THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0196

Clearview Realty Ventures, LLC v. City of Laconia
Chhavi Hospitality, LLC, et al. v. Town of Conway
JHM Hix Keene, LLC v. City of Keene
VIDHI Hospitality, LLC v. City of Keene
Naksh Hospitality, LLC v. City of Manchester
298 Queen City Hotel, LLC v. City of Manchester
ANSHI Hospitality, LLC v. City of Manchester
700 Elm, LLC v. City of Manchester
Bedford-Carnevale, LLC v. Town of Bedford
Carnevale Holdings, LLC v. Town of Bedford

OPENING BRIEF OF APPELLANTS

Appeal Pursuant to Supreme Court Rule 8 from
Hillsborough County Superior Court North, 211-2021-CV-00181;
212-2021-CV-00123; 213-2021-CV-00125; 213-2021-CV-00126;
216-2021-CV-00554; 216-2021-CV-00555; 216-2021-CV-00556;
216-2021-CV-00557; 216-2021-CV-00558; 216-2021-CV-00559

Attorneys for Appellants

Bernstein, Shur, Sawyer & Nelson, P.A.
Roy W. Tilsley, Jr., Esq., Bar No. 9400
Hilary H. Rheaume, Esq., Bar No. 265510
670 N. Commercial Street, Suite 108
P.O. Box 1120
Manchester, New Hampshire 03105
(603) 623-8700
rtilsley@bernsteinshur.com
hrheaume@bernsteinshur.com

June 23, 2022

TABLE OF CONTENTS

QUESTIONS PRESENTED 8

STATEMENT OF THE CASE AND FACTS 8

A. Statement of the Case 8

B. Statement of the Facts 9

STANDARD OF REVIEW 22

SUMMARY OF THE ARGUMENT 23

ARGUMENT 24

I. INTERLOCUTORY APPEAL QUESTION NO. 1 SHOULD BE ANSWERED IN THE AFFIRMATIVE BECAUSE, FOR PURPOSES OF R.S.A. 76:21, THE PLAIN AND ORDINARY MEANING OF A "NATURAL DISASTER" INCLUDES THE COVID-19 PANDEMIC 24

A. Natural 26

B. Disaster 27

II. INTERLOCUTORY APPEAL QUESTION NO. 2 SHOULD BE ANSWERED IN THE AFFIRMATIVE BECAUSE THE BUILDINGS SUBJECT TO THIS APPEAL WERE DAMAGED BY COVID-19, SUCH THAT THEY WERE NOT ABLE TO BE USED FOR THEIR INTENDED USE UNDER THE MEANING OF R.S.A. 76:21(I) 31

A. For Purposes of R.S.A. 76:21, a Taxable Building is "Damaged" When, as a Result of a Natural Disaster, the Taxable Building Cannot Be Used for Its Intended Use 32

i. Statutory Language 32

ii. Income Approach / Loss of Value 36

B. The Appellants Were Not Able to Use the Taxable Buildings for their Respective Intended Use for a Portion of the Applicable Tax Year 38

CONCLUSION 40

ORAL ARGUMENT 41

STATEMENT OF COMPLIANCE 42

CERTIFICATE OF SERVICE 43

TABLE OF AUTHORITIES

Cases

AB Stable VIII LLC v. Maps Hotels and Resorts One LLC,
No. 2020-0310, 2020 WL 7024929, at *1 (Del. 2020) 25, 26, 28

Akwa Vista, LLC v. NRT, Inc.,
160 N.H. 594, 603 (2010) 37

Andrew Cooper v. Governor Christopher T. Sununu, in his official capacity, and City of Nashua,
Docket No. 2020-CV-00266, Order on Plaintiff's
Emergency Motion for Preliminary Injunction
(Hillsborough – Southern Super. Ct. July 13, 2020) 28, 30

Appeal of Town of Lincoln,
172 N.H. 244 (2017) 25

Badgley v. Varelas,
729 F.2d 894 (2d Cir. 1984) 27

Bamb Track Operations, LLC d/b/a Riverside Speedway and Adventure Park v. Governor Christopher T. Sununu,
Docket No. 214-2020-CV-00046, Order on Motion
to Dismiss (Merrimack Super. Ct. Aug. 14, 2020) 28, 30

Bedford School District v. State,
171 N.H. 246 (2018) 25

Binford, et al. v. Governor Sununu,
Docket No. 217-2020-CV-00152, Order on Plaintiff's
Petition for Preliminary Injunction and Defendant's
Motion to Dismiss (Merrimack Super. Ct. Mar. 25, 2020) 29, 30

Carlisle v. Frisbie Mem. Hosp.,
152 N.H. 762 (2005) 33

Carr v. Town of New London,
170 N.H. 10 (2017) 22

Commonwealth v. Vila,
204 Va. Cir. 389 (Va. Cir. 2020) 25, 26, 28

Easom v. US Well Services, Inc.,
527 F. Supp. 3d 898 (S.D. Tex. 2021) 25, 26, 27, 28

Elwood v. Bolte,
119 N.H. 508 (1979) 37

Friends of Danny DeVito v. Wolf,
227 A.3d 872 (Pa. 2020) 25, 26, 28

Henderson Holdings at Sugar Hill v. Town of Sugar Hill,
164 N.H. 36 (2012) 22

Home Gas Corp. v. Strafford Fuels,
130 N.H. 74 (1987) 33

In re Art Van Furniture, LLC,
-- B.R. – (Bankr. D. Del. Mar. 21, 2022) 25, 26, 28

JN Contemporary Art LLC v. Phillips Auctioneers LLC,
507 F. Supp. 3d 490 (S.D.N.Y. 2020) 25, 26, 28

K.L.N. Construction Company, Inc. v. Town of Pelham,
167 N.H. 180 (2014) 25

Lord v. Lovett,
146 N.H. 232 (2001) 33

MacPherson v. Weiner,
158 N.H. 6 (2008) 33, 35

Martinonis v. Town of Kingston,
124 N.H. 304 (1983) 36

Meyer v. Conlon,
162 F.3d 1264 (10th Cir. 1998) 27

Nat. Res. Def. Council v. EPA,
896 F. 3d 459 (D.C. Cir. 2018) 27

Natasha Athens v. Christopher Sununu, Governor of the State of New Hampshire,
Docket No. 213-2020-CV-00104, Order on Motion for Preliminary Injunction and Motion to Dismiss (Cheshire Super. Ct. July 14, 2020) 28

N.H. Resident Ltd. Partners of Lyme Timber Co. v. N.H. Dep't of Revenue Admin.,
162 N.H. 98 (2011) 22

Pennsylvania Democratic Party v. Boockvar,
238 A.3d 345 (Pa. 2020) 25, 26, 28

Schleicher & Stebbins Hotels, LLC,
No. 217-2020-CV-00309, 2021 WL 4029204, at *1 (Merrimack Super. Ct. 2021) 35

Silva v. Warden,
150 N.H. 372 (2003) 33

Smith v. Cote,
128 N.H. 231 (1986) 32

State v. Exxon Mobil Corporation,
168 N.H. 211 (2015) 32, 33

Town of Croydon v. Current Use Advisory Bd.,
121 N.H. 442 (1981) 36

Ventas Realty Limited Partnership v. City of Dover,
172 N.H. 752 (2020) 36

Statutes

R.S.A. 4:45 .... 29, 30

R.S.A. 4:47 29

R.S.A. 21-P:35(VIII) 29, 30

R.S.A. 76:21 .... *passim*

R.S.A. 155-B:1 34

R.S.A. 232:30 34

R.S.A. 359-G:2 34

Other Authorities

1 J. Bonright, Valuation of Property 230 (1st ed. 1937) 36

Angela L. Rasmussen, *On the Origins of SARS-CoV-2*, 27 Nature Medicine 9, 9 (2021) 26

Black's Law Dictionary (11th ed. 2019) 25, 26, 27, 28

Murat Seyran, *et al., Questions Concerning the Proximal Origin of SARS CoV-2*, Journal of Medical Virology 1, 1 (2020) 26, 27

Oxford English Dictionary (March 2022) 25

QUESTIONS PRESENTED

1. For purposes of R.S.A. 76:21, does the novel coronavirus ("COVID-19") pandemic constitute a natural disaster? (*See* Int. Appeal St. at p. 19.)

