THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2016 Term

SUPREME COURT DOCKET NO. 2015-0625

APPEAL OF NEW HAMPSHIRE ELECTRIC COOPERATIVE, INC.

APPEAL BY PETITION PURSUANT TO RSA 541:6
NEW HAMPSHIRE BOARD OF TAX AND LAND APPEALS

BRIEF OF THE NEW HAMPSHIRE MUNICIPAL ASSOCIATION AS *AMICUS CURIAE*

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STATEMENT OF THE FACTS

The New Hampshire Municipal Association defers to the Statement of Facts and of the Case in the Briefs of the appellee-municipalities, and relies thereon.

SUMMARY OF THE ARGUMENT

First, The Board of Tax and Land Appeals (BTLA) did not err in determining that the New Hampshire Electric Cooperative (NHEC) failed to establish disproportionality and was, therefore, not entitled to the requested abatements. Contrary to NHEC's assertions, the municipalities in this case were not required to use the unit method of valuation for determining market value. Instead, in accordance with New Hampshire law, the selectmen properly used their discretion to choose one of five approaches to valuation of NHEC's utility property, and their decision not to use the unit method did not create disproportionate appraisals. Furthermore, RSA Chapter 83-F is not binding on municipalities, and does not require municipalities to use the unit method for determining market value of utility property at the local level.

Second, the Court should disregard the Department of Revenue Administration's (DRA) brief. The DRA's equalization process and the appraisal of utility property under RSA Chapter 83-F are not at issue in this case. The BTLA did not rule that the DRA appraisals were improper or invalid for the purposes of equalization or assessment of the utility property tax, and these are not issues in the case before this Court. Nor is it proper for the DRA to use its position as *amicus curiae* to rehabilitate the reputation of its appraiser who testified at the BTLA. Finally, the DRA should not be asserting a position adverse to the state's political subdivisions in a case involving local property taxation.

ARGUMENT

I. MUNICIPALITIES ARE NOT REQUIRED TO USE THE UNIT METHOD OF VALUATION.

NHEC appeals the BTLA's determination that NHEC failed to prove disproportionality and was not entitled to tax abatements of local assessments performed by over 80 municipalities in 2011 and 2012. BTLA Decision at 34. In support of its position that these assessments were disproportionate, NHEC argues that the BTLA erred in rejecting NHEC's market value assessments, which were based on the unit method of valuation. NHEC maintains that the unit method is the best method for determining market value of utility property, citing the fact that the Department of Revenue uses the unit method for the purposes of the statewide utility property tax, pursuant to RSA Chapter 83-F, and the fact that other states mandate use of this method for valuation of utility property. However, NHEC's position directly contradicts New Hampshire law, and the Board of Tax and Land Appeals' decision should be upheld.

A. New Hampshire Law Does Not Require Municipalities to Use the Unit Method for Determining Market Value of Utility Property.

It is undisputed that New Hampshire law does not require municipalities to use the unit method to appraise utility property.

Under RSA 72:8, NHEC's property is taxable as real estate in the municipality in which it lies:

> All structures, machinery, dynamos, apparatus, poles, wires, fixtures of all kinds and descriptions, and pipe lines employed in the generation, production, supply, distribution, transmission, or transportation of electric power or natural gas, crude petroleum and refined petroleum products or combinations thereof, shall be taxed as real estate in the town in which said

property or any part of it is situated; provided that no electric power fixtures which would otherwise be taxed under this section shall be taxed under this section if they are employed solely as an emergency source of electric power.

Furthermore, because NHEC's property is located in more than one municipality, the property is taxed "in each town according to the value of that part lying within its limits." RSA 72:9.

RSA 75:1 requires this property to be appraised at its market value. "Market value" is "the property's full and true value as the same would be appraised in payment of a just debt due from a solvent debtor." *Id.* The selectmen possess the authority and responsibility to determine market value, and are required to "receive and consider all evidence that may be submitted to them relative to the value of property, the value of which cannot be determined by personal examination." *Id.*

Not only is it the selectmen's responsibility to determine market value, it is also within their discretion to determine what method is used for appraisal. This Court has repeatedly held that there are five approaches to valuation of property from which the selectmen may choose: (1) original cost less depreciation; (2) reproduction cost less depreciation; (3) comparable sales; (4) capitalized earnings; (5) and the cost of alternative facilities capable of delivering equivalent energy. *Public Serv. Co. v. Town of Ashland*, 117 N.H. 635, 638 (1977). This Court has recognized that no method is perfect, and yet each is permitted: "Although recognizing five potential valuation methods, we have noted that all also have weaknesses." *Id.* (internal citations omitted) BTLA Decision at 14. Therefore, this Court has determined that "[g]iven all the imponderables in the valuation process, (j)udgment is the touchstone." *Public Serv. Co.*, 117 N.H. at 639 (internal citations omitted). Only 30 - 35% of municipalities have chosen to use the unit method

under these circumstances. In fact, this Court has previously upheld a superior court's finding that the unit method was "an unreliable means of evaluating specific property" in a prior case involving local appraisal of utility property. *Public Serv. Co. of New Hampshire v. Town of Bow*, 139 N.H. 105, 107 (1994); BTLA Decision at 26.

