conform to accepted methods and result in credible value estimates." *Orford*, Apx. p. 351.

The BTLA specifically noted in that decision that present at the hearing was Representative Betsey Patten, Chair of the Assessing Standards BTLA (ASB). Representative Patten introduced on January 4, 2006, within two months of that decision , HB 1206, which was adopted as Chapter 193, N.H. Session Laws to include within the powers and duties of the ASB a mandate ("shall") that the standards for revaluation be based on the most recent edition of the Uniform Standards of Professional Appraisal Practice (USPAP). *RSA 21-J:14-b(I)(c)*. The adoption resulted in regulation amendments reflecting that legislative mandate. *Asb 301.05*, Asb 301.56, and *Asb 302.01*, which in turn were followed by *Rev 601.44*, *Rev 601.45*, and *Rev 603.04 (h) (1)*, which mandated ("shall") a town-wide

reassessment to provide a USPAP compliant appraisal manual. Manual. Apx. 107, ¶¶ 3.5.1.

Standard 6 of Uniform Standards of Professional Appraisal Practice for 2016-7, marked as Exhibit 29(Id) Apx. p. 358, was the most recent edition of the USPAP at the time the Avitar reassessment.   Specifically, Standard Rule 6-8 the written report (the USPAP Report described in the ASB Manual) "to clearly communicate elements, results, opinions, and value conclusions and the appraisal. Each written report of a mass appraisal **must**:" and thereafter are subsections (a) – (q). Those of particular importance in this case are:

> (c) clearly and accurately disclose all assumptions...used in the assignment; ...
>
> (k) describe and justify the model specification(s) considered data requirements, and the model(s) chosen; ...
>
> Comment: The appraiser must provide sufficient information to enable the client and intended users to have confidence that the process and procedures used conform to accepted methods and result in credible value conclusions. In the case of mass appraisal for ad valorem taxation, stability and accuracy are important to the credibility of value opinions. The report must include a discussion of the rationale for each model, the calibration techniques to be used, and the performance measures to be used.

The downstream effect of the BTLA's Orford decision was a legislation establishing the standard of legal relevancy of a CAMA being used as evidence of actual fair market value of a property. *Evid. Rule 402*.

C. THE AVITAR CAMA QUANTIFYING VIEW FACTORS DID NOT COMPLY WITH NH LAW.

1. Little if Any Guidance Exists on How to Comply with the USPAP When Explaining and Documenting a Subjective Determination of the Value of a View.

After the adoption of *RSA 21-J:14-b(I)(c)* and the resulting rule changes, little if any legislative, administrative or BTLA guidance for USPAP compliance was offered over the next sixteen years other than ASB Manual, which the View Valuation portion of which was added in 2019 edition. See Apx. pp. 620-642

In 2012, the BTLA denied an RSA 71-B:16 (IV) complaint in the Town of Randolph finding that the petitioners did not meet their burden of proof. *In Re Randolph Reassessment, Docket No. 26074-11RA (8/31/2012)*. While the BTLA in dicta based upon testimony from Avitar's owner that the "steps and the Town's assessment model are consistent with the approach discussed by the BTLA in Orford" and found no basis:

> "to find the contributory view values determined during the 2009 reassessment resulted in **disproportionality**, either for the total assessments on individual properties or on a systemic basis. Mere differences of opinion regarding specific contributory view values determined for individual properties **is not a valid ground for setting aside a completed reassessment**." [emphasis added].

Randolph, supra. The BTLA noted as well in dicta:

> To document and support his conclusions, [the owner of Avitar] took one photograph of each property and placed this picture, along with the indicated contributory value, in the "view report" included in section 10 of the Manual.... [which] allows taxpayers and other interested parties to examine for themselves the distinctions drawn by that assessor between different properties with views and challenge the determination through the tax abatement and appeal process to the extent it results in a **disproportional total assessment** of the taxpayer's entire estate. [emphasis added].

Randolph, supra.

No discussion took place in *Randolph* relating to whether the same complied with the USPAP for it was not an issue. Because the methodology was to produce a proportionate tax base and specific property valuations were not at issue, proportionality and not fair market value was the BTLA's focus.

In was not until the ASB Manual was amended in 2019, that any guidance was provided. The ASB Manual[4] in its discussion on how Views are Assessed, two methods are identified, the first a paired sales analysis with photographs explaining it (Apx. pp. 625-630) and the second an extraction method described by spreadsheet example (Apx. 630-31) in which the Sale Prices of qualified sales are reduced by the Already Established Land & Building Values, with the result being the Contributory Value of Views.

> Once various views are analyzed and the market contributory value extracted, the assessor can then apply that [contributory view value] whenever the same view occurs, similar to land and building values. The difficulty occurs when more or less substantial views or completely different views are found in the town than were found in the sales data. When this occurs, the assessor, like all other real estate professionals, uses all the sales data available and then must provide an opinion of the contributory value of the view.

ASB Manual page 5-10, Apx. p. 631.

2. <u>Those Portions of the Avitar CAMA relating to Quantifying View Factors Do Not Comply with the Legally Imposed USPAP Standards.</u>

[4] At the time this appeal was filed, the Assessing Standards Board View Assessments (Draft) was available on line. Exhibit 27, Apx. p. 341.

In the Avitar CAMA at issue the cost approach to valuation was used, "where the appraiser determines the value of the land without the buildings and then adds to that sum the depreciated current cost of reconstructing the buildings...." *Torromeo Industries v. State, 173 N.H. 168, 175 (2020)*, *International Association of Assessing Officers, Property Assessment Valuation (2010)* p. 68. In essence the cost approach builds the value from the bottom up, valuing each stick in the bundle, estimating the value of vacant land then adding the construction cost of improvements less depreciation.

The cost approach is documented on Exhibit 15, the Tax Card for the subject property. The card has a Land Valuation section with a land value to which was added an additional view factor of $153,000, for a total of $260,000, a Building Details section with a market cost new of $179,194, a 19% depreciation rate, which it subtracts for a building value of $145,100, and an Extra Feature value for the shed, totaling a Taxable Value of $408,400 as of April 1, 2017. Apx. pp. 82-3.

With respect to its quantification of the view factor every part of Avitar's USPAP Manual relating to the assessing of view is within Exhibit

20, Apx. 92. Apx. p. 536. Those portions of Exhibit 20 are: (1) a measurement diagram (Apx. 121); (2) the View Base Rate extraction table (Apx. 130); the table of view and factor codes (Apx. 134); a one-page narrative entitled Views (Apx. 136); and 809 2 x 2" photographs of views (Apx. 138 – 299).

The only connection between Avitar's model of quantifying view factors and the ASB Manual is the first half of its Extraction table, which follows the ASB Manual. Exhibit 20, Apx. 130; Exhibit 25, Apx. p. 321.