2. If the first question is answered in the affirmative, then were the buildings subject to this appeal "damaged" by COVID-19 such that they were "not able to be used for [their] intended use" under the meaning of R.S.A. 76:21, I? (*See id.*)

STATEMENT OF THE CASE AND FACTS

A. Statement of the Case

This Interlocutory Appeal concerns whether a hotel owner, who could not use a taxable building for its intended use because of the COVID-19 pandemic, is entitled to relief under R.S.A. 76:21. New Hampshire law entitles a taxpayer to a proration of real estate taxes when a taxable building is damaged due to a natural disaster, such that the building is not able to used for its intended use. *See* R.S.A. 76:21. The Appellants—all owners of commercial real estate—were unable to use their respective taxable buildings because of the COVID-19 pandemic. Accordingly, the Appellants applied to their respective municipalities, in relevant part, for a proration of real estates under R.S.A. 76:21. However, the Appellee municipalities denied the applications. The Appellants subsequently appealed to the New Hampshire Superior Court, and such appeals are currently pending.

The Parties submitted this Interlocutory Appeal to the New Hampshire Supreme Court, so the Court can make the initial decision as to whether, for purposes of R.S.A. 76:21, (1) the COVID-19 pandemic

constitutes a "natural disaster," and (2) the taxable buildings subject to this appeal were damaged, such that they were unable to be used for their intended use. At this time, there are at least ten (10) cases pending in five (5) Superior Courts that raise this issue. In an effort to avoid potentially conflicting opinions, the Appellants initiated the instant Interlocutory Appeal with the assent of the Appellees. In the event the New Hampshire Supreme Court answers both interlocutory appeal questions in the affirmative, then the Appellants will proceed with their respective claims under R.S.A. 76:21 in the Superior Courts. At that point, the Superior Courts will determine the appropriate proration of the building assessment based on the statute. *See* R.S.A. 76:21(II).

B. Statement of the Facts

The Parties prepared the following agreed-upon Statement of Facts, which was previously submitted with the Interlocutory Appeal and approved by the Superior Court when it transferred the Interlocutory Appeal to the New Hampshire Supreme Court for an initial ruling:

1. In December 2019, an outbreak of respiratory illness due to a novel coronavirus ("COVID-19") started to impact the United States of America. (App. at 1.)[1]

2. On January 23, 2020, the Centers for Disease Control and Prevention (the "CDC") activated its Emergency Response System in response to the COVID-19 outbreak. (*Id.*)

[1] The term "App" refers to the Appellants' Appendix filed with the Interlocutory Appeal Statement.

3. On January 30, 2020, the World Health Organization ("WHO") declared a Public Health Emergency of International Concern in response to the COVID-19 outbreak. (*Id.*)

4. On January 31, 2020, the United States Department of Health and Human Services declared a Public Health Emergency in response to the COVID-19 outbreak. (*Id.*)

5. On or around March 11, 2020, the WHO declared COVID-19 a pandemic. (*Id.*)

6. On March 12, 2020, the State of New Hampshire Division of Public Health and the Division of Homeland Security and Emergency Management provided New Hampshire residents with a telephone number to discuss questions related to COVID-19. (*Id.*)

7. On March 13, 2020, the President of the United States declared a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak. (*Id.* at 2.)

8. On March 13, 2020, the Governor for the State of New Hampshire, Governor Sununu, issued Executive Order 2020-04, in which he declared a State of Emergency caused by COVID-19. (*Id.* at 1-6.)

9. Executive Order 2020-04 recites that "experts indicate that COVID-19 is most commonly spread from an infected symptomatic person to others through respiratory droplets, including: through the air by coughing and sneezing; close personal contact, such as touching and shaking hands; touching an object or surface with the virus on it, then touching your mouth, nose, or eyes before washing your hands." (*Id.* at 2.)

10. The CDC reported that COVID-19 may be spread before an infected person shows symptoms of the virus. (*Id.* at 10.)

11. On March 13, 2020, the State of New Hampshire Department of Safety, Division of Homeland Security and Emergency Management activated the State Emergency Operations Center as a result of COVID-19. (*Id.* at 2.)

12. On March 16, 2020, Governor Sununu issued Emergency Order No. 2 pursuant to Executive Order 2020-04, which temporarily prohibited the following activities within the State of New Hampshire:

> 1. Scheduled gatherings of 50 people or more for social, spiritual and recreational activities, including but not limited to, community, civic, public, leisure, faith based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities.
>
> 2. Food and beverage sales are restricted to carry-out, delivery, curbside pick up, and drive through only, to the extent permitted by current law. No onsite consumption areas in restaurants, diners, bars, saloons, private clubs, or any other establishment that offers food and beverages for sale shall be closed to customers.

(*Id.* at 7.)

13. Pursuant to Emergency Order No. 2, the Governor also authorized the Division of Public Health to enforce the Order and "if necessary may do so with the assistance of State or local police." (*Id.*)

14. On March 23, 2020, the first New Hampshire death resulting from COVID-19 occurred. (*Id.* at 9.)

15. On March 23, 2020, Governor Sununu issued Emergency Order No. 16 pursuant to Executive Order 2020-04, which superseded in part Emergency Order No. 2, and temporarily prohibited scheduled

gatherings of ten (10) or more attendees at the activities described in Emergency Order No. 2. (*Id.* at 8.)

16. Food and beverage sales were still restricted to carry-out, delivery, curbside pick-up and drive through only, as set forth in Emergency Order No. 2. (*Id.* at 7-8.)

17. As of March 26, 2020, the CDC reported 54,453 confirmed cases of COVID-19 in the United States with 737 deaths. (*Id.* at 9.)

18. Further, 27 U.S. states, including New Hampshire, reported some community spread of COVID-19. (*Id.* at 10.)

19. In New Hampshire, the Department of Health and Human Services, Division of Public Health Services reported 158 cases of COVID-19, 1 death, and 16 hospitalizations. (*Id.*)

20. On March 26, 2020, Governor Sununu issued Emergency Order No. 17, pursuant to Executive Order 2020-04, which provided in relevant part that:

> 2. All businesses and other organizations that do not provide Essential Services shall close their physical workspaces and facilities to workers, customers, and the public and cease all in person operations as of 11:59 p.m. on March 27, 2020 and shall not re-open to workers, customers or the public or resume in person operations before 12:01 a.m. on May 4, 2020.
> …
> 4. Beginning at 11:59 p.m. on March 27, 2020, New Hampshire citizens shall stay at home or in their place of residence with the following exceptions…

(*Id.* at 9-12.)

