

**Littleton Hospital Association  
d/b/a Littleton Regional Hospital**

**v.**

**Town of Littleton**

**Docket No. 26537-11PT  
Docket No. 26854-12PT  
Docket No. 27518-13PT  
Docket No. 27512-13EX**

**ORDER AND HEARING NOTICE**

The board held a noticed hearing on December 10, 2014 to consider three discovery motions filed by the parties and to address the resulting case management and scheduling issues posed by delays in completing discovery. (See November 19, 2014 Order on Pending Motions.)

Specifically, the “Town” filed an October 23, 2014 “Motion to Compel Discovery” in the 2011 and 2012 appeals (Docket Nos. 26537-11PT and 26854-12PT), the “Taxpayer” filed an October 31, 2014 “Motion to Compel Discovery” in the 2011 and 2012 appeals and the Town filed a December 8, 2014 “Motion to Compel Discovery” in the 2013 exemption appeal (Docket No. 27512-13EX).

In light of these continuing discovery disputes, the parties agree the February 25, 2015 scheduled hearing date for the 2011 and 2012 appeals is no longer feasible and it is therefore removed from the board’s calendar. The board rules as follows with respect to the

remaining discovery and scheduling issues.

### 1. Rulings on Discovery

Each party has already complied in part with the other party's outstanding discovery requests. However, the parties still disagree, primarily on relevancy and burdensome grounds (discussed further below), regarding whether further discovery should be compelled. In addition to specific objections to the other party's discovery, which the board has reviewed, each party submitted a December 8, 2014 "Memorandum of Law," as directed by the board, stating their respective position regarding further discovery. Despite the involvement of multiple attorneys for each party, however, no resolution was achieved of these discovery disputes (with one minor exception pertaining to Taxpayer Interrogatory 13<sup>1</sup>).

These discovery disputes arose, to a substantial degree, because of fundamental disagreements and/or confusion regarding the nature of these appeals. Based on a full review of the record presented, including the appeal documents filed by the Taxpayer and its prior rulings regarding the "Property,"<sup>2</sup> the board finds:

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<sup>1</sup> The Taxpayer has withdrawn its objection to the Town's response to Interrogatory 13. (See Taxpayer's Memorandum of Law, pp. 15-16 and fn. 8.)

<sup>2</sup> See, e.g., March 26, 2013 Order (denying the Town's Motion to Dismiss the 2011 appeal), which states:

Both the abatement application and appeal document refer to a tax year 2011 ad valorem assessment of \$7,642,000 on Map 55-4, 600 St. Johnsbury Road (the "Property"). The Property is a regional hospital facility operated by the Taxpayer and the Town has granted an RSA 72:23, V charitable tax exemption for many years. The Town's assessment-record cards . . . indicate the Property consists of 43.36 acres of land with substantial improvements . . . The \$7,642,000 assessment is a small part of the total estimated market value of the hospital . . . The Town made this assessment in response to the construction of an "MOB" (Medical Office Building) addition to the hospital building on the Property.

In actuality, as clarified by the Taxpayer's attorneys for the first time at the December 10, 2014 hearing and as shown in Municipality Exhibit A, there is both an "older MOB," already established, and a "new MOB" (also designated as the "Medical Office Building Extension"), where construction was not completed and occupancy did not occur until just prior to tax year 2011.

- (1) the charitable purpose of the Taxpayer as a hospital (at least for the tax years in question) is not a contestable issue in these appeals and therefore compelling further discovery to allow the Town to delve into facts pertaining to charitable purpose is not warranted;
- (2) these appeals involve the much narrower question of how much of the Property (referred to as the “Disputed Offices” in the Taxpayer’s Memorandum of Law, p. 3) is subject to ad valorem assessment in tax years 2011, 2012 and 2013; and
- (3) in order to prevail in these tax appeals, the Taxpayer must satisfy the burden of proving the Disputed Offices are used and occupied directly for the Taxpayer’s charitable purpose, the third of the four “factors” necessary to qualify for a charitable exemption articulated by the supreme court in ElderTrust of Florida, Inc. v. Town of Epsom, 154 N.H. 693, 697-98 (2007).<sup>3</sup>