VIEW BASE RATE

Annual Trend: 0.00% < 04/01/17 > 0.00%

Location Map Lot Sub	Sale Date/Days	Price/Adjusted Zn	Building Value	Features Value	Excess Ac Value	Excess FF Value	Site Value	View Residual	View Subject	View Width	View Depth	View Distance	View Cond	Indicated View Value
526 GLEN LEDGE RD 2GLENL 000102 000000	03/06/17 26	$327,000 05 $327,000	$233,100	$6,500	$7,900	$0	$57,000	$22,500	0.40	0.80	0.50	0.50	0.75	$375,000
191 GLEN LEDGE RD 2GLENL 000027 000000	07/12/16 263	$287,530 05 $287,530	$140,600	$5,000	$14,400	$0	$62,700	$64,830	1.00	0.50	0.50	0.50	0.95	$545,937
16 LAUREL LEDGE RD 2GLENL 000181 000B14	01/24/17 67	$660,000 05 $660,000	$358,700	$10,000	$6,700	$0	$92,400	$192,200	1.00	1.00	0.50	1.00	0.75	$512,533
38 LINDERHOF STRASS 2MITTN 000017 000000	11/23/16 129	$282,400 05 $282,400	$123,200	$7,100	$0	$0	$112,500	$39,600	1.00	1.00	0.25	0.50	0.75	$422,400
64 PARKER RIDGE RD 5STLNG 000A00 000029	04/28/17 -27	$568,000 05 $568,000	$331,600	$3,000	$3,800	$0	$115,200	$114,400	1.00	1.00	0.50	0.50	1.00	$457,600
15 POPLAR LANE 1INTHI 000072 000000	06/20/16 285	$250,000 05 $250,000	$165,100	$3,000	$0	$0	$70,800	$11,100	1.00	0.50	0.25	0.25	0.95	$373,888
44 WILD VIEW DR 1RT16A 000101 000H17	04/14/16 352	$850,000 05 $850,000	$322,900	$5,200	$27,600	$0	$102,900	$391,400	1.25	1.25	0.75	1.00	0.75	$445,326
54 KARWENDAL STRA! 2LNDRH 000167 000000	09/01/16 212	$265,000 05 $265,000	$132,500	$1,200	$1,700	$0	$100,800	$28,800	1.25	0.50	0.25	0.50	0.50	$737,271
55 KARWENDAL STRAS 2LNDRH 000210 000000	09/29/16 184	$324,000 05 $324,000	$162,900	$0	$1,500	$0	$130,000	$29,600	1.25	1.00	0.50	0.25	0.75	$252,586

Average Indicated View Value: $458,060

Median Indicated View Value: $445,326

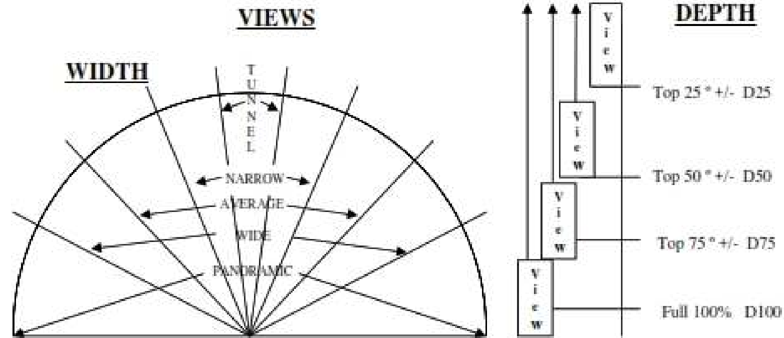
AFTER ADJUSTING FOR DIFFERNECE IN SUBJECT, WIDTH, DEPTH, AND DISTANCE A VIEW BASE RATE OF $450,000 WAS DETERMINED BY RELYING ON BOTH STATISTICS

This View Base Rate table was explained somewhat in the Interrogatories (Answer 8, Apx. 306) and in the cross-examination of Mr. Woodward. Apx.

pp 590-91. Avitar extracted the contributory value of the view from nine sales in 2017. That extracted contributory view value for each of those sales is identified in the middle column on that page as the View Residual, which is where the ASB Manual stopped. The table did not end at that point as suggested in the ASB Manual. Apx. p. 631. The table continuing to include certain multipliers for subject, width, depth, distance, and condition. The only explanation is found in the narrative in Section 7. Exhibit 20, Apx. p. 136.

> "To assist in that process, the views are further defined by their width, depth, distance and subject matter as outlined in Section 1.D. Here experience and common sense play a large part of this process. "

The reference to Section 1, D. Data Collection led to the unexplained diagram. Apx. p. 121.



SUBJECT *	DISTANCE	
LAK Lakes	CLS (or NER)	Close or Near – trees are visible & distinguishable
MTS Mountains	DST	Distant – you know there are trees but they are not distinguishable
HLS Hills	EXT	Extreme – no visual ability to distinguish tree cover
PST Pastoral		
STR Streams/Rivers		
LMT Lakes & Mountains		

*Descriptions can vary by town and are defined in the cost tables

View note samples: Noted as Subject/Width/Depth/Distance
MTS/TUN/D75/DST
(Tunnel View of Mountains 75% Deep, Far Away)

The factors applied are all listed and defined in Section 9.

At the bottom is stated, "The factors applied are all listed and defined in Section 9." Five hundred pages later in the Section 9 entitled Final Valuation Tables is the following table from which we we presume that the Section I, D. diagram was intended to measure certain view "codes" to which are assigned "factors" or multipliers with the Valuation table.

View Subjects		
Code	Description	Factor
HILL	HILLS	40
MTNS	MOUNTAINS	100
PRES	PRESIDENTIALS	125

View Widths		
Code	Description	Factor
AVG	AVERAGE	100
NAR	NARROW	80
PANO	PANORAMIC	125
TN	TUNNEL	50
WIDE	WIDE	115

View Depths		
Code	Description	Factor
D100	FULL	100
D25	TOP 25	25
D50	TOP 50	50
D75	TOP 75	75

View Distances		
Code	Description	Factor
CLS	CLOSE	25
DST	DISTANT	50
EXT	EXTREME	100

Exhibit 20 at Apx p. 121. **There is no definition or explanation of how the Valuation Table was created.**

Only after reviewing (not included in the Manual) the Tax Cards for the nine sales in the Extraction Table (Exhibit 25, Apx. pp. 322-39) it appears Avitar reverse applied the codes and factors from the nine properties to the View Residual Value in the Table in order to compute the Indicated View Value from which the mean and median resulted in a View Base Rate of $450,000. Mr. Woodward explained the reverse application of the “codes” and “factors” to the contributory view as, “We’re trying to find an average.” Apx. p. 591.

We do know that Avitar’s code system for views is certainly subjective and dependent upon the eye of the viewer, and even from where on the lot he or she stands. The Width code in the Section 1, D.

diagram appears like a protector, but without a specific degree reference to know when one code changes to another. The Subject code (as amended by valuation table) does not describe the difference between a Hills and Mountains and would seem to include every Presidential in the highest value code, and not just Mt. Washington. The Depth code fails explain where bottom starts and the top ends, nor explain how it handles a closer layer (or trees) or ridge over which a Hill may appear, over which a Mountain may appear. The Distance codes for Distant and Extreme are indistinguishable.

