

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

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**REPLY BRIEF FOR APPELLANT**

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(Oral argument by Attorney Cooper)

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**STATEMENT OF FACTS AND CASE**

See the Statement of Facts and Statement of Case in the  
Taxpayer's Brief.

## ARGUMENT

- I. **THE TOWN BRIEF INVITES THIS COURT TO TREAT THIS APPEAL AS IF IT IS AS A RUN-OF-THE-MILL APPEAL FROM A “WELL-REASONED” BTLA DECISION WEIGHING TWO COMPETING REAL ESTATE APPRAISALS WHILE CONSCIOUSLY CHOOSING NOT TO BRIEF THE ISSUE OF THE LEGAL RELEVANCE AND RELIABILITY OF AVITAR CAMA.**

The Town in its Brief consciously ignored the issues and argument raised by the Taxpayer relating to the legal admissibility of the portions of the Avitar CAMA relating to view factor valuation. Instead, the Town attempts to reframe the issues as if this case was merely an appeal from a choice between two competing appraisals.

Taxpayer's Question 1 in both its Rule 10 Appeal and its Brief challenges the legal relevance and reliability of the Avitar CAMA. The Taxpayer clearly stated in its brief the lack of its probative value due to the failure of the Avitar CAMA to comply with Standard 6 of the USPAP, and that this failure was not a ground for abatement but instead legally irrelevant and unreliable evidence arising out of the unexplained and undocumented system having more than 3,000 possible permutations to

value view.

The Town chose not to Brief or contest the issue and argument relating to compliance of view factor portions of the Avitar CAMA with the Section 6 of the USPAP. Similar to the resultant waiver by an appellant not briefing an issue, the Town's failure to contest this issue should stand as a concession. *State v. Kelley, 159 N.H. 49, 455 (2009)*.

**II. THE BTLA, AS THE FINDER OF FACT, DID NOT PROPERLY EXERCISE ITS AUTHORITY TO WEIGHT ONLY ADMISSIBLE AND RELEVANT EVIDENCE TO MAKE THE REQUIRED FINDING OF FAIR MARKET VALUE.**

The standard for review of BTLA decisions is statutory. 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, that such order is unjust or unreasonable with the appealing party having the burden of demonstrating that the BTLA's decision was clearly unreasonable or unlawful. *Appeal of Keith R. Mader 2000 Revocable Trust, 173 N.H. 362, 365. (2020)*. This Court will uphold the trial court's factual findings unless they lack evidentiary support **or are legally erroneous**. *Ventas Realty Ltd. P'ship v. City of Dover, 172 N.H. 752, 755, (2020)*. (Emphasis added).



A. **THE BTLA IN RECASTING THE FACTUAL ISSUE TO THE PROPER ASSESSMENT FAILED TO MAKE A FINDING OF FAIR MARKET VALUE.**

“When resolving tax abatement appeals, the BTLA **must make specific factual findings regarding the fair market value of the taxpayer’s property** and the general level of assessment for the municipality.”

*Appeal of City of Berlin, \_\_\_ N.H. \_\_\_, 2022 WL 108571 (1/12/22)*

*(Emphasis added)*. The BTLA didn’t make a specific factual finding of the market value of the subject, and as acknowledge by the Town in its brief that such a determination may only maybe inferred by backing into a fair market value applying the assessment ratio to the BTLA’s determination of the “proper” assessed value of the property. Town Reply Brief p. 18.

The Town intead in its brief glowingly describing the BTLA decision as well-reasoned while asking this Court to ignore the fact that the BTLA found itself defending the difficult burden imposed upon assessing firms by its own *Orford* decision and the statutory result, instead of concentrating the on the remedial nature of the proceeding to protect taxpayers. Notwithstandng the Town’s argument that is sufficient to back

into a finding of fair market value from the BTLA finding of assessed value, this in itself was an acknowledgement by the Town that the Board of Tax Appeals lost sight of the burden of the Taxpayer prove market value, and went off on its own to find the Woodward testimony relating to the proper view assessment as “credible and reflective of the challenges posed by this aspect of the assessment and appraisal process.” Order on Motion for Rehearing, Apx. 439.

**B. THE EVIDENCE RELATING TO THE NON-COMPLIANT AVITAR CAMA RELATED TO ITS LEGAL RELEVANCE AND RELIABILITY.**

The BTLA considered as both relevant and reliable evidence testimony and exhibits incorporating the view factor portions of the Avitar, which as discussed in detail in the Taxpayer’s Brief failed to comply with Standard 6 of the USPAP. The Town in its Brief attempts to equate the issue relating to the Avitar CAMA non-compliance with USPAP as being identical to the problems the taxpayer had in *Porter v. Town of Sanbornton, 150 N.H. 363 (2003)*. The Taxpayer’s criticism of the CAMA system’s handling of property views was not raised as grounds for abatement or to establish market value but was raised to challenge the

legal relevancy and reliability of any evidence dependent upon assessed view factors.