21. Pursuant to Exhibit A of Emergency Order No. 17, all businesses deemed "essential" were "urged to follow social distancing

protocols for employees in accordance with guidance from the Department of Public Health, including but not limited to: (1) Prohibiting all gatherings with more than 10 individuals, (2) Keeping all personnel six feet apart, [and] (3) Encouraging employees to stay home when sick, and sending home those who report feeling ill or display symptoms." (*Id.* at 13.)

22. In relevant part, "workers at hotel and commercial lodging facilities" were deemed to be "essential" under Emergency Order No. 17. (*Id.* at 21.)

23. Again, Governor Sununu authorized the Division of Public Health and State or local police to enforce Emergency Order No. 17. (*Id.* at 12.)

24. As of April 2, 2020, the CDC reported that every U.S. state had a reported case of COVID-19 and there were 213,144 confirmed cases of COVID-19 in the United States and territorial partners with 4,513 deaths. (*Id.* at 25.)

25. As of April 3, 2020, the state Department of Health and Human Services, Division of Public Health Services reported 540 cases of COVID-19 in the State of New Hampshire, 7 deaths, 80 hospitalizations, 1,700 individuals were being monitored for COVID-19 and all 10 counties in the State of New Hampshire had been impacted. (*Id.* at 26.)

26. On April 3, 2020, Governor Sununu issued Executive Order No. 2020-05, in which he extended the State of Emergency declared in Executive Order No. 2020-04 and all Emergency Orders issued pursuant thereto. (*Id.* at 25-27.)

27. According to Executive Order No. 2020-05, the CDC reported that "COVID-19 may be spread before an infected person shows symptoms

of the virus" and "COVID-19 is spread mainly from person-to-person, that COVID-19 is currently spreading very easily and sustainably, and that the best way to prevent illness is to avoid being exposed to COVID-19." (*Id.* at 26.)

28. On April 6, 2020, Governor Sununu issued Emergency Order No. 27, pursuant to Executive Orders 2020-04 and 2020-05, which provided in relevant part that:

> 1. In order to slow the spread of COVID-19, and to promote and secure the safety and protection of the people of New Hampshire, all lodging providers within the State of New Hampshire are hereby restricted to providing lodging for vulnerable populations and essential workers only, as those terms are defined in this Order.
>
> 2. For purposes of this Order, lodging providers shall include hotels; motels; bed and breakfasts; inns; and short term rentals such as those made available through VRBO, Homeaway, AirBnb and other services.
>
> …
>
> 7. The Division of Public Health and State or local police shall have the authority to enforce this Order.

(*Id.* at 28-30.)

29. According to Emergency Order No. 27, "vulnerable populations" included:

> a. Children in emergency placements
> b. Persons who are victims of or at risk of domestic violence
> c. Homeless individuals and families for whom hotels or other lodging accommodations and operations are being used as emergency shelters

d. New Hampshire residents who are self-isolating or self-quarantining

e. Individuals receiving long-term, specialized medical care from a physician or other medical provider located in New Hampshire and accompanying family members

f. Individuals in need of housing, accommodation and shelter due to extenuating circumstances such as fire or casualty

g. Individuals unable to return to their homes outside of New Hampshire due to flight cancellations, border closures, or other direction and materials constraints on travel.

(*Id.* at 29-30.)

30. Further, Emergency Order No. 27 suspended all online reservations for lodging in the State of New Hampshire and required all lodging providers to "post a prominent notice on their web platforms to advise potential guests that reservations for lodging in New Hampshire, as allowed by this Order, shall be accepted by phone only." (*Id.* at 30.)

31. Additionally, Emergency Order No. 27 prohibited lodging providers from allowing "stay extension or new reservations, except for the purposes permitted in this Order." (*Id.*)

32. On May 1, 2020, Governor Sununu issued Emergency Order No. 40, which superseded Emergency Order No. 17. (*Id.* at 31-35.)

33. Pursuant to Emergency Order No. 40, certain businesses, including lodging, were permitted as of May 1, 2020 to resume operations in accordance with the State of New Hampshire's Universal Business Guidelines and industry-specific guidelines. (*Id.* at 36-121.)

34. According to the industry-specific guidelines that apply to the lodging industry, all hotels, motels, bed and breakfasts, cabin communities and similar operations open to the public, including short-term rentals, were allowed to immediately accept reservations and commence guest check-ins as of June 5, 2020 for New Hampshire residents, or out-of-state visitors who met the 14 day quarantine requirement. (*Id.* at 115.)

35. Per Emergency Order No. 40, lodging business were permitted to resume operations according to an Exhibit D schedule and guidelines, which stated as to capacity:

> Safeguarding Guidance: In addition to strict adherence to CDC guidelines, the State of New Hampshire recommends putting into place measures to protect consumers and employees, including:
> …
> Business Process Adaptations: 1. Capacity for lodging operations that have inside room access should be limited to 50% of approved rentable rooms in order to limit guests coming into close contact. For lodging operations that have individual outside room access, or inns or bed and breakfast facilities with 20 or fewer internal access rooms, no capacity restrictions apply. For the purposes of determining capacity, room usage by pandemic emergency workers and first responders, and existing occupancy by long term residents, shall be not (sic) be included in the capacity calculation.

(*Id.* at 115-117.)

36. Additionally, the Exhibit D schedule and guidance recommended that lodging businesses that served food should follow certain Restaurant and Food Service Guidance promulgated by the Governor's Economic Reopening Task Force. (*Id.*; *see also id.* at 118-21).

37. The Restaurant and Food Service Guidance recommended that, during "Consumer Protection Phase 1", seated indoor dining is not permitted, tables are limited to no more than six (6) guests per table, bar seating remains closed, and no catering or large-group functions allowed. (*Id.* at 119-21.)

38. On June 15, 2020, Governor Sununu issued Emergency Order No. 52, which required "[a]ll businesses or organizations operating within this State" to operate in accordance with the Universal Business Guidelines issued by the State of New Hampshire, along with any applicable industry specific guidelines. (*Id.* at 122-28.)

39. Under guidance for the Food Services Industry – Phase 2, restaurants located in Belknap, Coos, Carroll, Cheshire, Sullivan, and Grafton Counties were allowed to provide indoor seated dining to patrons. (*Id.* at 138.)

40. Under guidance for the Food Services Industry, restaurants located in Rockingham, Hillsborough, Merrimack and Strafford Counties were allowed to provide indoor seated dining at fifty (50%) percent capacity. (*Id.*)

41. At all restaurants, tables remained limited to six (6) patrons and there was a required six (6) foot distance between tables. (*Id.* at 138-39)

42. Also, under guidance for the Food Services Industry – Phase 2, indoor post-wedding celebrations and meals were limited to fifty (50%) percent of the normal operating seating capacity. (*Id.* at 140-41.)

43. The June 25, 2020 guidance for lodging removed the 50% limit on capacity, allowing for 100% capacity for all lodging facilities. (*Id.* at 142-45.)

44. As recited in Executive Order 202-15, issued July 17, 2020, a CDC report on the best way to prevent illness by avoiding exposure to COVID-19 included, as one step, the routine cleaning and disinfecting of frequently touched surfaces. (*Id.* at 149.)