Cf. Taxpayer’s Memorandum of Law, pp. 2-5 and Town’s Memorandum of Law, pp. 8-9, both citing and discussing ElderTrust ; see also Granite State Mgt. and Resources v. City of Concord, 165 N.H. 277, 283-85 (2013), reaffirming the four factors articulated in ElderTrust

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<sup>3</sup> In this widely noted portion of the ElderTrust decision, the supreme court ruled:

We hold that the plain language of RSA 72:23, V and RSA 72:23–I requires the institution to satisfy each of the following four factors; namely, whether: (1) the institution or organization was established and is administered for a charitable purpose; (2) an obligation exists to perform the organization's stated purpose to the public rather than simply to members of the organization; (3) the land, in addition to being owned by the organization, is occupied by it and used directly for the stated charitable purposes; and (4) any of the organization's income or profits are used for any purpose other than the purpose for which the organization was established. Under the fourth factor, the organization's officers or members may not derive any pecuniary profit or benefit. See RSA 72:23, V; RSA 72:23–I. Although these four factors are anchored in the plain language of the statutes, they also have firm moorings in our case law. See, e.g., [Housing Partnership v.] Town of Rollinsford, 141 N.H. [239] at 241–42 [(1996)], 683 A.2d 189; Society of Cincinnati v. Town of Exeter, 92 N.H. 348, 352, 31 A.2d 52 (1943).

See also RSA 72:23, V-a.

and further holding:

Generally, charitable purposes fall into the following categories: (1) relieving poverty; (2) promoting health; (3) advancing education; (4) aiding religion; (5) providing governmental or municipal facilities and services; and (6) other purposes that are beneficial to the community. Town of Peterborough v. MacDowell Colony, 157 N.H. 1, 12, 943 A.2d 768 (2008) (Dalianis, J., concurring). “[T]he legislative purpose to encourage charitable institutions is not to be thwarted by a strained, over-technical and unnecessary construction [of RSA 72:23, V and RSA 72:23–I].” Id. at 5, 943 A.2d 768 (quotation omitted).

The board’s resolution of the present discovery disputes is guided by the above findings and governing New Hampshire law pertaining to charitable exemptions, as well as the well-established standards for evaluating the relevance and burden of specific discovery requests. See, e.g., Great Lakes Hydro America, LLC v. City of Berlin, et al., BTLA Docket Nos. 25531-10PT, 26219-11PT, 25532-10PT and 26620-11PT (October 8, 2013 Order) at pp. 2-3 (cited in Taxpayer’s Memorandum of Law, p. 5):

The stated purpose of discovery is to allow each party an opportunity “to adequately prepare” its presentation, but discovery cannot be “overly burdensome” taking into account “the type and complexity of the appeal.” Tax 201.19(a). The same balance between allowing adequate discovery and protection from undue burden is reflected in the superior court rules cited below and in the case law.<sup>4</sup> Tax 201.19(b) further provides the “superior court discovery rules shall apply to all board proceedings,” except as modified by the board’s own rules. . . .

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<sup>4</sup> See, e.g., New Hampshire Ball Bearings, Inc. v. Jackson, 158 N.H. 421, 429-30 (2009) (“trial court has discretion to determine the limits of discovery” and can “keep discovery within reasonable limits and avoid ‘open-ended fishing expeditions’ or harassment to ensure that discovery contributes to the orderly dispatch of judicial business. [Citations omitted.]”); Petition of Haines, 148 N.H. 380, 381 (2002) (“Control over the breadth and scope of pre-trial discovery is left to the sound discretion of the trial judge. [Citation omitted.]”); and Wal-Mart Real Estate Business Trust v. Town of Conway, BTLA Docket Nos. 20892-04PT and 21665-05PT (December 31, 2007) at p. 5:

There is clearly a spectrum of permissible and impermissible discovery ranging, at the one end, from an information request that is either directly “relevant” to triable issues or “appears reasonably calculated to lead to the discovery of admissible evidence” and, at the other end, an information request that is no more than a ‘fishing expedition,’ or worse, one causing discovery abuse (such as unwarranted annoyance, embarrassment or undue burden or expense). [Citing Super. Ct. R. 35(g)(1).]