Avitar has created a faux-objective system which has up to 3,125 permutations. The various permutations that are possible are as follows:

Avitar Permutation Table									
Subject		Width		Depth		Distance		Condition	
Code	Factor	Code	Factor	Code	Factor	Code	Factor	Code	Factor
Hil	40	Avg	100	Full	100	Close	25	100	100
Mountain	100	Nar	80	Top 25	25	Distant	50	90	90
Pres	125	Pano	125	Top 50	50	Extreme	100	80	80
		Tunnel	50	Top 75	75			70	70
		Wide	115					60	60
								50	50
								40	40
								30	30
								20	20
								10	10

For the subject property, and every property with a view, after the subjective decision as which codes apply, certain unexplained, out-of-thin-air factors or multipliers from the Valuation Table are applied by the CAMA. These unexplained factors do not comply with Standard 6-k as explained in the Comment. There is no discussion of the rationale, the calibration technique or the performance measure used to create these factors. There necessarily is a requirement that there is some connection between the factors and market data.

In preparing the models for a CAMA, the coding of a property characteristic occurs in order to be ultimately reduced to a numerical value so that a mathematical calculation can occur. Given the subjectivity of views, the codes being applied in the code diagram at Apx. p. 121 are "qualitative" in which judgments are presumably being made in an attempt to use objective criteria and observable characteristics in order to reduce subjectivity. *Fundamentals of Mass Appraisal*, pp. 49-50.

The assignment of a separate factor to each of these distinguishing codes also establishes that Avitar considered each of the codes of width, depth, distance, and subject matter as separate dependent variables since

should be necessarily connected to market data and sales. *Fundamentals of Mass Appraisal*, pp. 91-92. In order to assign and create particular factors to each view code, there must be market data that is sufficient.

> If, for example, eight neighborhoods have been defined and reliable adjustments are need for each in a sales comparison model, then there must be adequate sales for each. Similarly if a model includes a variable for swimming pools, then there must be adequate sales for the model to determine a proper adjustment.

Id. at 92.

That makes common sense that to in order to quantitate the value of a view as being 25% more valuable if it includes a Presidential as compared to the other Mountains visible in Bartlett, something more than the factor table at Apx. 134 is needed. Similarly, if it is possible to draw a line between a “distant view”, defined as Apx. 121 as “you know there are trees but they are not distinguishable”, with an “extreme view”, defined as “no visible ability to distinguish tree cover”, there is a 50% difference in adjustment. There necessarily has to be adequate sales from which those adjustment may be derived, and there is no evidence within the Manual that it ever occurred and certainly not clearly explained.

There is nothing within Exhibit 20 that suggest that the Codes

and/or Factors of the Permutation Table were based upon assessment models extracted and constructed from market data, applied consistently with good appraisal judgment, and then tested by sales ratio studies. See *Orford* Decision. Nor can any explanation be found in Exhibit 20 that connects at all the derivation of the Codes and the computation of Factors the extracted sales data, other than be reverse applied to create the base value. There necessarily are unidentified and unexplained assumptions . 2016-17 Uniform Standards of Professional Appraisal Practice, Rule 6-8(f). As such Avitar's CAMA relating to View Factors does not comply with NH law.

D. THE USE OF VIEW FACTOR VALUES FROM THE LEGALLY FLAWED AVITAR CAMA WERE IRRELEVANT AND UNRELIABLE IN THE DETERMINATION OF FAIR MARKET VALUE OF THE SUBJECT PROPERTY .

As discussed in Section II below, the BTLA considered as both relevant and reliable evidence testimony and exhibits incorporating the View Factor portions of the Avitar CAMA which did not comply with NH law. In framing its decision in the context of the correct assessment of the property (not the fair market value), the BTLA conclusory findings specifically depended upon that evidence.

> Using its judgment and experience, and weighing all of the evidence presented, **including the photographs and other detailed information in the Avitar manual**, the Hayes appraisal presented by the Taxpayer, **the Towns comparable sales analysis and the testimony at the hearing**, the BTLA finds that the contributary value of the view in tax year 2018 was $90,000 (instead of the $153,000 shown on the assessment card.)

Decision, p. 5, Apx. 422

The relevance and reliability of the Avitar CAMA has been an issue from the outset of this case. The right of the Taxpayer to challenge the same was confirmed by her Motion to Clarify, Apx. p. 12, granted on April 20, 2020. Apx. p. 22. The issue was exacerbated by the BTLA denial of the Taxpayer's Motion in Limine (Apx. p. 400) and allowing into evidence Defendant's Exhibit A[5] (Apx. p. 369) and Exhibit B[6] (Apx. p. 372) and subsequent testimony by Mr. Woodward the Avitar representative regarding the same (Apx. pp 530 et seq.) The issue was specifically raised again in the Memorandum filed with the BTLA. Apx. p. 649.

In addressing the Taxpayer's Motion for Rehearing the BTLA stated

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[5] An unsigned expert report with conclusions similar to an appraisal which is being offered for the truth of the matters asserted therein.

[6] A hybrid comparable sales report adjusting the sales data of four comparable properties with the cost approach data of those properties from the mass appraisal.

the Taxpayer "wants the BTLA to adopt the market value estimate of the Taxpayer's own appraiser to the exclusion of all other evidence, **including the Town's own market value evidence**." Apx. 437. That statement acknowledges that the BTLA considered that Avitar CAMA , Exhibits A and B, and the testimony of the Avitar representation as relevant, reliable and probative on the issue of fair market value. In rejecting the Taxpayer's contentions that the CAMA methodology was flawed, unlawful and not in compliance with appraisal standards, the BTLA ruled: "These contentions and criticisms are not supported by established law and are not warranted by the evidence presented." By footnote, the BTLA suggested that it was up to the DRA to assure compliance and that the Taxpayer had to provide evidence of a DRA finding of a deficiency it was not a valid issue. Apx. 440.

While the BTLA as it did in Orford or the DRA under its duties may choose to ignore the USPAP issue in order to a facilitate a cost-effective means of assessing real estate taxes, that should not result in undocumented and unexplained view factor valuations be used as evidence of **actual fair market value** of property.

While hearings before the BTLA are not strictly governed by the

rules of evidence, the BTLA must give due regard to the principles behind the rules of evidence. *Tax 201.30*. If legislative and administrative rule mandates are going to have any meaningful purpose in allowing an ordinary citizen to know how his or her real estate is being assessed, *Evid Rule 402* should exclude as irrelevant such a flawed portion of the CAMA assessing view factors from being used in an abatement appeal as fair market value. *Rev 603.04 (h) (1).*

RSA 516:29-a, Evid Rule 701 and 702 only allows opinion evidence based upon specialized knowledge **which is the product of reliable principles and methods**; and **in which the expert has reliably applied the principles and methods to the facts of the case**. Expert opinion testimony is permissible if due to the scientific, technical, or other specialized training, the expert's testimony will assist the trier of fact. *State v. Langill, 157 N.H. 77, 83 (2008).* Expert testimony must rise to a threshold level of reliability to be admissible. *Id.* Allowing expert testimony that relies upon such a flawed portion of the CAMA, particularly as in this case, when the BTLA changed the factual issue to focus on only one of the sticks in the bundle making up the value of real estate. *See State v. Boyer, 168 N.H.*

553, 562 (2016).

This Court very recently in *Shaw's Supermarkets, Inc. v. Town of Windham*, affirmed "[T]he credibility of an appraisal is a question of fact that the trial court must decide based upon the evidence presented in a given case." ___ *N.H.* ____, *2021 WL 4888979 (10/20/21)*. In so doing, however, this Court also affirmed that any such finding is required to have evidentiary support and not be legally erroneous. Id. In that case, the Town argued that the Taxpayer's appraisal was not sufficient reliable in that it failed to comply with USPAP.

