THE STATE OF NEW HAMPSHIRE
SUPREME COURT

#2022-0196

Clearview Realty Ventures, LLC v. City of Laconia
JHM Hix Keene, LLC v. City of Keene
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Carnevale Holdings, LLC v. Town of Bedford

BRIEF OF THE APPELLEES, CITY OF LACONIA, CITY OF KEENE, CITY OF MANCHESTER, AND TOWN OF BEDFORD

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STATUTES

RSA 76:21 Prorated Assessments for Damaged Buildings.

I. Whenever a taxable building is damaged due to unintended fire or natural disaster to the extent that it renders the building not able to be used for its intended use, the assessing officials shall prorate the assessment for the building for the current tax year. For purposes of this paragraph, an unintended fire means a fire which does not arise out of any act committed by or at the direction of the property owner with the intent to cause a loss.

II. The proration of the building assessment shall be based on the number of days that the building was available for its intended use divided by the number of days in the tax year, multiplied by the building assessment.

III. A person aggrieved of a property tax for a building damaged as provided in paragraph I shall file an application with the assessing officials in writing within 60 days of the event described in paragraph I or by March 1, whichever is later.

IV. Proration of the assessment shall be denied if the assessing officials determine that the applicant did not meet the requirements of this section or acted in bad faith.

V. The total tax reduction from proration under this section for any city or town shall be limited to an amount equal to 1/2 of one percent of the total property taxes committed in the tax year. If the assessing officials determine that it is likely that this limit will be reached, the proration shall not be applied to any additional properties.

VI. Nothing in this section shall limit the ability of the assessing officials to abate taxes for good cause shown pursuant to RSA 76:16.

VII. Appeals of a decision under this section shall be to the board of tax and land appeals or the superior court as set forth in RSA 76:16-a or RSA 76:17.

QUESTIONS PRESENTED FOR REVIEW

1. For purposes of RSA 76:21, were the buildings subject to this appeal “damaged” by government COVID-19 orders limiting or restricting Appellants’ business operation?

2. For purposes of RSA 76:21, does the COVID-19 pandemic constitute a natural disaster?

STATEMENT OF THE CASE AND FACTS

The opening brief of the appellants sets forth the agreed statement of the parties for this interlocutory appeal.

STANDARD OF REVIEW

The appellants cite a decision for the proposition that ambiguities in a taxing statute are construed against the government. *See Carr v. Town of New London*, 170 N.H. 10, 13 (2017) (citing *N.H. Resident Ltd. Partners of Lyme Timber Co. v. N.H. Dep't of Revenue* Admin., 162 N.H. 98, 102 (2011)). The municipalities do not agree that the statute is ambiguous, but even if it was, this Court's jurisprudence holds that a tax exemption (such as RSA 76:21) is not interpreted with rigorous strictness, but to give full effect to the legislative intent. *See Appeal of Town of Belmont*, 172 N.H. 61, 65 (2019); *see also In re City of Nashua*, 164 N.H. 749 (2013).

<u>SUMMARY OF THE ARGUMENT</u>

The purpose of RSA 76:21 is to provide relief to a building owner from real estate taxation when the building is damaged by a natural disaster.

The language of the statute, the evident legislative intent, and comparable case law across the country demonstrate that the statute applies only to *physical* damage to a building that renders it *useless*. Accordingly, the Appellant's purely economic loss cannot be read to be within the terms of RSA 76:21 as the type of damage for which the statute was intended to provide relief. The government COVID-19 orders restricting the Appellants' business operations did not damage the buildings for the purposes of RSA 76:21, as the buildings were still able to be used as intended.

Furthermore, the COVID-19 pandemic does not constitute a "natural disaster" for purposes of RSA 76:21 based on case law from jurisdictions that addressed this question and statutory interpretation. COVID-19 was not a sudden event in nature causing serious damage to the structure of the building which is subject to taxation. Rather, the pandemic and its effects occurred on a more gradual time frame and directly depended upon the actions and decisions made by government entities and individuals. As a result, the COVID-19 pandemic differs from sudden, cataclysmic events such as hurricanes, earthquakes, or even unintended fires (as the statute explicitly lists). There is no support in the language of the statute that supports an interpretation of RSA 76:21 that would find that COVID-19

qualifies as the type of natural disaster warranting relief from real estate taxation.