Finally, NHEC's reliance on RSA Chapter 83-F, which requires the state to use the unit method for purposes of the statewide utility tax, is misplaced. The legislative history clearly establishes that RSA Chapter 83-F was never intended to bind municipalities:

> It is further the intent of the general court that RSA 83-F shall govern the valuation of utilities for purposes of the utility property tax administered by the commissioner of the department of revenue administration. . . . Nothing in this act is intended to restrict the ability of any municipality to independently assess utility property for the purpose of locally administered municipal, county, school, or district taxes.

2010 N.H. Laws 219:1; *See also* BTLA Decision at 16.

Therefore, NHEC has no legal support for its position that the unit method should have been used, or that the BTLA erred in rejecting the unit method in this case.

B. The BTLA Did Not Commit Legally Reversible Error by Refusing to Employ the Unit Method of Valuation Even Though It Had Employed that Assessment Methodology in *Portland Pipe Line v. Gorham*, BTLA Docket Nos. 24198-08PT/25123-09PT/25539-10PT.

According to Question #3 in NHEC's Notice of Appeal, the BTLA erred when it failed to accept the unit method of valuation employed by NHEC's experts even though that methodology was approved by the BTLA and this Court in *Portland Pipe Line v. Gorham*, N.H. BTLA Nos. 24198-08PT, 25123-09Pt, 25539-10PT, 2013 N.H. Lexis Tax 83 (2013). NHEC Notice of Appeal, p. 4. NHEC argues in its brief that a utility system

in multiple jurisdictions must be valued by looking at that whole system, as the BTLA did in *Portland Pipe Line.* NHEC asserts that the failure of the BTLA to employ that method two years later in this matter was erroneous. NHEC Brief, pp. 28 – 29.

As stated by the BTLA in *Portland Pipe Line:*

> The "unit method" is not intrinsically tied to any one of the . . . five valuation approaches. . . The unit method, or unitary method of valuation is a method that values the property within a particular jurisdiction based on the fair share of the value of an operating enterprise of which the property is an integral part.

Portland Pipe Line, 2103 N.H. Tax Lexis 83, *13 - *14 (internal citations omitted).

In *Portland Pipe,* based on the unit method approach, the BLTA determined that the taxpayer had met its burden of proving disproportionality, and an abatement was granted for three tax years.

In the present matter, the BTLA concluded the evidence presented by NHEC failed to prove disproportionality. BTLA Decision at 8. In so ruling, the BTLA stated that there is no statutory or other requirement mandating a uniform method of utility property tax assessment. BTLA Decision at 11. It further stated that the simple assertion that a method of appraisal is poor or flawed does not prove disproportionality. BTLA Decision at 38. Rather, the BTLA must determine the weight to be given each form of submitted evidence, which is central to the authority delegated to the BTLA. BTLA Decision at 13 – 14. *Appeal of City of Nashua,* 138 N.H. 261, 265 (1994). In deciding to reject the use of the unit method in this matter, the BTLA concluded that in contrast to the relatively homogeneous property represented by the oil pipeline in *Portland Pipe Line,* the varied poles, wires and equipment in this matter were not homogeneous, making the unit method inappropriate. BTLA Decision at 19 – 20.

The standard for review of BTLA decisions is statutory. *Appeal of Wilson,* 161 N.H. 659, 661 (2011); *see* RSA 541:13. This Court should not set aside or vacate the decision appealed from except for errors of law, unless the Court is satisfied, by a clear preponderance of the evidence, that such order is unjust or unreasonable. RSA 541:13; *In re City of Nashua,* 164 N.H. 749, 750 (2013). The decision to reject the unit method of valuation is not reversible error since that judgment rests within the sound discretion of the BTLA. Perhaps NHEC is in effect arguing, like PSNH in *Appeal of Public Service*, 141 N.H. 13, 18 (1996), that by not using the unit method, the BTLA was erroneously ignoring a binding administrative gloss or abandoning long standing practice, an argument this Court rejected.

Similarly, it was also not reversible error for the BTLA to deny an abatement sought by a utility due to the BTLA's inability to determine market value of the utility's facilities because the utility failed to introduce evidence as to "substitution" cost of the facilities. *Public Serv. Co. v. Town of Ashland*, 117 N.H. 635 (1977). Furthermore, so long as this Court can determine an evidentiary basis for the BTLA's decision, this is sufficient to sustain the decision. *Vickerry Realty Co. Trust v. City of Nashua*, 116 N.H. 536 (1976). Accordingly, the BTLA's rejection of the unit method of property assessment in this matter is not reversible error and the appeal of NHEC should be denied.