> This argument ultimately rests on the premise that the appraisal could not deviate from the USPAP in any respect. However, the Town cites no authority to this effect, and we decline to adopt such a rule on this record.

Id. In this case, however, such authority exists both by statute and rule requiring Avitar Manual to provide a USPAP compliant appraisal report. RSA 21-J:14-b (3); Rev 603.04 (h)(1). Avitar CAMA incorporating view factors continues to have same defect it had in *Orford* but hides it behind a faux-objective system and 800 plus 2x2 pictures. The Avitar CAMA at least with respect to challenging fair market value evidence is unreliable

and irrelevant.

II. THE BTLA'S CONSIDERATION OF AVITAR'S VIEW FACTOR VALUATIONS TO DISCOUNT THE TAXPAYERS'S INDEPENDENT APPRASAL WAS UNJUST AND UNREASONABLE BASED UPON A CLEAR PREPONDERANCE OF ADMISSIBLE EVIDENCE.

A. A SINGLE-PROPERTY APPRAISAL IS GENERALLY MORE ACCURATE AND RELIABLE THAN ADMISSIBLE DATA FROM A CAMA IN DETERMINING MARKET VALUE FOR A SPECIFIC PROPERTY.

In a single-property appraisal, the appraiser selects the valuation method most appropriate to the assignment in question. *Fundamentals of Mass Appraisal* p. 15. The Taxpayer's appraiser testified in support of her a single-property appraisal of the subject property as of April 1, 2018, that she used the sales comparison approach and complied with all of the requirements of the USPAP. Exhibit 14 Apx. p.55; Apx. 477.

The sales comparison approach derives value for the subject property by comparing similar properties that have recently been sold. *Torromeo*, 173 N.H. at 175. As compared to a replacement cost analysis, which builds the value up from beginning with the value of vacant land, in a sales comparison, the appraiser starts with real, actual sales between

willing buyers and willing sellers. There is no distinction in a sale price by a buyer between what is land, buildings, improvement, view etc. In a comparison sales approach to fair market value, it begins with the sales price of the entire bundle of sticks of a comparable property with adjustments being made to bring the property sold more in line with the subject property. While there are adjustments being made, no attempt is made to value each stick. It is one value for the entire bundle.

> Based on the concept of value in exchange, the sales comparison approach to value compares property being appraised with similar properties that recently sold. The characteristics of the sold properties are analyzed for their similarity to those of the subject of appraisal. Because no two properties are exactly alike, the prices of the sold properties must be adjusted for any differences between the sold properties and the subject property. **Value indications from derived from the sales comparison approach are usually considered particularly significant**. (Emphasis added.)

Property Assessment Valuation p. 10.

As a matter of law, generally real estate appraisals are recognized as having a higher degree accuracy and reliability then tax assessments in establishing market value. A real estate appraisal by a state licensed real estate appraiser is required as a matter of law by the FDIC for a residential real estate transaction that has a value of more than $400,000. *12 CFR*

§323.3(a)(1). For less than that amount, the institution is allowed to obtain "an appropriate evaluation of real property collateral that is consistent with safe and sound banking practices." *12 CFR §323.3(b)*. "Institutions that demonstrate that a valid correlation exists between tax assessment values and market values may use such information to develop the market value conclusion in an **evaluation**." *Financial Institution Letter, FIL-16-2016 (March 4, 2016), Supervisory Expectations of Evaluations*. [Emphasis added.]

B. THE TAXPAYER'S SALES COMPARISON SINGLE-PROPERTY APPRAISAL ENTERED INTO EVIDENCE TOGETHER WITH THE TESTIMONY OF HER APPRAISER MET THE TAXPAYERS' BURDEN OF PROOF AND BURDEN OF GOING FORWARD.

As admitted by the defendant's assessor, since the CAMA assessment for the taxpayer's property for 2017 was $408,400 and the median equalization ratio was 89.1%, the equalized assessment as of April 1, 2018 was $458,000. See Description, Defendants Exhibit A, Apx. p. 369. The burden of the taxpayer was to prove that the fair market value of the taxpayer's property as of April 1, 2018 was less than $458,000. That was and remained her only burden.

The Taxpayer's offered into evidence the appraisal of the fair market value of the property as of April 1, 2018. Exhibit 14, Apx. p. 55. The same was signed by the appraiser and certified that it complied with the requirements of the USPAP. Apx. p. 66 The appraisal was by a licensed and qualified appraiser with "extensive experience in valuing properties in town." Finding by BTLA in its Decision, Apx. 221. In selecting the comparable properties, the appraiser stayed within the Linderhof development and within a year before the appraisal date, properties of the same vintage and square footage, qualify of construction and view. Apx. 478-81. The appraisal included over separate adjustment factors to be considered relating to each comparable sale. Apx. 64. The conclusion was a fair market value of $270,000, which results in an overassessment of $188,000. The BTLA found that the Taxpayer had met her burden of proof. Apx. p. 418.

RSA 76:16-a (nor RSA 76:17 with respect to abatement appeals to Superior Court) does not establish any legal presumption that the assessed value is presumed to be market value. While the law does establish a burden of proof on the taxpayer, given the remedial nature of the process,

once that burden of proof has been met, the burden of going forward shifts to the Town, and quite possibly the burden of persuasion should shift as well. See, *Evid. Rule 301*; *Cunningham v. City of Manchester Fire Department, 129 N.H. 232, 236 (1987)*; *Jodoin v. Barood, 95 N.H. 154, 157 (1948).*

C. THE BTLA ERRONEOUSLY RECAST THE FACTUAL ISSUE TO CONSIDERING ONLY ONE ELEMENT IN VALUING PROPERTY BY THE CAMA COST APPROACH and IMPROPERLY CONSIDERed IRRELEVANT AND UNRELIABLE EVIDENCE TO UNJUSTLY AND UNREASONABLE REDUCE THE TAXPAYER'S APPRAISAL OF FAIR MARKET VALUE.

The BTLA confusingly within its decision recast the factual issue into what was the proper assessment of view factor for the property. Apx pp. 421-22.

> Using its judgment and experience, and weighing all of the evidence presented, including the photographs and other detailed information in the Avitar manual, the Hayes appraisal presented by the Taxpayer, the Towns comparable sales analysis and the testimony at the hearing, **the BTLA finds that the contributary value of the view in tax year 2018 was $90,000** (instead of the $153,000 shown on the assessment card.)

Decision, p. 5, Apx. 422.

The BTLA question the credibility in how the appraiser “adjusted” for view for sales in the Linderhof development by confusing her testimony as contending that “property buyers **in Town** would not place a contributory value of more than $25,000 to $30,000 for a property with a view when compared to one without a view.” Decision p. 4, Apx. p. 421. While the credibility of an appraisal is a question of fact, any such finding is required to have evidentiary support and not be legally erroneous. *Shaw’s Supermarket, supra.* The Avitar representative on cross questioned the appraiser regarding the adjustments made to the two comparable sales in Linderhof without a view, the appraiser testified that over years in that area, properties with view usually sell around for more than $25,000 to $30,000 at that time, but “now it’s a different story”. Apx. 504. Later when questioned by a member of the Board in the abstract without any specificity of location , she acknowledged that panoramic views commanded more than narrow views and the value could exceed $30,000. That was the extent of the testimony.