45. As of July 16, 2020, the state Department of Health and Human Services, Division of Public Health, reported 6,139 cases of COVID-19 in the State of New Hampshire, 395 deaths, 668 hospitalizations, and approximately 3,575 individuals who were being monitored. (*Id.*)

46. Further, as of July 16, 2020, the CDC reported that there were 3,483,832 confirmed cases of COVID-19 in the United States with 136,938 deaths. (*Id.* at 149.)

47. On August 13, 2020, Governor Sununu issued Emergency Order No. 65, which provided that:

> 1. Violations of any Emergency Order, rule, or regulation issued under the State of Emergency are subject to the penalty provision under R.S.A. 21:P:47.
>
> …
>
> 5. The Division of Public Health (DPH), working through its staff or local health officers, shall take necessary enforcement actions for violations of the Emergency Orders, including imposing civil penalties or immediately closing any event, activity, business, entity, organization, facility, or property.

(*Id.* at 154-56.)

48. On August 21, 2020, Governor Sununu announced that "effective immediately, we will have 100% capacity in restaurants that choose to do so." (*Id.* at 160.)

49. On November 14, 2020, Governor Sununu issued Emergency Order No. 72, which required all New Hampshire residents and

travelers/visitors to the State of New Hampshire to comply with the travel guidance documents issued by the Division of Public Health and included on Exhibit A to the Emergency Order. (*Id.* at 172-75.)

50. Pursuant to the Exhibit A travel guidance,

> **[t]ravelers/visitors** to **AND residents** of NH need to self-quarantine for 14 days following the last date of any high-risk travel, which includes travel internationally (including to/from Canada); on a cruise ship; or domestically outside of the New England states of Maine, Vermont, Massachusetts, Connecticut, or Rhode Island for non-essential purposes.
> …
> It is permissible for travelers/visitors to NH to quarantine in their home state for the 14 days immediately prior to arrival as long as they did not travel on public transportation to get to NH. Alternatively, travelers/visitors to NH have the option of quarantining in their home state for 7 days, and then obtaining a molecular test (e.g., PCR-based test) to test for active SARS-CoV-2 infection immediately prior to arrival to NH, and if negative the traveler is not require to quarantine upon arrival to NH as long as they did not travel on public transportation to get to NH….Quarantine means the person may not leave their home, even for work, school, or other essential functions, and the person traveling to NH may not end quarantine before receiving their test result and before traveling to NH (i.e., from the point of testing negative until their arrival in NH, there must be no other potential public exposures).

(*Id.* at 176-77.) (emphasis in original).

51. As of March 22, 2021, the New Hampshire Department of Health and Human Services, Division of Public Health reported 80,750 cases of COVID-19 in the State of New Hampshire, 1,217 deaths, and 1,186 hospitalizations. (*Id.* at 184.)

52. As of March 23, 2021, the CDC reported that there were 29,652,483 confirmed cases of COVID-19 in the United States with 539,517 deaths. (*Id.*)

53. On May 26, 2021, the CDC reported that there were 32,994,369 confirmed cases of COVID-19 in the United States with 588,421 deaths. (*Id.* at 192.)

54. As of May 26, 2021, the state New Hampshire Department of Health and Human Services, Division of Public Health reported 98,470 cases of COVID-19 in the State of New Hampshire, 1,346 deaths, and 49 hospitalizations. (*Id.*)

55. Emergency Order No. 52 remained in effect through May 7, 2021. (*Id.* at 190.)

56. The travel guidance set forth in Emergency Order No. 72 remained in effect through May 7, 2021. (*Id.*)

57. Governor Sununu extended the State of Emergency declared in Executive Order No. 2020-04 twenty-one (21) times with the last extension issued on May 28, 2021. (*Id.* at 191-94.)

58. Executive Order No. 2020-04 expired on June 11, 2021. As a result, all Emergency Orders that were issued pursuant to Executive Order No. 2020-04 also expired on June 11, 2021. (*Id.* at 194.)

59. The Plaintiffs own commercial real estate within the State of New Hampshire.

60. The Plaintiffs operate separate hotels on their respective real estate, and a few of the hotels offer restaurant services to patrons, along with banquet and/or function facilities.

61. The Plaintiffs all filed timely abatement applications with their respective municipality on or before March 1, 2021.

62. In their tax abatement applications, the Plaintiffs sought an abatement of real estate taxes, pursuant to R.S.A. 76:17, and/or a proration of real estate taxes, pursuant to R.S.A. 76:21.

63. The applicable municipalities either denied the Plaintiffs' abatement request and/or granted a partial abatement.

64. On or around August 31, 2021, the Plaintiffs each filed a Petition for Abatement of Real Estate Taxes Assessed for Tax Year 2020 Pursuant to R.S.A. 76:17 and 76:21 (the "Petitions"), which, in relevant part, seeks a proration of real estate taxes under R.S.A. 76:21. R.S.A. 76:21(I) provides that:

> 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.

65. In their Petitions, the Plaintiffs seek a proration of real estate taxes under R.S.A. 76:21 on the basis that the novel coronavirus ("COVID-19") pandemic qualifies as a natural disaster that caused damage to their respective buildings and, as a result of the natural disaster, their buildings were not able to be used, or fully used, for their intended use.

66. Plaintiffs contend that the buildings were "damaged" by COVID-19 and therefore "not able to be used for [their] intended use" under the meaning of R.S.A. 76:21, I.

67. All but two of the Plaintiffs received Paycheck Protection Program funding from the federal government in amounts ranging from approximately $80,000 to $1,179,000; and at least one of the Plaintiffs also received funding form the New Hampshire Main Street Relief Program.

STANDARD OF REVIEW

This Interlocutory Appeal does not require the Court to review a trial court decision, but, instead, requires the Court to make an initial determination concerning the applicability of R.S.A. 76:21 to the COVID-19 pandemic. Specifically, the issue before this Court is whether, as a result of the COVID-19 pandemic, a taxpayer may be entitled to a proration of real estate taxes under R.S.A. 76:21. Accordingly, to resolve this Interlocutory Appeal, the Court will need to interpret R.S.A. 76:21(I). When interpreting a statute, the Court will first examine "the language of the statute and ascribe the plain and ordinary meanings to the words used." *See Carr v. Town of New London*, 170 N.H. 10, 13 (2017) (quoting *Henderson Holdings at Sugar Hill v. Town of Sugar Hill*, 164 N.H. 36, 38 (2012)). Further, the Court will interpret the statute "in the context of the overall statutory scheme and not in isolation." *Id.* Ultimately, the Court's goal is to "apply statutes in light of the legislature's intent in enacting them and in light of the policy sought to be advanced by the entire statutory scheme." *Id.*

In the event a taxing statute is deemed ambiguous, the Court "will construe it against the government and in favor of the taxpayer." *Id.* (citing *N.H. Resident Ltd. Partners of Lyme Timber Co. v. N.H. Dep't of Revenue Admin.*, 162 N.H. 98, 102 (2011)).

SUMMARY OF THE ARGUMENT

The COVID-19 pandemic qualifies as a "natural disaster" under R.S.A. 76:21 and, thus, the Court should answer the first interlocutory appeal question in the affirmative. First, the COVID-19 pandemic was brought about by nature and, thus, qualifies as a "natural" event. Second, the COVID-19 pandemic, which caused a significant loss of life, constitutes a "disaster." Further, Governor Sununu and the New Hampshire Superior Courts previously concluded that the COVID-19 pandemic qualifies as a "disaster."