II. THE COURT SHOULD DISREGARD THE DEPARTMENT OF REVENUE ADMINISTRATION'S BRIEF.

NHMA acknowledges that DRA has a right, under Supreme Court Rule 30(3), to file a brief of *amicus curiae*; and NHMA, as a non-party in the case, does not have

standing to move to strike DRA's brief. Nevertheless, NHMA submits that DRA has no interest in the case and respectfully requests the court to disregard its brief.

DRA's brief seems to serve three purposes: (1) to justify its use of the unit method of valuation for purposes of the equalization process under RSA 21-J and appraisal of utility property under RSA 83-F; (2) to defend the reputation of DRA's chief utility appraiser; and (3) to support the taxpayer's request for relief. The first two of these reasons do not warrant the filing of a brief, as they do not involve an actual controversy before this court; the third purpose raises significant concerns about the state's relationship with its municipalities.

A. The Equalization Process and the Appraisal of Utility Property under RSA 83-F Are Not at Issue in this Case.

DRA's brief takes significant exception to the BTLA's finding that the DRA appraisals were far less credible than those of the municipalities. Among other things, it expresses concern that the BTLA's rejection of the DRA appraisals "jeopardizes the DRA's equalization process, which uses those allocated values to represent the fair market value of utility property in each municipality." DRA Brief at 14. It also states that BTLA's criticism of the DRA appraisals could undermine the department's administration of the state's utility property tax under RSA 83-F. *See id.*

However, this case is not about the equalization process or the utility property tax, and the BTLA's ruling does not affect either of those issues. The sole issue in the appeal of a local property tax assessment under RSA 76:16-a is whether the taxpayer's assessment is disproportional. The taxpayer has the burden of proving disproportionality,

and if it fails to do so, the appeal will be dismissed. *See Appeal of City of Nashua,* 138 N.H. 261, 265 (1994).

Here, the BTLA found that "the Taxpayer did not meet its burden of proving disproportionality of each local assessment by relying on the Teagarden Appraisals and the DRA Appraisals. In brief, the board finds these appraisals fail to establish the Taxpayer's entitlement to tax abatements." BTLA Decision at 34.

The BTLA did not rule that the DRA appraisals were improper or invalid for the purposes of equalization or assessment of the utility property tax—nor could it have done so, because that question was not at issue and was not litigated. It merely found that the DRA appraisals did not enable the taxpayer to get over the hurdle of proving disproportionality. Although the credibility of the DRA appraisals was an ancillary issue in that it affected whether the taxpayer had met its burden, the DRA appraisals themselves were not on trial.

It is true that the BTLA rejected the DRA appraisals rather firmly. Still, the fact remains that this case was about local property tax assessments, not about equalization or about the utility property tax. The BTLA's rejection of the DRA appraisals does not undermine DRA's equalization or utility appraisal practices, any more than a jury's rejection of a medical expert's opinion in a malpractice case constitutes a finding that the expert should lose his license. It is simply a question of which opinion the board found more reliable, *in this case*, for the sole purpose of local property tax assessments.

B. The Reputation of DRA's Appraiser Is Not at Issue in this Case.

The DRA brief also mounts a defense of the DRA appraiser, devoting two pages to a discussion of his credentials and practices. *See* DRA Brief at 10-12. This is unusual, to say the least. DRA purports to be a disinterested party, whose employee was called to testify under subpoena by the taxpayer. NHMA has never heard of a third-party *witness* taking an active role in the appeal of a property tax case, or any kind of litigation. If the *taxpayer* wants to argue that DRA's witness was more credible than the towns' witness, as part of its claim that the BTLA erred in its consideration, that is fine. But DRA's use of its *amicus* status to make a stand-alone argument for the expertise of its appraiser is an odd waste of judicial and administrative resources.

Again, this case is about local property tax assessments. It is not an inquisition into the DRA appraiser's expertise. The BTLA did not rule, nor could it have, that the DRA appraiser is incompetent or that his appraisals are not useful for the purposes for which they are performed. Those questions are not raised on appeal and do not warrant briefing.

C. DRA Should Not Be Working Against the State's Political Subdivisions in a Local Property Tax Case.

While the DRA appraiser's expertise and the use of his appraisals for equalization and utility property tax purposes are not the matters at issue in this case, at least they are matters of legitimate concern to DRA. More troubling is that DRA has openly inserted itself into a local property tax dispute, taking a position adverse to the state's political subdivisions.