While the BTLA as the fact finder made certain statements in support of its decision, all those statements incorporated to some extent

or another a comparison between the Taxpayer's appraisal and the Avitar CAMA result, and/or Exhibits A and B, the Avitar Comparative Sales Analysis For instance, in the first full paragraph of Page 4 of the decision (Apx. p. 421), the BTLA adjusts the appraiser's market value opinion by the cost approach assessment amount of improvements to casts doubts on the validity of the appraisal "as a basis of a finding of disproportionality." That was not the factual issue before the BTLA.

As discussed above, the CAMA is about a creating a proportionate taxing system and not fair market value for each specific property and as the ASB Manual suggests that when dealing specific property valuation more is required than mere reliance upon the CAMA. Apx. 639. Unfortunately given the role of contract assessors and the cost associated with tax appeals, the relevant factual issue has been misplaced at both the BTLA level and at the municipal level, with the issue being the defense of the assessment (is it fair and proportionate) and not the fair market value of the subject property.

Whether as a marketing tool or a service Town wished to have provided, as noted by the BTLA in *Orford* even at that time, the role of the contract assessor was now a stand in for the BTLA of Selectmen:

> [W]hile certainly not addressing any possible associated attorney expenses, paragraph 6 of the Town's "Revaluation Agreement" with Avitar requires Avitar to defend any appeals arising from the 2005 assessments before the BTLA or the superior court. Routinely, municipalities during the reassessment rely on their contract assessor to defend assessments in appeals before the BTLA rather than retaining an attorney to do so.

Supra., Apx. p. 349. And as so described in that quote, even then the BTLA viewed the Town's role in an abatement appeal as a defense of the assessment and not the correct issue of fair market value..

The BTLA erred when it allowed the Avitar representative to offer expert testimony and exhibits relative to the fair market value of the property to cast doubt on the Taxpayer appraiser's valuation. Apx. 421, 1st full ¶. The only contrary evidence at the hearing, e.g. "those mentioned at the hearing by the Town " were Exhibits A and B and the direct testimony of the Avitar representative all admitted over the Taxpayer's objection in her Motion in Limine. Apx. 400. The Taxpayer, due to word count restraints, chooses not to brief the procedural issues raised in the Motion

in Limine[7], and instead will focus on the substantive issues of whether the testimony and the contents of the Exhibits were relevant, reliable and admissible.

Exhibit A (Apx. p. 369) and Exhibit B (Apx. 372) are titled and taken into evidence as a Comparable Property/Sales Report, and relied upon by the BTLA . Apx. p. 421. Exhibits A and B combined elements of both a comparative sales approach with elements of the flawed view factors in the CAMA cost approach. "We have never attempted to tie the fact finder's hands with a rigid fair market value formula in the absence of legislative directive. Rather, judgment is the touchstone" Torromeo 173 N.H. at 175. Nor, however, has this court ever allowed the mixing the elements of approaches to valuation. Judgement would require, at least, for such a mixed approach to at least meet the standards of Evid Rule 702 and RSA 516:29-a.

The Avitar representative admitted that he was not a licensed real estate appraiser. Apx. p. 537. Exhibit A and B admittedly did not comply

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[7] Interesting how the BTLA chooses which of its rules to strictly enforce. *See Appeal of Keith R. Mader 2000 Revocable Trust ___ N.H. ____ (10/8/2021)*.

with the USPAP relative to appraisals. Apx. p. 538. Three of the four comparative sales were after Tax Year 2018 the use of which was justified on "trending backwards" whatever that means. Apx. p. 539. One of those properties was extensively renovated April 1, 2018. Apx. pp. 545-6. . There was no personal inspection of the inside of the properties, including the subject property, so there was no means of adjusting how the internal improvements were included in the sale price. Apx. p. 545.

Most importantly and significantly the adjustment made to each of the sales prices of the comparable sales for "view" incorporated the flawed cost approach view factor, assigning as a comparative sale adjustment, the difference between the assessed View Factor for the subject property of $153,000 and the assessed View Factor for each of the comparable properties, which assumed the accuracy of the assessed view factor assigned to the all the properties. Apx. 547. This "adjustment" was not upon specialized knowledge which was the product of reliable principles and method. Evid. Rule 701 and 702. Just the oppositely it was based on a legally erroneous assessment of view as discussed above. Neither Exhibits A and B or the testimony of Mr. Woodward were the

product of reliable principles and methods or reliably applied the principles and methods to the facts of the case, which certainly Evid Rule 702; RSA 516:29-a.

The Taxpayer had to make a cost benefit analysis to engage the services of an independent appraiser to carry her burden of proof, which she met. The Town chose not to engage the service of independent appraiser. Given the inherent differences between assessed values and fair market value, once the Taxpayer met her burden of proof of fair market value, the burden was on the Town to provide credible and reliable evidence of market value, not assessed value, contrary to that of the Taxpayer.

Understanding the virtual impossibility of complying with RSA 75:1 and the constitutional obligation of proportionality while conducting a CAMA, the law does not burden the taxpayer to prove a faulty assessment but to offer proof of fair market value.

To place any greater burden on a taxpayer fighting town hall is not reasonable and just. In this case, the taxpayer engaged the services of a reliable and experienced appraiser. The Town chose to rely only on its

Annual Contract with Avitar. Exhibit 22, Section I (B)(d) and (C), Apx. p. 313. Shifting the burden at that point to the Town promote justice and advance the public welfare and important and beneficial public objects. The Town should at the Selectmen's level use their common sense, and their understanding of the Town and the neighborhood, to determine if it is worth the expenditure by the Town to obtain admissible evidence of fair market value.

CONCLUSION

For the reasons articulated above, the taxpayer/appellant request this Court to reverse the decision of the BTLA and find that the only credible and admissible evidence of fair market value of the subject property as of April 1, 2018 was the Taxpayer's appraisal and that she is entitled to an abatement based upon the fair market value of her property and thus was over-assessment of $188,000.

Respectfully Submitted,
The Appellants,
By its Attorneys,
COOPER CARGILL CHANT, P.A.

Dated: November 30, 2021 By: ______________________

Randall F. Cooper
N.H. Bar No. 501
2935 White Mountain Highway
North Conway, NH 03860
(603) 356-5439
rcooper@coopercargillchant.com

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 November 30, 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 Court Rule 16(11) word limit as required by Supreme Court Rule 26(7).

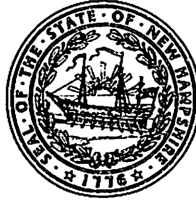
Dated: November 30, 2021 By: ______________________

Randall F. Cooper, Bar No. 501.

State of New Hampshire

Board of Tax and Land Appeals

Michele E. LeBrun, Chair
Albert F. Shamash, Esq., Member
Theresa M. Walker, Member
- - - - - - - - - - - - -
Anne M. Stelmach, Clerk



Governor Hugh J. Gallen
State Office Park
Johnson Hall
107 Pleasant Street
Concord, New Hampshire
03301-3834

Eleonora Porobic

v.