Pursuant to R.S.A. 76:21, a taxpayer is entitled to a proration of real estate taxes when, as a result of a natural disaster, a taxable building is unable to be used for its intended use. Here, the Appellants' taxable buildings were damaged, such that the Appellants were unable to use the taxable buildings for their intended use, as a result of the COVID-19 pandemic. Further, the taxable buildings were "damaged" as a result of COVID-19 because the reduced operations resulted in a loss of value. Accordingly, the Court should answer the second interlocutory appeal question in the affirmative.

For the reasons set forth herein, the Court should answer both interlocutory appeal questions in the affirmative.

ARGUMENT

I. INTERLOCUTORY APPEAL QUESTION NO. 1 SHOULD BE ANSWERED IN THE AFFIRMATIVE BECAUSE, FOR PURPOSES OF R.S.A. 76:21, THE PLAIN AND ORDINARY MEANING OF A "NATURAL DISASTER" INCLUDES THE COVID-19 PANDEMIC.

As set forth above, R.S.A. 76:21(I) provides that:

> 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.

R.S.A. 76:21(I) (emphasis added). In other words, R.S.A. 76:21 applies when a taxpayer can establish that a taxable building has been "damaged" by a "natural disaster," such that it could not be used for its intended use during a portion of the applicable tax year. Notably, R.S.A. 76:21 does not state that a taxpayer must establish that a taxable building suffered physical loss to seek a proration of real estate taxes under the statute. Rather, it simply applies when a taxable building has been "damaged" by a "natural disaster," such that the taxable building cannot be used for its intended use. Accordingly, a taxpayer's ability to obtain relief under R.S.A. 76:21 does not hinge on whether the taxable building suffered physical loss during the tax year and, thus, this case is distinguishable from the cases that analyze damage and/or physical loss under insurance policies.

R.S.A. 76:21 does not define the term "natural disaster," nor does a definition appear in any applicable regulations. Since the term "natural

disaster" is not defined in the statute, the Court will use the dictionary as guidance in its analysis. *K.L.N. Construction Company, Inc. v. Town of Pelham*, 167 N.H. 180, 185 (2014) ("When a term is not defined in the statute, we look to its common usage, using the dictionary for guidance"); *see also Appeal of Town of Lincoln*, 172 N.H. 244, 248 (2017) (using the Webster's Third New International Dictionary as guidance when a statutory term is not defined); *Bedford School District v. State*, 171 N.H. 246, 250 (2018) (using Black's Law Dictionary as guidance when a statutory term is not defined).

The vernacular definition of a "natural disaster" is "[a] natural event that causes great damage or loss of life such as a flood, earthquake, or hurricane." Oxford English Dictionary (March 2022). Black's Law Dictionary does not define "natural disaster," but it separately defines "natural" as "[b]rought about by nature as opposed to artificial means" and "disaster" as "[a] calamity; a catastrophic emergency." Black's Law Dictionary (11th ed. 2019). Notably, courts in other jurisdictions have determined that COVID-19 constitutes a "natural disaster" based on the same or similar definitions. *See Easom v. US Well Services, Inc.*, 527 F. Supp. 3d 898, 909 (S.D. Tex. 2021); *see also In re Art Van Furniture, LLC*, -- B.R. – (Bankr. D. Del. Mar. 21, 2022); *JN Contemporary Art LLC v. Phillips Auctioneers LLC*, 507 F. Supp. 3d 490, 502-03 (S.D.N.Y. 2020); *AB Stable VIII LLC v. Maps Hotels and Resorts One LLC*, No. 2020-0310, 2020 WL 7024929, at *58 (Del. 2020); *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 370 (Pa. 2020); *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 888-89 (Pa. 2020); *Commonwealth v. Vila*, 204 Va. Cir. 389 (Va. Cir. 2020).

With the foregoing definitions in mind, the COVID-19 pandemic qualifies as a "natural disaster" for purposes of R.S.A. 76:21 because (1) the COVID-19 pandemic was brought about by nature, and (2) the COVID-19 pandemic created a catastrophic emergency that resulted in a significant loss of life.

A. Natural

As set forth above, Black's Law Dictionary defines the term "natural" as "[b]rought about by nature as opposed to artificial means." Black's Law Dictionary (11th ed. 2019). A number of jurisdictions have previously concluded that COVID-19 was "brought about by nature" because "human beings were not responsible for starting or consciously spreading the virus." *See Easom*, 527 F. Supp. at 909; *see also In re Art Van Furniture, LLC*, -- B.R. at –; *JN Contemporary Art LLC*, 507 F. Supp. 3d at 502-03; *AB Stable VIII LLC*, 2020 WL 7024929, at *58; *Pennsylvania Democratic Party*, 238 A.3d at 370; *Friends of Danny DeVito f*, 227 A.3d at 888-89; *Commonwealth*, 204 Va. Cir. at 389.

As the Court in *Easom* explained, "COVID-19, like other viruses, did not require conscious human effort to appear or spread, as individuals without symptoms infected others." *Easom*, 527 F. Supp. 3d at 909 (citing Angela L. Rasmussen, *On the Origins of SARS-CoV-2*, 27 Nature Medicine 9, 9 (2021) ("[A]ll indications suggest that, like SARS-CoV and MERS-CoV, this virus probably evolved in a bat host until an unknown spillover event into humans occurred"); Murat Seyran, *et al., Questions Concerning the Proximal Origin of SARS CoV-2*, Journal of Medical Virology 1, 1 (2020) ("There is a consensus that severe acute respiratory syndrome coronavirus

(SARS-CoV-2) originated naturally from bat coronaviruses (CoVs), in particular RaTG13”)).

To the extent the Appellees argue that the COVID-19 pandemic does not constitute a “natural” event because human intervention can slow and/or increase the spread of the virus, such an argument lacks merit. For example, it is indisputable that an avalanche and/or a wildfire would constitute a natural disaster. Despite the foregoing, such natural disasters can be reduced and/or eliminated through human intervention. *See Easom*, 527 F. Supp. 3d at 908 n. 3 (“[A] natural disaster may be slowed or altered by human intervention and still be a natural disaster. Examples include measures to reduce avalanches or to control or stop wildfires.”) Accordingly, whether human intervention can slow and/or increase the spread of COVID-19 does not negate a finding that the COVID-19 pandemic is a natural disaster.

Further, other jurisdictions have concluded that a disease outbreak constitutes a “natural disaster.” *See Meyer v. Conlon*, 162 F.3d 1264, 1266 (10th Cir. 1998) (explaining that a natural disaster includes “hail and disease”); *Badgley v. Varelas*, 729 F.2d 894, 902 (2d Cir. 1984) (“explaining that a natural disaster includes a “fire or disease”); *see also Nat. Res. Def. Council v. EPA*, 896 F. 3d 459, 464 (D.C. Cir. 2018) (explaining that a “natural event” includes “organic processes, such as viral epidemics and seasonal changes”).

Based on the foregoing, the COVID-19 pandemic constitutes a “natural” event for purposes of R.S.A. 76:21.