While this Court very recently rejected in *Shaw's Supermarkets, Inc. v. Town of Windham*, \_\_\_ N.H. \_\_\_\_, 2021 WL 4888979 (10/20/21), an argument that an appraisal was invalid because portions of it contrary to the provisions of the USPAP, it did so because "the 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."

As discussed in detail in the Taxpayer's brief, 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). The use of Avitar CAMA and in particular the view factor valuations are legally unreliable and irrelevant to be used to challenge the Taxpayer's evidence of fair market value.

**C. THE BTLA DECISION WAS LEGALLY ERRONEOUS BEING DEPENDENT UPON THE NON-COMPLIANT PORTIONS OF THE AVITAR CAMA RELATING TO VIEW FACTOR VALUATIONS.**

The BTLA in its decision specified exactly the importance of the

information it relied upon in making its decision.

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 contributory 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. As emphasized, any of the challenges to the Taxpayer's fair market appraisal related to Avitar CAMA view values. The major adjustments in the so-called Comparable Property Report prepared by Mr. Woodward used specifically the values from the Avitar CAMA, "The views of all sales were adjusted to be comparable to the subjects. The CAMA Model was used as a basis for the adjustments given the varying views." Apx. 369. As such the Decision was legally erroneous. *Ventas, supra.*

**D. THE BTLA BY VIRTUE OF ITS OWN RULES MUST GIVE DUE REGARD TO THE RULES OF EVIDENCE .**

The Town Brief clearly argues that by virtue of RSA 541-A:33 that the rules of evidence do not reply whatsoever. Thus the denial of the

Motion in Limine allowing Mr. Woodward to give un-qualified opinion evidence based upon legally unreliable and irrelevant View Factor portions of the Avitar CAMA is sufficient evidence to support the BTLA's decision.

There is no doubt, however, 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).

RSA 71-B:7 does provide that the BTLA shall be bound "by the strict rules of evidence adhered to in the superior courts in this state." The BTLA did, however, adopt Tax 201.30, Evidence.

**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.

RSA 516:29-a is certainly a legislative statement as to what the General Court considered the important principles behind Evid. Rule 702. As such the Decision was legally erroneous. *Ventas, supra*.

E. **A CERTIFIED PROPERTY ASSESSOR SUPERVISOR IS NEITHER LICENSED OR QUALIFIED TO APPRAISE THE FAIR MARKET VALUE OF REAL ESTATE.**

With respect to David Woodward qualifications to opine on the fair market value of a property, the Town presumes that Mr. Woodward as a Certified Property Assessor Supervisor with 22 years of assessing experience, is qualified to appraise the fair market value of the property using the comparative sales approach. Town's Brief pp. 15-16. BLTA rejected the Taxpayer raising that qualification issue when it denied the Motion in Limine. Apx. 400.

A Certified Real Estate Appraiser and Certified Property Assessor Supervisor have two different jobs, and two different licensure and training requirements. The former is governed by the Real Estate Appraisal Board as established and governed by RSA Chapter 310-B and the latter by the Assessing Standards Board as authorized by RSA 21-J:14-f and administratively attached to the DRA. With respect to the former, an “Appraisal means the practice of developing **an opinion of the value** of real property in conformance with the Uniform Standards for Professional Appraisal Practice as developed by the Appraisal Foundation.” RSA 310-B:2(XVI). [Compare with RSA 356-B:2(XV) e.g. “Valuation means an estimate of the value of real estate or real property.”].

The duties and training of the Certified Property Assessor Supervisor in accordance with RSA 21-J:14-f(II) as established in Asb Rule 304.04, do not include either proficiency or a duty to make comparative land sales appraisals of individual properties but instead all such duties and training is confined to the tax assessment process and the defense of **assessed values**. e.g. mass appraisals See Asb 303.06(b)(5). A specific exception to the licensure requirements for a real estate appraiser allows

“... a person under contract by a municipality [to do a] valuation for the sole purpose of ad valorem taxation.” RSA 310-B:3(III)

In this case, Mr. Woodward was not defending the assessed value, nor doing a valuation for taxation, but instead used the unreliable assessed values for views to create the illusion of a comparative land sales analysis in order to challenge the a USPAP compliant appraisal by a licensed real estate appraiser.

**III. THE PARTIES AGREED TO THE GENERAL LEVEL OF ASSESSMENT IN THE TOWN AND IT WAS FOUND AS SUCH BY THE BTLA**

The Taxpayer agrees that the general level of assessment is remains a factual issue on appeal with the burden on the taxpayer. *Appeal of City of Berlin, \_\_\_ N.H. \_\_\_\_, 2022 WL 108571 (1/12/22)*. In this case, however, both parties agreed that the general level of assessment was 89.1% and was so found by the BTLA. Decision, Apx p. 420.



**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 of \$270,000 and thus was over-assessed by \$188,000.

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



Dated: February 9, 2022 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 February 9, 2022 that a copy of the foregoing was forwarded to opposing counsel via the Supreme Court's electronic filing system.

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: February 9, 2022 By:



\_\_\_\_\_  
Randall F. Cooper, Bar No. 501.