Turning to the superior court rules, the articulated test for the “scope of discovery” is stated in Rule 35 and hinges on whether the discovery items sought are “relevant to the subject matter involved.” [Fn. omitted.] A party cannot object to production simply by claiming “the information sought will be inadmissible at trial,” provided “the information sought is reasonably calculated to lead to the discovery of admissible evidence.” . . .

Consequently, to the extent the Town seeks to compel discovery in these appeals in order to question or challenge whether the Taxpayer, operating as a modern hospital, has a charitable purpose (such as, for example by delving into additional facts pertaining to the type(s) and quantity of charitable care provided, patient referral practices and compensation and other financial arrangements with doctors and senior managers<sup>5</sup>), the board finds compelling the disclosure of such information is beyond the limited scope of these tax appeals.<sup>6</sup>

The Town defends the relevancy of its discovery requests in very broad and indefinite terms because “it still does not know what it does not know.” (Town’s Memorandum of Law, p. 22.) This acknowledged ignorance regarding what may or may not be unearthed with expanded discovery (involving much time and considerable litigation costs to both parties) does not justify an open ended and protracted investigation into the hospital’s operations and

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<sup>5</sup> The Town’s Memorandum of Law (pp. 16-21), discusses cases from other jurisdictions (Illinois and Virginia, among them) involving health care providers to justify the general categories of information regarding hospital affairs it is seeking and to argue why its discovery requests are “Relevant Under New Hampshire Law.” The board does not agree with the Town’s arguments, finds those cases to be distinguishable and further notes the Town has cited no decision or ruling where the type of discovery it now seeks was compelled by any court.

<sup>6</sup> In oral argument, both attorneys for the Town referenced (unidentified) litigation involving other New Hampshire hospitals where this type of information may have been provided on a voluntary basis (without a court order granting a motion to compel). The board can give these anecdotal references no weight in deciding whether discovery should be compelled in these appeals.

dealings with third parties and can be fairly objected to as a “fishing expedition.”<sup>7</sup> The arguments presented by the Town at the December 10, 2014 hearing indicates much of the discovery it still seeks from the Taxpayer is for the purpose of allowing one or more “experts” the Town may decide to hire in the future to opine on the issue of whether the Taxpayer has a charitable purpose. As stated above, the board finds the types of questions the Town seeks to explore through discovery regarding charitable purpose are outside the scope of these appeals.

Turning to the specific requests at issue in these motions, the board finds the Town is not entitled to compel the production of additional documents pertaining to:

Town Document Request Nos. 2, 4 and 5, which relate to acquisition(s) of “private medical practices,” “physician referrals of patients” and “profit sharing” or other “arrangements” with “any for-profit . . . entities”;

Town Document Request No. 6, which relates to the Taxpayer’s motivations and planning for the Medical Office Building (“MOB”) or other “expansion”;

Town Document Request Nos. 7 and 13, which relate to “senior management” and physician employee “compensation” and “evaluation” and “quarterly and annual” hospital “operating income and expense[s],” except for certain additional documents the Taxpayer has agreed to provide<sup>8</sup>; and

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<sup>7</sup> See the Taxpayer’s “Objection” to the Town’s “Motion to Compel Discovery,” pp. 3 – 4, which complains the Town and its counsel are conducting such an expedition “to support a new and undisclosed theory to justify its actions after the fact; a rationale that did not constitute the basis for the Town’s denial of the abatement applications; and a rationale that is at odds with the position that the Town has previously advanced . . . The responses and materials provided by the Town to the [Taxpayer] . . . are devoid of any such rationale.”

<sup>8</sup> The Taxpayer has already provided the Town with many documents, some of which are “publicly available,” and has agreed to provide certain additional documents in response to Town Document Request No. 13. (See Taxpayer’s Memorandum of Law, p. 15.)