Although DRA makes a token concession, in a footnote, that "New Hampshire does not require use of the unit method by local assessors," *see* DRA Brief at 7 n.4, it spends several pages essentially arguing that use of the unit method *should* be required. The DRA brief repeatedly states that the unit method is the "most accurate," or a "more accurate," method for valuing utility property, and asserts that the BTLA erred in not using the unit method. *See id.* at 7-10.

Section I above discusses the use of the unit method and the well established principle that use of the unit method is *not* required. That discussion does not need to be repeated here. What is troubling is that when New Hampshire law clearly *allows*, but does not *require*, use of the unit method, a state agency is using its influence to intervene in opposition to municipalities and assert that only the unit method results in an accurate valuation.

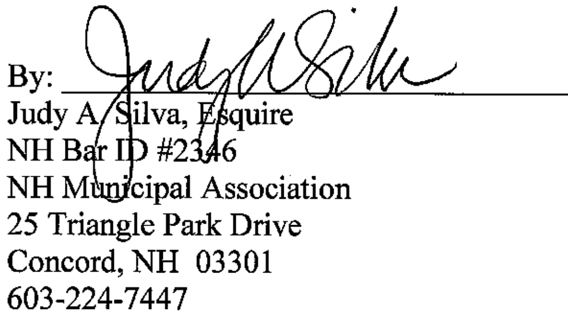
Again, DRA's only involvement in this case was that its appraiser was subpoenaed by the taxpayer to testify about his appraisals, and DRA was officially a neutral party. Nevertheless, it is difficult to avoid the conclusion that DRA is actively cooperating with the public utility to advocate against the interests of the state's own municipalities and their taxpayers. That is a matter of serious concern to NHMA and its members. NHMA respectfully requests that the court disregard the DRA brief.

CONCLUSION

For the foregoing reasons, the *amicus curiae* respectfully joins in the appellee-municipalities' request for relief.

Dated:

Respectfully submitted,
NEW HAMPSHIRE MUNICIPAL ASSOCIATION



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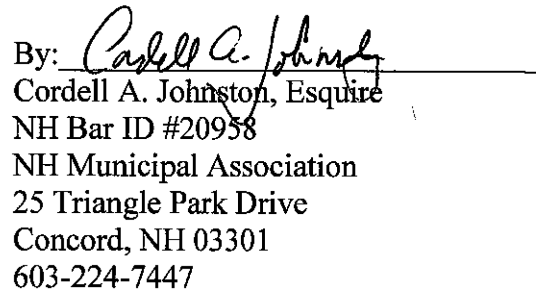

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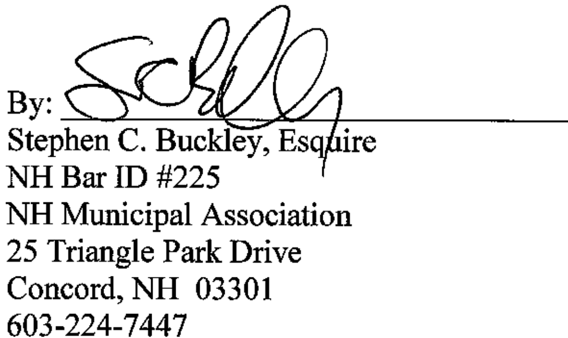

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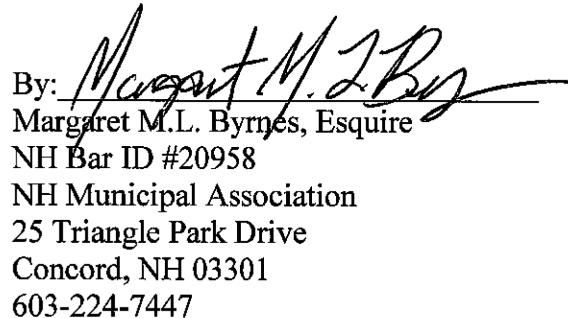

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I hereby certify that on this 1st day of November 2016, I have mailed two copies of this brief to each of Margaret H. Nelson, Esq.; Derek D. Lick, Esq.; Judith E. Whitelaw, Esq.; Walter L. Mitchell, Esq.; Shawn M. Tanguay, Esq.; and George E. Sansoucy, P.E., Laura E.B. Lombardi, Esq., Brian W. Buonamano, Esq.

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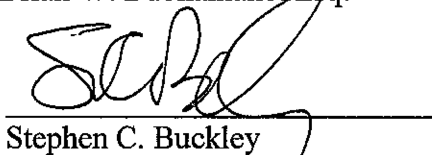

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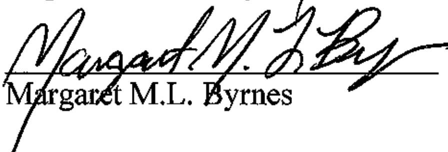

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