ARGUMENT

I. Interlocutory Appeal Question No. 1 Should be Answered in the Negative Because the Buildings Subject to this Appeal Were Not Damaged by Government COVID-19 Orders Limiting or Restricting Appellants' Business Operations, for Purposes of RSA 76:21.

RSA 76:21 states, "Whenever a taxable *building* is *damaged* due to unintended fire or natural disaster to the extent that it renders the building not able to be used for its intended use, the assessing officials shall prorate the assessment for the building for the current tax year." N.H. Rev. Stat. Ann. 76:21(I) (2021) (emphasis added). Though the statute does not explicitly identify the types of damages it encompasses, the language used strongly implies *physical* damage, rather than purely economic loss. Because the government COVID-19 orders limiting or restricting Appellants' business operations did not cause physical damage to the buildings subject to this appeal, said buildings were not damaged for purposes of RSA 76:21.

A. RSA 76:21 Requires that a Taxable Building Be Physically Damaged in Order for the Owner to Obtain Relief Under the Statute.

Many reasons exist that demonstrate that relief under RSA 76:21 should be triggered only by damages that are purely physical in nature. The language of the statute itself, the legislative history, comparable law outside

the state, and case law across the country all support the contention that RSA 76:21 addresses *physical* damages.

i. Statutory Language.

Considering the plain and ordinary meaning of RSA 76:21, there must be physical damage to a building in order for its owner to be eligible for a tax proration under the statute. The statute specifically addresses damage to a "building," that is, "[a] structure with walls and a roof, especially a permanent structure." *Black's Law Dictionary* (11th ed. 2019). It makes no mention of damage to one's business, or even one's property. Furthermore, though Appellants appear to urge otherwise, *see* Appellants' Opening Br. 32 ("R.S.A. 76:21 states that a taxable building will be 'damaged' when, as a result of a natural disaster, the building cannot be used for its intended use."), the phrase "not able to be used for its intended use" should not be construed as the definition of "damaged" but rather as a threshold amount of damage qualifying a building owner for tax proration. *See* RSA 76:21(I). The phrase simply limits the qualifying damages to those that "render[] the building not able to be used for its intended use." *Id.* Without this language, even relatively minor damages could trigger tax proration. For example, a basement that becomes flooded as a result of a hurricane may qualify as damage to a building, but does not necessarily prevent the hotel occupying that building from renting rooms to its guests. Absent the "not able to be used for its intended use" qualification, an otherwise functional hotel with a flooded basement could, nevertheless, be eligible for a tax proration under RSA 76:21. *See id.* In other words, under the statute, a building is not necessarily damaged if it cannot be used for its

intended use; rather, a *damaged* building is eligible for tax proration only if it cannot be used for its intended use. *See id.*

Appellants strategically omit any reference to the word "damage" in their attempt to paraphrase the statute: "Put simply, a taxpayer is entitled to relief under R.S.A. 76:21 when, due to a natural disaster, the taxable building cannot be used for its intended use." Appellants' Opening Br. 35. In construing the statute this way, Appellants misrepresent the purpose of the statute, broadening the scope of the text well beyond "the plain and ordinary meaning of the words used." *See id.* 33 (referencing *MacPherson v. Weiner*, 158 N.H. 6, 9 (2008)). Had the legislature intended that the statute be interpreted as suggested by Appellants, the legislature would not have included the word "damaged" in the section title or statutory text. *See Marcotte v. Timberlane/Hampstead School Dist.*, 143 N.H. 331, 339 (1999) ("The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect."); *see also* RSA 76:21 (titled "Prorated Assessments for *Damaged* Buildings" (emphasis added)). The phrase "not able to be used for its intended use" *modifies* rather than defines what may qualify as "damaged" for purposes of the statute. *See* RSA 76:21(I). According to Appellants' interpretation, an otherwise functional hotel would be considered damaged under RSA 76:21 if it were located down a road destroyed by a tornado (or other natural disaster). *See* Appellants' Opening Br. 35. In this example, though the hotel itself may be completely unscathed by the tornado, it is still "not able to be used for its intended use" so long as it cannot be accessed by hotel guests, i.e., "used for its intended use." *See* RSA 76:21(I).