Town Document Request No. 12, which relates to the “charity care” provided for “calendar years 2008-2013”;

The board agrees with the Taxpayer that these discovery requests are overbroad, unduly burdensome and seek information not reasonably calculated to lead to the discovery of admissible evidence in these appeals and therefore denies the Town’s Motion to Compel with respect to them.<sup>9</sup>

With respect to Town Document Request No. 3, which pertains to use and occupancy of the “Subject Property” (defined by the Town as all land and buildings owned by the Taxpayer), the Taxpayers’ attorneys at the December 10, 2014 hearing agreed to provide documents in the Taxpayer’s possession pertaining to the “Alpine Clinic” and, aside from the “ten lease agreements” and “floor plan” already provided for the MOB, “any additional leases” pertaining to the Disputed Offices if such leases exist. The board grants Town Document Request No. 3 to this extent and directs the Taxpayer to provide any responsive documents by January 16, 2015.

The Town indicated its second Motion to Compel, filed with respect to the 2013 appeal, overlaps and duplicates the requests in its first Motion to Compel and the Town’s Memorandum of Law makes no additional arguments pertaining to the 2013 appeal. Therefore, the board finds the above rulings apply to both of the Town’s motions.

Turning to the Taxpayer’s Motion to Compel, the board finds this motion should be granted for the reasons stated in the Taxpayer’s Memorandum of Law (pp. 16-18). By January 16, 2015, the Town shall provide full and complete responses to Taxpayer

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<sup>9</sup> The Taxpayer correctly notes many of the Town’s discovery requests are “overly broad” because they seek information dating back to “2008” and “2005,” years before the tax years under appeal. (See Taxpayer’s Memorandum of Law, pp. 6-7.)

Interrogatory Nos. 7, 8, 9, 11 and 12. To the extent the Town claims information responsive to these interrogatories is being withheld based on exceptions in the Right to Know Law, RSA ch. 91-A and/or the so-called “deliberative process privilege,” the Town is directed to prepare and provide to the Taxpayer a “privilege log” for each item withheld in the manner outlined in the Taxpayer’s Memorandum of Law (pp. 16-17) by January 16, 2015.

Correspondingly, to the extent the Taxpayer has withheld any document responsive to the Town’s permissible discovery requests based on privilege, the Taxpayer shall supply a “privilege log” to the Town, also by January 16, 2015.

## 2. Completion of Discovery and Additional Mediation

The parties are directed to complete any remaining discovery for all four appeals, including any lay witness depositions yet to be scheduled, by February 27, 2015. In the event either party decides to retain one or more “experts” to testify, that expert shall furnish any report prepared to the other party by March 31, 2015; and any expert deposition shall be taken by April 30, 2015, which shall be the final discovery cutoff date in these appeals. Whatever expert testimony is presented should be limited to the issues actually involved in these appeals which the board has identified above.

Further, and based on its review of the arguments and the record presented, the board finds additional mediation, pursuant to Tax 203.07, is warranted. The parties and their attorneys are directed to meet, at their earliest convenience, and in any event not later than May 15, 2015, to comply with this rule. Among other things, through the mediation process the parties should be able to resolve at least some, if not all, of the questions arising from the Town’s tax year 2011, 2012 and 2013 assessments on the Disputed Offices, such as the specific areas involved (including square footage information) pertaining to these

assessments. The parties are directed to submit to the board any factual stipulations that can be reached in good faith at or before the time they file the mediation report required by Tax 203.07 (May 15, 2015).

3. Consolidated Hearing on the Merits

Because of the substantial similarity of the issues presented in each appeal, the board finds a consolidated hearing of the four appeals is warranted. The board has considered the parties' respective time estimates and has scheduled two days on its hearing calendar, June 8 and 9, 2015, for the consolidated hearing on the merits of these appeals. [See attached Hearing Notice and "Important Rules & Reminders" pertaining to board hearings.]