B. Disaster

For purposes of R.S.A. 76:21, the COVID-19 pandemic constitutes a “disaster.” As set forth above, Black’s Law Dictionary defines the term

"disaster" as "[a] calamity; a catastrophic emergency." Black's Law Dictionary (11th ed. 2019). Based on this definition, a number of jurisdictions have found that the COVID-19 pandemic constitutes a disaster. *Easom*, 527 F. Supp. 3d at 908 ("COVID-19 is clearly a 'disaster.'"); *JN Contemporary Art LLC*, 507 F. Supp. 3d at 501-503 (explaining that "the COVID-19 pandemic is fairly described as a 'natural disaster.' It is a worldwide public health crisis that has taken untold lives and upended the world economy."); *AB Stable VIII LLC*, 2020 WL 7024929 at *57 (explaining that the COVID-19 pandemic fits within the plain meaning of the term "calamity" because "[m]illions have endured economic disruptions, become sick, or died from the pandemic. COVID-19 has caused human suffering and loss on a global scale, in the hospitality industry, and for Strategic's business. The COVID-19 outbreak has caused lasting suffering and loss throughout the world."); *see also In re Art Van Furniture, LLC*, -- B.R. –; *Pennsylvania Democratic Party*, 238 A.3d at 370; *Friends of Danny DeVito*, 227 A.3d 872, 888-89 (Pa. 2020); *Commonwealth*, 204 Va. Cir. 389 (Va. Cir. 2020).

Although this Court has not previously concluded that the COVID-19 pandemic constitutes a "disaster," several New Hampshire Superior Courts have concluded that the COVID-19 pandemic constitutes a "disaster." *See Natasha Athens v. Christopher Sununu, Governor of the State of New Hampshire*, Docket No. 213-2020-CV-00104, Order on Motion for Preliminary Injunction and Motion to Dismiss (Cheshire Super. Ct. July 14, 2020); *Andrew Cooper v. Governor Christopher T. Sununu, in his official capacity, and City of Nashua*, Docket No. 2020-CV-00266, Order on Plaintiff's Emergency Motion for Preliminary Injunction (Hillsborough – Southern Super. Ct. July 13, 2020); *Bamb Track Operations, LLC d/b/a*

Riverside Speedway and Adventure Park v. Governor Christopher T. Sununu, Docket No. 214-2020-CV-00046, Order on Motion to Dismiss (Merrimack Super. Ct. Aug. 14, 2020); *Binford, et al. v. Governor Sununu*, Docket No. 217-2020-CV-00152, Order on Plaintiff's Petition for Preliminary Injunction and Defendant's Motion to Dismiss (Merrimack Super. Ct. Mar. 25, 2020).

For example, in *Binford*, the Merrimack Superior Court determined that the Governor Sununu had a lawful basis to declare a state of emergency and issue certain executive orders, such as Executive Order 2020-04, in response to the COVID-19 pandemic on the basis that the COVID-19 pandemic constituted a "disaster." *See Binford*, Docket No. 217-2020-CV-00152 at *6-*9. To reach its conclusion, the Merrimack Superior Court explained that the "governor's power to declare a state of emergency is derived from R.S.A. 4:45 and 4:47." *Id.* at *6. R.S.A. 4:45(I) provides that:

> The governor shall have the power to declare a state of emergency, as defined in R.S.A. 21-P:35, VIII, by executive order if the governor finds that a natural, technological, or man-made <u>disaster</u> of major proportions is imminent or has occurred within this state, and that the safety and welfare of the inhabitants of this state require an invocation of the provisions of this section.

R.S.A. 4:45(I) (emphasis added). R.S.A. 21-P:35(VIII) defines a state of emergency as a

> condition, situation, or set of circumstances deemed to be so extremely hazardous or dangerous to life or property that it is necessary and essential to invoke, require, or utilize extraordinary measures, actions, and procedures to lessen or mitigate possible harm.

R.S.A. 21-P:35(VIII). Although the plaintiff argued that the COVID-19 pandemic did not constitute a "disaster," the Merrimack Superior Court disagreed and concluded that, based on the factual representations made in Executive Order 2020-04, the COVID-19 pandemic qualified as a "natural, technological, or man-made disaster of major proportions." *Binford*, Docket No. 217-2020-CV-00152 at *8-*9.

Similarly, the Hillsborough County Superior Court—Southern District explained that the Governor properly declared a state of emergency on the basis that the COVID-19 pandemic was a "disaster" because:

> First, the Governor's Executive Orders themselves adequately establish the factual bases supporting his 'emergency' finding. And, as a matter of common sense, it is clear that a state of emergency exists. As anyone not living in a cave for the past few months would know, the State, the Country, and the entire world are in the midst of a once-in-a-century pandemic event. Nearly every aspect of everyday life has changed because of the novel coronavirus, SARS-CoV-2. Millions of Americans have been infected with the virus. Hundreds of thousands of Americans have died, and the death toll is continuing to climb each day, with no clear end in sight. In the past few days, the number of new infections in this country has skyrocketed to all-time highs. Many New Hampshire citizens have lost their jobs, while businesses and schools have closed. The tragic and fast-changing circumstances caused by the novel coronavirus clearly demand the flexibility afforded to the Governor under the emergency powers granted by R.S.A. 4:45; 47.

Cooper, Docket No. 2020-CV-00266 at *14; *see also Bamb Track Operations, LLC d/b/a Riverside Speedway and Adventure Park*, Docket No. 214-2020-CV-00046 at *13 ("Given the rapid spread of the disease and the lives that may have been and may yet to be lost in the absence of government action, the Governor did not err in finding that the spread of COVID-19 is an

'extremely hazardous or dangerous' threat 'to life or property.'"). Accordingly, the COVID-19 pandemic constitutes a "disaster" for purposes of R.S.A. 76:21.

Based on the foregoing, the COVID-19 pandemic qualifies as a "natural disaster." Not only would such a holding line up with the definition of a "natural disaster," but also it would follow the holdings of several other jurisdictions that have addressed the issue. Therefore, the Court should answer the first interlocutory appeal question in the affirmative because, for purposes of R.S.A. 76:21, the COVID-19 pandemic constitutes a "natural disaster."

II. INTERLOCUTORY APPEAL QUESTION NO. 2 SHOULD BE ANSWERED IN THE AFFIRMATIVE BECAUSE THE BUILDINGS SUBJECT TO THIS APPEAL WERE DAMAGED BY COVID-19, SUCH THAT THEY WERE NOT ABLE TO BE USED FOR THEIR INTENDED USE UNDER THE MEANING OF R.S.A. 76:21(I).

Upon deciding that the COVID-19 pandemic qualifies as a "natural disaster" for purposes of R.S.A. 76:21, the Court should likewise conclude that the taxable buildings subject to this appeal were damaged by COVID-19, such that they were not able to be used for their intended use. *See* R.S.A. 76:21(I). As set forth above, R.S.A. 76:21(I) provides that:

> 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.

R.S.A. 76:21(I) (emphasis added). In other words, the "assessing officials shall prorate the assessment" for a taxable building when, in relevant part, the building was "damaged" by a natural disaster, such that it was "not able to be used for its intended use." *See id.* For the reasons set forth herein, the Court should answer the second interlocutory appeal question in the affirmative because COVID-19 damaged the taxable buildings, such that the Appellants were not able to use the taxable buildings for their intended use.