This interpretation does not square with the plain language of the statute, which specifically refers to *building* damage rather than *business* damage more generally. *See id.* This interpretation, if adopted, would likely trigger an avalanche of exemption claims by myriad property owners claiming damage to their business. Even with the cap included at RSA 76:21(V), such an interpretation would overwhelm local assessing departments by turning the cap from being an emergency relief valve into an annual calculation exercise.

ii. Legislative History.

The Court need not look beyond the statutory text of RSA 76:21 to determine legislative intent, *See MacPherson v. Weiner*, 158 N.H. 6, 9 (2008) ("We interpret legislative intent from the statute as written[.]"), but legislative history lends further support to Appellees' argument. The statute was introduced in the legislature in 2012 as Senate Bill 382, which initially stated the following:

> Whenever . . . a building containing a residential dwelling unit or no more than 4 residential units is damaged due to unintended fire or natural disaster *to the extent that 75 percent of the building requires reconstruction to restore occupancy*, the assessing officials shall prorate the assessment for the building for the current tax year.

S. J. No. 6–7, 162d Sess., 2d Year 253 (N.H. 2012) (emphasis added). That the bill specifically addresses damage requiring reconstruction demonstrates that the Senate intended for the statute to refer to physical damages rather than nonphysical damages such as the loss of business due to government COVID-19 orders. The subsequent amendment requiring, more broadly, that a building be rendered "not able to be used for its

intended use" does not permit the relief sought by Appellants; rather, it prevents possible under-inclusivity. *See* H.R. Calendar No. 36, 162d Sess., 2d Year 31 (N.H. 2012). Specifically, the updated language permits a prorated assessment where a building is "not able to be used for its intended use" but requires less than 75 percent reconstruction. *See id.*; RSA 76:21(I). In explaining the amended bill, Representative Betsey L. Patten stated that "[t]he loss of a *building* due to fire or Mother Nature is a unique circumstance deserving special recognition[.]" H.R. Calendar No. 36, 162d Sess., 2d Year 10 (N.H. 2012) (emphasis added). It is noteworthy that Representative Patten referred to the loss of a *building* rather than the loss of *business*. This distinction is further evidence that RSA 76:21 addresses only physical damages.

iii. Comparable Law.

Appellees' interpretation of RSA 76:21(I) also finds support in Oregon law, which includes a similar statute. It states, "If . . . any real or personal property is destroyed or damaged by fire or act of God, the property owner . . . may apply to the tax collector for proration of the taxes imposed on the property for the tax year." Or. Rev. Stat. Ann. 308.425(2). Notably, an administrative rule goes on to clarify the phrase "destroyed or damaged": "'Destroyed or Damaged' means that the real or personal property is *physically* degraded by a qualifying fire or Act of God event." Or. Admin. R. 150-308-0510 (2022) (emphasis added). The rule also provides the following example:

> A landslide caused by an Act of God occurs in a subdivision. Some properties in the subdivision are physically damaged or

> destroyed by the landslide. Other properties in the subdivision are not physically affected by the slide, but may have a degraded market value due to the market attaching a stigma to the subdivision. Only those properties in the subdivision, which were physically degraded by the slide, are "damaged or destroyed" and eligible for a proration of tax under ORS 308.425.

Id. The Oregon statute and corresponding rule, taken together, provide strong support for Appellees' contention that RSA 76:21(I) addresses only physical damage.

iv. Case Law.