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Michele E. LeBrun, Chair

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Albert F. Shamash, Member

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Theresa M. Walker, Member

## **HEARING NOTICE**

**Littleton Hospital Association  
d/b/a Littleton Regional Hospital  
v.  
Town of Littleton**

**Docket No. 26537-11PT  
Docket No. 26854-12PT  
Docket No. 27518-13PT  
Docket No. 27512-13EX**

- Date/Time:** June 8 and June 9, 2015, commencing at 8:30 a.m. each day.
- Place:** Gov. Gallen State Office Park, 107 Pleasant Street, 1<sup>st</sup> Fl., Johnson Hall, Concord, NH 03301
- Subject:** Pursuant to RSA 71-B, the above appeals have been scheduled for hearing on the appeal of property tax assessment(s) in accordance with RSA 76:16-a and RSA 72:34-a.
- Statutes & Rules:** The following statutes and board rules are applicable to this appeal: RSA 71-B:5, 1; RSA 541-A:30-a; RSA 75:1; RSA 76:16-a; RSA 72:34-a; Tax 101, 201, 202 & 203. Because the board's rules or governing statutes address the requirements of RSA 541-A:30-a, the model rules shall not apply to board procedures.
- Appearances:** Parties are not required to have an attorney present, but have the right to have one at the party's own expense. See RSA 541-A:31, III(e). Parties may choose to represent themselves or have a tax representative do so. See RSA 71-B:7-a and Tax 207.
- Attendance:** Attendance is required at the hearing unless you receive leave from the board to not attend. (See Tax 202.05).

**PLEASE READ CAREFULLY.**  
**ATTACHED TO AND INCLUDED AS A PART OF THIS HEARING NOTICE IS AN**  
**INSERT WHICH SUMMARIZES BOARD RULES AND REMINDERS.**

Date: December 23, 2014

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Anne M. Stelmach, Clerk

## **IMPORTANT RULES & REMINDERS BEFORE A BTLA HEARING**

### **EXHIBITS/NUMBER OF COPIES:**

If you plan to submit any document as evidence at a hearing, please bring **4** copies with you. Otherwise, you will be charged .25 per page. (See Tax 201.31 and 501.01(a)(11)).

If you wish to have any or all of your exhibits returned to you, please complete the form available at the board's office on the day of your hearing. All exhibits can be returned 45 days after a final, non-appealable decision has been issued. (See Tax 201.32).

### **CONTINUANCE:**

A continuance (or rescheduling) of the hearing dates will only be granted in extraordinary circumstances or medical emergencies.

### **INCLEMENT WEATHER:**

The board intends to hear all cases as scheduled. Any weather related questions should be addressed to the Clerk.

### **SETTLEMENT/WITHDRAWAL OF APPEAL:**

The board encourages the parties to discuss their positions even after a hearing has been scheduled. If you settle or withdraw your case prior to or the day of the hearing, please contact the board via telephone immediately. Forms can be found on the board's website at [www.nh.gov/forms](http://www.nh.gov/forms). (See Tax 201.23).

### **MISCELLANEOUS:**

- Advise the board should you require any assistance or need special accommodations before the start of a hearing.
- Avoid use of strong perfumes or colognes as others in the room may have allergies.
- Turn off all cell phones, pagers and other electronic devices during the hearing.
- Because we record our hearings please limit private conversation during testimony.
- The board has a refrigerator available should you wish to bring a lunch or snack.

**CERTIFICATION**

I hereby certify a copy of the foregoing Order and Hearing Notice has this date been mailed, postage prepaid, to: Mark C. Russell, Esq., Samaha Russell Hodgdon, P.A., PO Box 70, Littleton, NH 03561; William Ardinger, Esq., Christopher J. Sullivan, Esq., and Kathryn H. Michaelis, Esq., Rath, Young & Pignatelli, P.C., PO Box 1500, Concord, NH 03302, counselors for the Taxpayer; Adele M. Fulton, Esq., Gardner, Fulton & Waugh, PLLC, 78 Bank Street, Lebanon, NH, 03766 and Jamie N. Hage, Esq., HageHodes, PA, 1855 Elm Street, Manchester, NH 03104, counselors for the Municipality; and Town of Littleton, Chairman, Board of Selectmen, 125 Main Street, Suite 200, Littleton, NH, 03561.

Date: December 23, 2014

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Anne M. Stelmach, Clerk