A. For Purposes of R.S.A. 76:21, a Taxable Building is "Damaged" When, as a Result of a Natural Disaster, the Taxable Building Cannot Be Used for Its Intended Use

For at least two (2) reasons, the Court should conclude that, for purposes of R.S.A. 76:21, a taxable building is "damaged" when, as a result of a natural disaster, the taxable building cannot be used for its intended use. First, the term "damaged" in R.S.A. 76:21 is qualified by the phrase "not able to be used for its intended use." Second, the taxable buildings were "damaged" as a result of COVID-19 because they were not able to be used for their intended use and, thus, resulted in a loss of value.

i. Statutory Language

As set forth above, R.S.A. 76:21 does not require a showing of direct and/or physical loss to the property. Rather, 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. Notably, R.S.A. 76:21 does not define the term "damage," nor is it defined in any relevant regulations. However, New Hampshire law recognizes a broad variety of "damages." *See Smith v. Cote*, 128 N.H. 231, 242 (1986) (defining "damages" as a "sum of money awarded to one who has suffered an injury"); *see also State v. Exxon*

Mobil Corporation, 168 N.H. 211, 264 (2015) (explaining that the plaintiff is entitled to be "fully compensated for the harm" caused by the defendant); *Carlisle v. Frisbie Mem. Hosp.*, 152 N.H. 762, 778 (2005) (affirming the trial court's broad instruction on damages, which stated that the "damage award should be 'full, fair and adequate' and that the award should compensate the plaintiff and make her whole'"); *Silv*a *v. Warden*, 150 N.H. 372, 374 (2003) (recognizing damages that "do not have physical manifestations"); *Lord v. Lovett*, 146 N.H. 232, 239 (2001) (recognizing an injury for loss of opportunity).

Since the term "damaged" is not defined in the statute, the Court will ascribe the plain and ordinary meaning of the words used. *MacPherson v. Weiner*, 158 N.H. 6, 9 (2008). The Court will "interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Id.* Further, the Court will "interpret a statute to lead to a reasonable result and review a particular provision, not in isolation, but together with all associated sections." *Id.* This is known as the doctrine of *noscitur a sociis*, in which "the broader term itself takes on the more specialized character of its neighbors." *Home Gas Corp. v. Strafford Fuels*, 130 N.H. 74, 82 (1987).

Upon applying the doctrine of *noscitur a sociis* to R.S.A. 76:21, it is clear that the term "damaged" is qualified by the phrase "not able to be used for its intended use." Although R.S.A. 76:21 does not provide specific examples concerning the type of "damage" that would qualify for a proration of real estate taxes, it *does* include an important qualification. Specifically, R.S.A. 76:21 provides that a taxable building will be damaged when "the building [is] not able to be used for its intended use." *See* R.S.A. 76:21.

Notably, the statute *does not* include any other language concerning the term "damage" for purposes of R.S.A. 76:21. For example, the statute does not impose a requirement that a taxable building must be "destroyed" or "collapsed" to be deemed "damaged" under R.S.A. 76:21. Similarly, the statute does not impose a requirement that a certain percentage of the taxable building must be "damaged" to qualify for relief under R.S.A. 76:21.[2] In fact, R.S.A. 76:21 *does not even state that the taxable building must incur property damage and/or actual damage*.[3] Indeed, the statute does not limit and/or define the term "damage" to instances where there is "actual" or "physical" harm caused to a taxable building. Rather, R.S.A. 76:21 solely includes the following qualification: a taxable building will be deemed

---

[2] Senate Bill 382, which established R.S.A. 76:21, initially stated that a proration would only apply when "75 percent of the building requires reconstruction to restore occupancy." *See* S.B. 382, 162d Cong. (as amended by S. Comm. On Ways & Means, Mar. 21, 2012.) Senate Bill 382 was subsequently transferred to the House of Representatives, at which time the Municipal and County Government Committee removed the requirement that "75 percent of the building requires reconstruction to restore occupancy." *See* S.B. 382, 162d Cong. (as amended by S. Comm. Mun. and Cty. Govt., May 9, 2012). Senate Bill 382, as amended, was approved on June 7, 2012 and became effective as R.S.A. 76:21 on April 1, 2013.

[3] To the extent the legislature intended to require "actual damage" Or "physical damage," it would have included such language in R.S.A. 76:21 and it has done in other statutes. *See* R.S.A. 359-G:2 (explaining that the term "construction defect" may include "physical damage to the residence"); R.S.A. 155-B:1 (defining a "hazardous building" as "any building which, because of inadequate maintenance, dilapidation, physical damage, unsanitary condition, or abandonment constitutes a fire hazard or a hazard to public safety or health"); R.S.A. 232:30 (using the term "actual damage" to describe the type of damage that is recoverable).

"damaged" when it cannot be used for its intended use. 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.

To the extent the Appellees argue that R.S.A. 76:21 requires *actual* damage to the taxable building, such an argument lacks merit. First, the legislature did not include such a requirement in the statute and the Court cannot insert such a requirement when none exists. *See MacPherson*, 158 N.H. at 9 (explaining that the Court will not add language to a statute that the legislature did not see fit to include).

Second, a New Hampshire Superior Court previously determined that the closure of a hotel, as a result of the COVID-19 pandemic, was "damaged" in the context of an insurance policy. In *Schleicher & Stebbins Hotels, LLC*, the plaintiffs owned several hotels in the State of New Hampshire. 2021 WL 4029204, at * 2 (Merrimack Super. Ct. 2021). The plaintiffs filed an insurance claim after they were ordered to cease and/or reduce operations as a result of the COVID-19 pandemic. *Id.* at * 4. The insurance company denied the plaintiff's insurance claim on the basis that the plaintiffs did not provide sufficient evidence to establish that its commercial real estate was "damaged" and/or suffered physical loss as a result of the COVID-19 pandemic. *Id.* at * 5. However, in an Order on a Motion for Partial Summary Judgment, the Merrimack County Superior Court (Kissinger, J.) concluded, in relevant part, that the term "damage" "encompasses the kind of damage caused by the spread of [COVID-19] to the [p]laintiffs' properties." *Id.* at * 10. In reaching its conclusion, the Superior Court explained that a property contaminated with COVID-19 is distinct from an "uncontaminated property." *Id.* (explaining that "in the event an infected guest at one of the

Hotels were to infect a doorknob, that the doorknob turns in no way lessens the now very different risk that it poses to human health"). Accordingly, the Merrimack County Superior Court determined that the closure and/or reduced operation of the plaintiffs' hotels, which arose out of the COVID-19 pandemic, constituted "damage" in the context of an insurance policy.

ii. Income Approach / Loss of Value

New Hampshire recognizes "three generally-accepted methods of valuing real estate: the replacement cost [cost less depreciation] approach, the comparable sales method, and the capitalization of income approach." *Martinonis v. Town of Kingston*, 124 N.H. 304, 306 (1983). In relevant part, the "capitalization of income method is, as its name implies, a method of valuing property by estimating the income 'derived or derivable from the property by its present or potential owner.'" *Town of Croydon v. Current Use Advisory Bd.*, 121 N.H. 442, 447 (1981) (citing 1 J. Bonright, Valuation of Property 230 (1st ed. 1937)). Specifically, to calculate the fair market value of real estate using the income capitalization approach, an appraiser "measurers the present value of property on the basis of the future net income the property could produce for the owner." *Ventas Realty Limited Partnership v. City of Dover*, 172 N.H. 752, 756 (2020). "The net income is the income the property would generate on an open market, less the normal and usual costs of operation." *Id.* "The figure is then capitalized to determine present worth." *Id.*

Here, the taxable buildings, i.e., hotels, generate income, in pertinent part, from room rentals, onsite food and beverage sales, and hosting events. Due to the COVID-19 pandemic, the hotels were either closed and/or operated at a limited capacity at the direction of the State of New Hampshire.