Town of Bartlett

Docket No.: 29283-18PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" tax year 2018 assessment of $408,400 (land $260,900; improvements $147,500) on Map 2LNDRH/Lot 225, a single-family home on 0.88 acres of land (the "Property"). For the reasons stated below, the appeal for abatement is granted.[1]

The Taxpayer has the burden of showing, by a preponderance of the evidence, the assessment was disproportionately high or unlawful, resulting in the Taxpayer paying a disproportionate share of taxes. See RSA 76:16-a; Tax 201.27(f); Tax 203.09(a); Appeal of City of Nashua, 138 N.H. 261, 265 (1994). To establish disproportionality, the Taxpayer must show the Property's assessment was higher than the general level of assessment in the municipality. Id. The board finds the Taxpayer carried this burden.

[1] Due to the on-going pandemic, the April 13, 2021 hearing on the merits was held using Cisco's WebEx platform. Board members Michele E. LeBrun and Albert F. Shamash heard and decided this appeal.

The Taxpayer, represented by Attorney Randall F. Cooper, argued the assessment was excessive because:

(1) she has owned the Property since 1993 and, in 2017, constructed an addition to the house and cleared some trees which, according to the Town, impacted the view and the market value of the Property (cf. Taxpayer Exhibit Nos. 3-6, 9 and 11-12);

(2) in tax year 2018, the assessment increased, both for the land (from $102,900 to $206,000) and for the improvements (from $103,100 to $147,500) and the total assessment increased from $206,000 to $408,400 (see Taxpayer Exhibit No. 15, p. 15-02);

(3) the appraisal prepared by Nanci Stone-Hayes, a certified general appraiser (hereinafter the "Hayes Appraisal," Taxpayer Exhibit No. 14), estimates the Property had a market value of $270,000 as of the April 1, 2018 assessment, a value the Town "ignored";

(4) the Taxpayer does not dispute the increase in the assessed value of the improvements, but disputes the increase in the land value because of a "view" value that is excessive;

(5) other lots in the same (Lindenhof) development have better views (of all or part of the "presidential mountain range") and have lower adjustments to their assessments for this feature; and

(6) the appeal should be granted and the assessment abated based on a market value of $270,000 (adjusted by the level of assessment).

The Town, represented by David Woodward of Avitar Associates of New England, Inc. (the Town's assessing contractor), argued the assessment was proper because:

(1) the Town performed a "full update" in tax year 2017 and updated the assessment in tax year 2018 due to the improvements and clearing of trees by the Taxpayer which enhanced the view and the market value of the Property;

(2) the Town's own "comparable sales analysis" (contained in Municipality Exhibits A and B) uses four comparables and correctly concludes, based upon an adjusted sales price range of $425,700 to $499,300, the assessment is proportional;

(3) the Hayes Appraisal vastly understates the values of the view and the first floor and there is little or no support for its $270,000 market value conclusion;

(4) the Town duly assessed the land with a contributory value for the view based upon an analysis of sales and a comparison of views (see Municipality Exhibits D, E and G) and applied a consistent methodology in doing so (cf. Taxpayer Exhibit No. 20, the "Bartlett 2017 Update Manual"), estimating the view had a contributory value of $153,000; and

(5) the appeal should be denied.

The parties agreed the level of assessment was 89.1% in tax year 2018, the median ratio calculated by the department of revenue administration. The Taxpayer requested leave to file a hearing memorandum after the close of the hearing. The board granted this request and has reviewed the "Memorandum" filed by her attorney as part of its deliberations.

Board's Rulings

Based on the evidence and arguments presented, the board finds the Taxpayer met her burden of proving the Property was disproportionally assessed in tax year 2018.[2] For the reasons stated below, the board grants the appeal and finds the assessment should be abated to $345,400.

The Taxpayer testified at some length, but did not offer her own opinion of the market value of the Property as of the April 1, 2018 assessment date. Instead, she relied upon the $270,000 market value estimate in the Hayes Appraisal. The board finds, for many reasons, including those mentioned at the hearing by the Town, that this opinion understates the market

[2] Cf. the authorities citied in the Memorandum, pp. 1-2, including Ventas Realty Limited Partnership v. City of Dover, 172 N.H. 752, 755 (2020).

value of the Property, notwithstanding Ms. Hayes' extensive experience in valuing properties in the Town.

The Taxpayer does not dispute the assessment on the improvements ($147,500), but only the assessment on the land. An estimated market value of $270,000, adjusted by the 89.1% level of assessment, would yield a total assessment of $240,600; deducting the $147,500 improvements assessment would yield a land assessment of $93,100 in tax year 2018, a value lower than the land assessment in 2017 ($102,900). This calculation, in and of itself, casts some doubt on the validity of Ms. Hayes' $270,000 value conclusion as the basis for a finding of disproportionality.

In addition, the board did not find her testimony credible insofar as she contended property buyers in the Town would not place a contributory value of more than $25,000 to $30,000 for a property with a view when compared to one without a view. The board finds there was little or no market evidence presented to support this contention.

To the contrary, a fixed lump sum conclusion about the contributory value of a view is implausible, at best, and is not supported by the sales data and analysis submitted by the Town. There can be little doubt that view attributes noted by the Town's assessor, such as "width, depth, distance and subject matter" can affect market value to varying degrees. [See the extended discussion and analysis of view differentials in Taxpayer Exhibit No. 20 (the "Bartlett 2017 Update Manual"), pp. 20-45 to 20-208 and Exhibit No. 25 ("View Base Rate").]

To say the least, the parties disagree regarding the contributory value of the view on the Property. The board finds merit in the Taxpayer's arguments that this feature was overassessed

in tax year 2018. Using its judgment and experience,[3] and weighing all of the evidence presented, including the photographs and other detailed information in the Avitar manual, the Hayes Appraisal presented by the Taxpayer, the Town's comparable sales analysis and the testimony at the hearing, the board finds the contributory value of the view in tax year 2018 was $90,000 (instead of the $153,000 shown on the assessment-record card).

The parties appear to recognize the subjective nature of views, their value in the marketplace and how their contributory values are applied in the Town's assessments. In the board's experience, assessing and appraising adjustments aimed at arriving at a reasonable estimate of market value often involve at least some elements of subjectivity. To recognize this fact, however, does not mean the "residual value" methodology employed by Avitar, the Town's assessing contractor, is either improper or "unlawful," as the Taxpayer's attorney argues in the Memorandum (cf. pp. 8-14).[4] If anything, the board decisions cited by him support rather than deny the importance of assessing the contributory value of views from a property as and when appropriate. See, e.g., Town of Orford, BTLA Docket No. 21473-05RA (November 3, 2005

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[3] See former RSA 541-A: 18, V(b), now RSA 541-A:33, VI, quoted in Appeal of City of Nashua, 138 N.H. 261, 265 (1994) (the board must employ its statutorily countenanced ability to utilize its "experience, technical competence and specialized knowledge in evaluating the evidence before it.") Further, in making market value findings, the board must determine for itself issues of credibility and the weight to be given each piece of evidence because "judgment is the touchstone." See, e.g., Appeal of Public Serv. Co. of New Hampshire, 124 N.H. 479, 484 (1984), quoting from New England Power Co. v. Littleton, 114 N.H. 594, 599 (1974) and Paras v. City of Portsmouth, 115 N.H. 63, 68 (1975); see also Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 256 (1994).

[4] The residual technique is an accepted valuation methodology and has been recognized in the appraisal literature. See, e.g., The Appraisal Institute, The Appraisal of Real Estate (11th ed. 1996), pp. 89 and 520-23.