Notably, courts across the country have declined to treat COVID-19, and related government orders, as property damage. In *Crystal Run Galleria LLC v. Town of Wallkill*, the petitioner challenged the tax assessment of its property, which had previously been set through the year 2021 pursuant to a consent order containing certain exceptions. 141 N.Y.S.3d 274, 276 (N.Y. Sup. Ct. 2021). One such exception read, "The Stipulated Full Market Values will be reduced if the Property is altered by fire, destruction, related demolition, or similar catastrophe." *Id.* (quoting consent order). The court held that this exception, viewed in light of the surrounding language and purpose of the order, did not apply to the COVID-19 pandemic. *Id.* at 280. The court stated in relevant part that

> a mere change in the value, use or function of the Property does not fall within the scope of the exception absent an alteration to the Property itself. . . . This change must involve *physical damage to the Property*. That is unambiguously signified by the requirement that it be caused "by fire, destruction, related demolition, or similar catastrophe."

Id. at 282.

Various other courts have held similarly in cases involving landlord-tenant and insurance disputes. In *Brown Jug, Inc. v. Cincinnati Ins. Co.*, plaintiff restaurant and entertainment venue operators sought a declaratory judgment that losses resulting from the presence of COVID-19 and government shutdown orders were compensable under their commercial property insurance policies. 27 F.4th 398, 400 (6th Cir. 2022). The court concluded that the plaintiffs "failed to adequately allege facts that support a finding that the virus caused actual property loss or damage." *Id.* at 403. In *Verveine Corp. v. Strathmore Ins. Co.*, plaintiff restaurant operators sought a declaratory judgment to determine whether economic losses resulting from government COVID-19 restrictions were covered by their insurance policies. 184 N.E.3d 1266, 1271 (Mass. 2022). The court held that "COVID-19 orders standing alone cannot possibly constitute 'direct physical loss of or damage to' property." *Id.* at 1276. In *Gap Inc. v. Ponte Gadea New York LLC*, plaintiff retailer contended that its closure of stores in response to loss of business stemming from the COVID-19 pandemic and associated government restrictions warranted the plaintiff's release from its obligations under its lease. 524 F. Supp. 3d 224, 227 (S.D.N.Y. 2021). The court held that COVID-19 and government COVID-19 restrictions did not qualify as "casualt[ies] causing damage occurring in or to the [rented] Premises[.]" *Id.* at 232 (internal quotation marks omitted).

In light of the above, RSA 76:21 should be read to encompass only physical damages to taxable buildings. The Court should therefore answer interlocutory appeal question no. 1 in the negative.

II. **Interlocutory Appeal Question No. 2 Should Be Answered In the Negative Because for Purposes of RSA 76:21, the COVID-19 Pandemic is Not a "Natural Disaster."**

The Appellants misconstrue court decisions in their brief as supporting their position that "courts in other jurisdictions have determined that COVID-19 constitutes a 'natural disaster.'" Appellants' Opening Br. 25. The Appellants rely on *Easom v. US Well Services, Inc.,* 527 F. Supp. 3d 898, 909 (S.D. Tex. 2021) which, notably was reversed and remanded by the U.S. Court of Appeals for the Fifth Circuit. *Easom v. US Well Servs., Inc*., 37 F.4th 238, 242 (5th Cir. 2022). Contrary to Appellants' argument, in *Easom*, the 5th Circuit explicitly held that the COVID-19 pandemic is ***not*** a "natural disaster." *Id*.

Appellants also cite to *JN Contemporary Art LLC v. Phillips Auctioneers LLC,* 507 F. Supp. 3d 490, 502-003 (S.D.N.Y. 2020) but again neglect to reference the appellate decision, *JN Contemp. Art LLC v. Phillips Auctioneers LLC*, 29 F.4th 118, 124 (2d Cir. 2022). The United States Court of Appeals for the Second Circuit chose to not resolve the question of whether COVID-19 is a "natural disaster" in reaching its decision.