As a result, the Appellants could not operate their hospitality businesses in the usual course because they were prohibited from renting rooms to the general public, selling food and/or beverages onsite, and they could not host events. Since the Appellants were not allowed to carry on business, the hotels suffered from a significant decline in income. Under the capitalization of income appraisal method, the reduced income negatively impacts the fair market value of the taxable buildings.

In other words, when a hotel is either closed, or operating at a reduced capacity, due to a natural disaster, the hotel produces less income and, therefore, has less value. The New Hampshire Supreme Court has previously recognized a "loss of value" as a category of damages in New Hampshire. *See Akwa Vista, LLC v. NRT, Inc.*, 160 N.H. 594, 603 (2010) (upholding jury award for loss of value on lots not sold). Further, the Court's analysis in *Elwood v. Bolte* is illustrative here. In *Elwood*, the defendant landed a plane in the plaintiff's apple orchard, which damaged several apple trees. *Elwood v. Bolte*, 119 N.H. 508, 509 (1979). The plaintiff filed a lawsuit against the defendant to recover for the destruction of eleven (11) apple trees and damage to four (4) apple trees. *Id.* On appeal, the New Hampshire Supreme Court held that the plaintiff was entitled to damages for lost production value based on the following reasoning:

> Each of the trees in a commercial orchard derives its value solely from its ability to produce fruit ... Before the crash the plaintiff had a quantifiable expectancy of future apple production from the trees, which constitutes a portion of the value of his orchard as a going concern. This portion has been irretrievably lost as a result of the defendant's negligent act. Because the purpose of damages is to put the injured party as nearly as possible in the same position he would have been had

> the injury not occurred, the plaintiff can only be made whole if compensated for that part of his lost production which cannot be offset by the productive output of new trees.

Id. at 511. Here, the Appellants suffered a similar loss. Namely, the hotels derive value solely from the ability to host guests for lodging, dining and/or function purposes. Before the COVID-19 pandemic, the Appellants had a quantifiable expectancy of income, which was based on the anticipated number of guests that would utilize the hotel for lodging, dining and/or function purposes within the respective fiscal year. However, this expectancy of income was irretrievably lost as a result of the COVID-19 pandemic when the hotels were shut down and/or required to operate at a reduced capacity. As a result, the hotels, which could not be used for their intended use, incurred a loss of value and, thus, were damaged due to the COVID-19 pandemic.

Based on the foregoing, the Court must answer the second interlocutory appeal question in the affirmative.

B. <u>The Appellants Were Not Able to Use the Taxable Buildings for their Respective Intended Uses for a Portion of the Applicable Tax Year</u>

As set forth above, the Appellants own commercial real estate within the State of New Hampshire. (Inter. Appeal St. ¶ 59.) The Appellants operate separate hotels on their respective real estate, and a few of the hotels offer restaurant services to patrons, along with banquet and/or function facilities. (*Id.* ¶ 60.) In other words, the intended uses of the taxable buildings subject to this Interlocutory Appeal are (1) lodging, (2) dining, and (3) hosting functions. (*See id.*)

As set forth in the timeline below, the Appellants were unable to use the taxable buildings for their respective intended uses for at least a portion of the relevant tax year:

Lodging/Hosting Functions

- March 16, 2020 - March 23, 2020: Appellants prohibited from using taxable buildings for hosting scheduled gatherings of fifty (50) people or more for social, spiritual and recreational activities, including but not limited to, community, civic, public, leisure, faith based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities. (App. at 7.)

- March 23, 2020 - March 27, 2020: Appellants prohibited from using taxable buildings for hosting scheduled gatherings of ten (10) people or more for social, spiritual and recreational activities, including but not limited to, community, civic, public, leisure, faith based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities. (App. at 8.)

- March 27, 2020 – June 15, 2020: Appellants prohibited from using taxable buildings for indoor post-wedding celebrations and meals above fifty (50%) percent normal operating seating capacity. (App. at 140-41.)

- April 6, 2020 - June 5, 2020: Appellants prohibited from using taxable buildings for lodging for non-vulnerable populations. (App. at 18-30.)

- June 5, 2020 - June 15, 2020: Appellants prohibited from using taxable buildings for lodging at a capacity that exceeds fifty (50%) percent. (App. at 115-17.)

Dining

- March 16, 2020 - May 1, 2020: Appellants prohibited from using taxable buildings for onsite, indoor or outdoor dining. (App. at 7.)

- May 1, 2020 - June 15, 2020: Appellants prohibited from using taxable buildings for onsite, indoor dining, bar service and/or catering services. (App. at 118-21.)

- June 15, 2020 - August 21, 2020: Appellants with taxable buildings in Hillsborough County prohibited from providing indoor dining services above fifty (50%) percent. (*Id.* at 138-39.)

Based on the foregoing, the Appellants were unable to use the taxable buildings for their respective intended use for at least a portion of the taxable year. Accordingly, the Court should answer the second interlocutory appeal question in the affirmative because the taxable buildings subject to this appeal were damaged by COVID-19, such that they were not able to be used for their intended use. *See* R.S.A. 76:21(I).

CONCLUSION

For the reasons set forth herein, the Court should answer the questions presented as follows:

1. Yes. For purposes of R.S.A. 76:21, the COVID-19 pandemic constitutes a natural disaster.

2. Yes. The buildings subject to this appeal were "damaged" by COVID-19 such that they were "not able to be used for [their] intended use" under the meaning of R.S.A. 76:21, I.

ORAL ARGUMENT

Pursuant to the Clerk's Order, dated May 9, 2022, the Court will schedule an oral argument on the Interlocutory Appeal. Roy W. Tilsley, Jr., Esq., will argue on behalf of the Appellants.

Respectfully Submitted,
Clearview Realty Ventures, LLC; Chhavi Hospitality, LLC and Kavya, LLC; JHX Hix Keene, LLC; VIDHI Hospitality, LLC; Naksh Hospitality, LLC; 298 Queen City Hotel, LLC; ANSHI Hospitality, LLC; 700 Elm, LLC; Bedford-Carnevale, LLC; and Carnevale Holdings, LLC

By and through their counsel,

/s/ Roy W. Tilsley, Jr.

Roy W. Tilsley, Jr., Esq., Bar No. 9400
Hilary H. Rheaume, Esq., Bar No. 265510
Bernstein, Shur, Sawyer & Nelson, P.A.
670 N. Commercial Street, Suite 108
P.O. Box 1120
Manchester, New Hampshire 03105
(603) 623-8700
rtilsley@bernsteinshur.com
hrheaume@bernsteinshur.com

June 23, 2022

STATEMENT OF COMPLIANCE

I hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 8,939 words, which is fewer than the 9,500-word limit permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

/s/ Roy W. Tilsley, Jr., Esq.
Roy W. Tilsley, Jr., Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 23rd day of June, 2022 through the electronic-filing system on all counsel of record.

/s/ Roy W. Tilsley, Jr., Esq.
Roy W. Tilsley, Jr., Esq.