Reassessment Order, p. 9[5]); and In Re: Town of Randolph Reassessment, BTLA Docket No. 26074-11RA (August 31, 2014 Order). In prior decisions, the board has ruled, based on the evidence presented, on the contributory value of a property with a view. See, e.g., Phillips v. Town of Jackson, BTLA Docket No. 21212-04PT (March 15, 2007), pp. 3-4 (adjusting the "view factor" applied by the municipality in order to result in a proportional assessment). Consequently, the Taxpayer's attorney is correct in stating "distinctions drawn by an assessor between different properties with views may be challenged through the tax abatement and appeal process to the extent it results in a disproportional total assessment of the [T]axpayer's entire estate." (See Memorandum, p. 4, referencing the Randolph Order cited above.)

For all these reasons, the appeal is granted and the assessment is abated to $345,400 (land $197,900; improvements $147,500).

If the taxes have been paid, the amount paid on the value in excess of $345,400 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Until the Town undergoes a general reassessment or in good faith reappraises the property pursuant to RSA 75:8, the Town shall use the ordered assessment for subsequent years. RSA 76:17-c, I and II.

Any party seeking a rehearing, reconsideration or clarification of this Decision must file a motion (collectively "rehearing motion") within thirty (30) days of the clerk's date below, not

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[5] In Orford, the board noted:

> One of the more significant factors affecting the property's value is its location. A view is a locational attribute. While certainly the feature that creates the view, a water body or a mountain range (or, in a negative manner, a junkyard) is in most instances located physically outside the property being valued, the view is a part of the transmissible bundle of rights of the property being valued. Views may not be as easily quantified as other locational attributes, such as road or water frontage, a corner signalized lot in a commercial area or a well-defined neighborhood . . . . However, to the extent the market indicates the locational attributes, including views, contribute to value, they must be considered and consistently assessed.

the date this decision is received. RSA 541:3; Tax 201.37(a). The rehearing motion must state with specificity all of the reasons supporting the request. RSA 541:4; Tax 201.37(b). A rehearing motion is granted only if the moving party establishes: 1) the Decision needs clarification; or 2) based on the evidence and arguments submitted to the board, the board's decision was erroneous in fact or in law. Thus, new evidence and new arguments are only allowed in very limited circumstances as stated in board rule Tax 201.37. Filing a rehearing motion is a prerequisite for appealing to the supreme court, and the grounds on appeal are limited to those stated in the rehearing motion. RSA 541:3 and RSA 541:6. Generally, if the board denies the rehearing motion, an appeal to the supreme court must be filed within thirty (30) days of the date on the board's denial with a copy provided to the board in accordance with Supreme Court Rule 10(7).

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Anne M. Stelmach, Clerk
Per Order of the Board

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Randall F. Cooper, Esq., Cooper Cargill Chant, P.A., 2935 White Mountain Highway, N. Conway, NH 03860, Taxpayer Representative; Bartlett Selectmen's Office, 56 Town Hall Road, Intervale, NH 03845; and Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258, Contracted Assessing Firm.

Date: April 30, 2021

Anne M. Stelmach, Clerk

State of New Hampshire

Board of Tax and Land Appeals

Michele E. LeBrun, Chair
Albert F. Shamash, Esq., Member
Theresa M. Walker, Member
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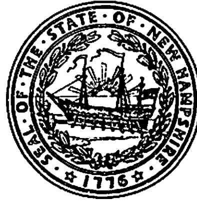
Anne M. Stelmach, Clerk



Governor Hugh J. Gallen
State Office Park
Johnson Hall
107 Pleasant Street
Concord, New Hampshire
03301-3834

Eleonora Porobic

v.

Town of Bartlett

Docket No.: 29283-18PT

ORDER

The board has reviewed the Motion for Rehearing filed by the attorney for the Taxpayer (initially on May 24, 2021 and "modified" on May 25, 2021) and the "Town's" June 3, 2021 "objection". The suspension Order issued on May 28, 2021 is hereby dissolved and the Motion for Rehearing is denied for the following reasons.

The Motion for Rehearing takes issue with aspects of the April 30, 2021 Decision issued by the board and calls them "unlawful." The board disagrees for the reasons noted below.

As a preliminary matter, the Motion for Rehearing, despite its length (ten pages), is less than clear as to what ultimate relief the Taxpayer is seeking by filing this pleading.[1] In the Decision, the board granted the Taxpayer's appeal and abated the tax year 2018 assessment on the "Property" from $408,400 to $345,400. This Decision was based on the market value evidence presented (by both parties) which the board carefully weighed, recognizing the

[1] For example, paragraph 3 of the Motion for Rehearing mentions that "[p]rior to the hearing" the board denied a "Motion in Limine" filed by the Taxpayer. It is not clear whether the Taxpayer (and/or her attorney) intends to challenge that procedural ruling, but the Motion for Rehearing is bereft of arguments regarding it.

Taxpayer's burden of proving the assessment under appeal was disproportional. (See Decision, p. 3 and fn. 3.)

Although not clearly stated, the Motion for Rehearing apparently wants the board to adopt the market value estimate of the Taxpayer's own appraiser to the exclusion of all other evidence, including the Town's own market value evidence. To the extent the Taxpayer and her attorney believe the tax abatement and appeal process should result in an "either/or" outcome, they are mistaken: the board was not required to accept in its entirety either party's estimate of market value.

Related to this mistake is their apparent belief that the board could not weigh the credibility of the assumptions and conclusions of the Taxpayer's appraiser. That appraiser estimated the Property had a market value of $270,000. She testified at the hearing and was subject to cross-examination and questions from the board. The Decision (pp. 3-6) adequately explains why her appraisal and testimony was not sufficient to meet the Taxpayer's burden of proving the market value of the Property in tax year 2018 was as low as $270,000.

In defense of that estimate, the Taxpayer's appraiser testified to her belief that it was proper to apply a standardized, narrow range for the contributory value of a view: namely, no "more than $25,000 to $30,000 for a property with a view when compared to one without a view," regardless of the type, quality or other attributes of the view. (See Decision, p. 4.) She did not present sufficient market evidence to support this belief and the board did not find it

credible.[2]

The board, as the trier of fact, has the discretion to weigh and decide for itself the credibility of any evidence presented by an appraiser, assessor or other witness, including the contributory value of a view. See, e.g., Appeal of Northern Pass Transmission, LLC, 172 N.H. 385, 401 (2019):

> The "trier of fact is in the best position to measure the persuasiveness and credibility of evidence and is not compelled to believe even uncontroverted evidence." DeLucca v. DeLucca, 152 N.H. 100, 102, 871 A.2d 72 (2005) (quotation omitted). . . . The trier of fact . . . "resolve[s] conflicts in the evidence" and could "accept or reject such portions of the evidence presented as [it] found proper." Id. (quotation omitted). "It is not our task to determine whether we would have credited one expert over another, or to reweigh the evidence, but rather to determine whether the [trier of fact's] findings are supported by competent evidence in the record." Appeal of Allen, 170 N.H. at 762, 186 A.3d 879. When faced with competing expert witnesses, "a trier of fact is free to accept or reject an expert's testimony, in whole or in part." Id. (quotation omitted).