Other cited cases by the Appellants where the Courts recognized COVID-19 as a natural disaster involve statutes and Emergency Codes which, unlike RSA 76:21, directly refer to pandemics, or public health crises when listing what would fall under their definition of a "natural disaster." *See Commonwealth v. Vila*, 104 Va. Cir. 389 (2020) (Virginia Code Section 44-146.16 states in part that a "natural disaster" includes a "communicable disease of public health threat," which is defined as "an illness of public health significance); *Friends of Danny DeVito v. Wolf*,

658 Pa. 165, 227 A.3d 872, cert. denied, 141 S. Ct. 239, 208 L. Ed. 2d 17 (2020) (Stating that the COVID-19 pandemic qualified as a "natural disaster" under the Emergency Code as the pandemic was of the same general nature or class as those specifically enumerated in the Code); *See also* Appellants' Opening Br. 26. Unlike the Virginia Code Section 44-146.16 in *Commonwealth v. Vila* and the Emergency Code referenced in *Friends of Danny DeVito*, RSA 76:21 does not define "natural disaster" nor does it specifically enumerate what would qualify as a natural disaster. Furthermore, none of the cases cited by the Appellants where the courts held that COVID-19 is a "natural disaster" involve a tax abatement statute similar to RSA 76:21.

Contrary to the impression conveyed in the Appellant's brief, on a closer inspection, the judicial treatment of whether COVID-19 is a "natural disaster" pursuant to RSA 76:21 is a far more mixed question and depends on the nature of the statute or code being analyzed.

Of the cases the Appellants rely upon to support their arguments, the analysis advanced by the 5th Circuit in *Easom* is most analogous. Even though *Easom* involved the interpretation of "natural disaster" under the WARN Act, there exist substantial similarities in the use of the same term in RSA 76:21. For example, just as the WARN Act does not define "natural disaster" so too, RSA 76:21 fails to provide a definition of the term. Therefore, in analyzing RSA 76:21, one would turn to the "ordinary meaning of the word ... as understood when the [Statute] was enacted." *See Easom,* 37 F.4th at 242 (*citing Carcieri v. Salazar*, 555 U.S. 379, 388, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009)).

In support of their argument, the appellants cite to the March 2022 version of the Oxford English Dictionary defining a "natural disaster" as a "natural event that causes great damage or loss of life such as a flood, earthquake, or hurricane." Even within this definition, a pandemic is not mentioned as an example of a "natural disaster." To supplement the appellants' dictionary definitions, Merriam Webster (July 2022) defines a "natural disaster" as "a sudden and terrible event in nature (such as a hurricane, tornado, or flood) that usually results in serious damage and many deaths." "Natural disaster." Merriam-Webster.com Dictionary, Merriam-Webster, *https://www.merriam-webster.com/dictionary/natural%20disaster*. Accessed 22 Jul. 2022. Similarly, the COVID-19 pandemic would not fall under this definition as it is not a "sudden…event in nature" but rather a gradual progression which has now spanned more than two years. *See CDC Museum COVID-19 Timeline*, (Jan. 5, 2022), *https://www.cdc.gov/museum/timeline/covid19.html*.

Furthermore, Courts will not add language to a statute that the legislature did not see fit to include. *Appeal of FairPoint Logistics, Inc*., 171 N.H. 361, 195 A.3d 825 (2018). RSA 76:21 does not include any language identifying that a pandemic, such as COVID-19, would fall under its definition of a natural disaster, even though the statute was enacted in 2012, on the coattails of the Swine Flu pandemic. Had the legislature intended to include pandemics or other broad-based health emergencies within the statute, it easily could have. The absence of such language is dispositive on this question. RSA 76:21 does not apply to the COVID-19 pandemic.

CONCLUSION

For these reasons, both questions transferred without ruling ought to be answered in the negative: The Appellants' buildings have not been "damaged" within the meaning of the statute, and the Covid-19 pandemic is not a "natural disaster" within the meaning of RSA 76:21.

REQUEST FOR ORAL ARGUMENT

The appellees request oral argument and designate Laura Spector-Morgan, Esquire to be heard.

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the within brief complies with Sup. Ct. R. 26 (7) and contains 3,167 words, excluding the cover page, table of contents, table of authorities, statutes, rules, and appendix.

Date: August 8, 2022

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this day forwarded through the Court's electronic filing system to all counsel of record.

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