Cf. In Re: Public Service Company of New Hampshire d/b/a Eversource Energy Master Docket No.: 28873-14-15-16-17PT (June 23, 2020), p. 7 (and the case law cited therein).

The Motion for Rehearing also appears to argue (erroneously) that the only market value evidence presented at the hearing on the merits was the appraisal submitted on behalf of the Taxpayer. In fact, the Town presented market value evidence of its own and a sales analysis which the board addressed in the Decision. (See Municipality Exhibits A and B; and Decision, pp. 2-3). The Town's 2017 Update Manual (Taxpayer Exhibit No. 20) was also admitted into evidence and contains additional sales data.

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[2] See Decision, p. 5 , which state the board's finding in response to this witness' unsupported beliefs:

> To the contrary, a fixed lump sum conclusion about the contributory value of a view is implausible, at best, and is not supported by the sales data and analysis submitted by the Town. There can be little doubt that view attributes noted by the Town's assessor, such as "width, depth, distance and subject matter" can affect market value to varying degrees. [See the extended discussion and analysis of view differentials in Taxpayer Exhibit No. 20 (the "Bartlett 2017 Update Manual"), pp. 20-45 to 20-208 and Exhibit No. 25 ("View Base Rate").]

It was neither "unlawful" nor erroneous for the board to give the Town's market value evidence some weight in arriving at its own market value finding (which was above the estimate of the Taxpayer's appraiser and below the Town's own estimate of value). Contrary to the Motion for Rehearing (p. 3), this finding was not intended to be, and did not result in, "a Solomon like decision."

The board has the authority to make independent factual findings based on the totality of the evidence presented. As the supreme court has held:

> RSA chapter 541 governs appeals from [board] decisions. RSA 71–B:12 (2003 & Supp. 2006); Appeal of Town of Wolfeboro, 152 N.H. 455, 458, 879 A.2d 1137 (2005). Under RSA 541:13 (2007), "we will not set aside the board's order except for errors of law, unless we are satisfied, by a clear preponderance of the evidence, that it is unjust or unreasonable." In re Huston, 150 N.H. 410, 411, 840 A.2d 773(2003). "Findings of fact made by the [board] on questions properly before it are deemed *prima facie* lawful and reasonable." Wolfeboro, 152 N.H. at 458, 879 A.2d 1137; see RSA 76:16–a, V (2003); RSA 541:13. . . .
>
> "We must affirm the board's factual findings unless we determine that there [i]s *no* evidence from which the board could conclude as it did." Huston, 150 N.H. at 414.

In re Walsh, 156 N.H. 347, 350 and 352 (2007) (italics in original).

Rehearing motions can only be granted for "good reason, pursuant to RSA 541:3" and not for "harmless errors that, if corrected, would not change the board's decision"; further, parties are required to:

> [S]ubmit all evidence and present all arguments at the hearing. Therefore, rehearing motions shall not be granted to consider evidence previously available to the moving party but not presented at the hearing or to consider new arguments that could have been raised at the hearing.

[See Tax 201.37 (e) and (g).]

At the hearing, the Taxpayer's attorney presented a multitude of exhibits and cross-examined the Town's contract assessor (Avitar Associates of New England, Inc., represented by

Dave Woodward) extensively regarding the Town's assessment methodology, especially with respect to the application of view factors to adjust land values in order to arrive at proportional assessments. The board finds Mr. Woodward's testimony was credible and reflective of the challenges posed by this aspect of the assessment and appraisal process. (See Decision, p. 5 and fn. 4.)

The Motion for Rehearing (see pp. 6-9) contends the Town's assessment methodology is somehow flawed and that the board should have adopted the alternative ("comparative sales method") presented by the Taxpayer's appraiser to estimate a lower market value for the Property. The Motion for Rehearing criticizes the methodology used by Avitar when it performed a "[T]own wide revaluation" in 2017 as being "unlawful" and not in compliance with appraisal standards. These contentions and criticisms are not supported by established law and are not warranted by the evidence presented.[3]

The supreme court has held that even when evidence is presented of a flawed or questionable assessment methodology, such evidence is not sufficient to satisfy a taxpayer's burden of proving the resulting assessment is disproportional. See Porter v. Town of Sanbornton, 150 N.H. 363 (2003). In Porter, the taxpayers challenged a municipality's methodology (imposing "increased assessments of [all] waterfront properties by 18%"); instead of presenting market value evidence specific to each property, the taxpayers "attempted to prove disproportionate tax burdens by demonstrating that the town employed a flawed method." Id. at 366 and 368. The supreme court responded to these arguments and ruled as follows:

[3] The Motion for Rehearing (p. 7) cites RSA 21-J:14-b(1)(c) and Rev. 603.04(h) which reference "USPAP Standard 6" and gives the department of revenue administration ("DRA") certain responsibilities to assure compliance in the "assessment review process." There was no evidence presented, however, that the DRA found any deficiencies or compliance problems in the tax year 2017 Town-wide revaluation detailed in the Town's "2017 Update Manual" (Taxpayer Exhibit No. 20).

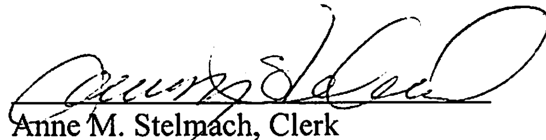
> The trial court focused upon the methodology that the town used to arrive at its assessment value, and not upon the actual harm. [Citations omitted.] Thus, the trial court erred as a matter of law in ruling that the plaintiffs were entitled to an abatement of their assessments . . .
>
> We presume that assessments are conclusive in the absence of fraud, bad faith or arbitrariness and place the burden on the taxpayer to show that the assessments made against his or her property are disproportionate. Nash Family Inv. Prop. v. Town of Hudson, 139 N.H. 595, 600-01 (1995). [Even a] finding of fraud, bad faith or arbitrariness does not prove a disproportionate tax burden [citation omitted] because a taxpayer must prove that he or she is paying more than he or she ought to pay. [Citations omitted.]

Id. at 369 and 371. The board finds adopting the Taxpayer's market value estimate would result in her paying less, not more, than "she ought to pay" in taxes in tax year 2018.

Consequently, and for all of these reasons, the Motion for Rehearing is denied.

Pursuant to RSA 541:6, any appeal of the Decision must be by petition to the supreme court filed within thirty (30) days of the date on this Order, with a copy provided to the board in accordance with Supreme Court Rule 10(7).

SO ORDERED.
BOARD OF TAX AND LAND APPEALS

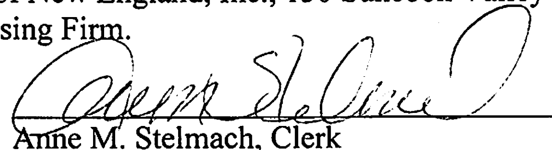


Anne M. Stelmach, Clerk
Per Order of the Board

Certification

I hereby certify a copy of the foregoing Order has this date been mailed, postage prepaid, to: Randall F. Cooper, Esq., Cooper Cargill Chant, P.A., 2935 White Mountain Highway, North Conway, NH 03860, Taxpayer's counsel; Town of Bartlett, Selectmen's Office, 56 Town Hall Road, Intervale, NH 03845; and Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258, Contracted Assessing Firm.

Date: June 11, 2021



Anne M. Stelmach, Clerk