

**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

This Order addresses the “Town’s” January 22, 2015 “Motion for Reconsideration” (“Motion”) of the December 23, 2014 Order and Hearing Notice (“Discovery Order”) and the “Taxpayer’s” “Objection” and “Memorandum” in support of the Objection,¹ which details why the Motion should be denied and seeks an “award of attorney’s fees and costs. . . .” The board dissolves the suspension Order issued on January 26, 2015 and, after a full review of the above pleadings and the entire record in these appeals, rules as follows:

the Motion is denied for the reasons stated in the Memorandum and the additional reasons stated below; and

although not without support in the record and the case law,² the Taxpayer’s request for attorney’s fees and costs is denied without prejudice (primarily because the board is hesitant to penalize the Town financially for the prolixity of the pleadings filed in these appeals).

¹ The Taxpayer filed the Objection on January 26, 2015, requesting additional time to respond because of the “lengthy nature” of the Motion. The board granted this request, resulting in the filing of the Memorandum on February 9, 2015.

² See Memorandum, Section V (pp. 21-25).

To place the issues presented in the Motion in context, the board notes the Discovery Order was the result of the parties' inability to resolve various discovery disputes on their own and the filing of three motions (two by the Town and one by the Taxpayer,³ along with supplemental lengthy pleadings) seeking orders compelling discovery. The board held a limited hearing on December 10, 2014 for the purpose of resolving these specific questions and deciding what discovery should be compelled. The board weighed and balanced the relevancy of each disputed discovery request against the burdensomeness and other objections presented. The Discovery Order: contains the board's specific rulings on each discovery dispute and "the resulting case management and scheduling issues posed by delays in completing discovery"; and was issued only after a full review of the voluminous pleadings filed in these dockets and the additional arguments presented at the limited hearing. (See Discovery Order, pp. 1, 4-5 and fn. 4; see also Memorandum, pp. 1 and 4-20.)

In this context, the Motion (consisting of 23 pages and 73 numbered paragraphs making numerous assertions⁴) goes far beyond the limited rulings in the Discovery Order. For example, one of the items of relief requested by the Town is 'dismissal' of the tax year 2011, 2012 and 2013 tax abatement appeals listed above. The Town's attorneys, dissatisfied with the board's earlier rulings, restate in the Motion many of the same arguments presented in prior pleadings

³ Specifically: (1) the Town filed an October 23, 2014 "Motion to Compel Discovery" in the 2011 and 2012 appeals (Docket Nos. 26537-11PT and 26854-12PT); (2) the Taxpayer filed an October 31, 2014 "Motion to Compel Discovery" in the 2011 and 2012 appeals; and (3) the Town filed a December 8, 2014 "Motion to Compel Discovery" in the 2013 exemption appeal (Docket No. 27512-13EX).

⁴ The Motion (see pp. 1, 11, 14 and 17) faults the Order for many alleged errors, including "misapprehension and misapplication of the law," causing "significant prejudice and irreparable harm" to the Town resulting in a "gross miscarriage of justice . . . completely contrary to legal precedent" that is "both unreasonable and unlawful." The board does not agree for the reasons stated in this Order and in the Memorandum.

filed over the past two years.⁵ (See Motion, pp. 2-9.) This effort, as well as the additional requests in the Motion, such as one to “[s]uspend the discovery and hearing schedule,” are unwarranted, as well as being redundant.

The December 10th hearing on the discovery motions was not, in form or in substance, a “hearing on the merits,” but was no more than a limited hearing to resolve the discovery disputes presented in the parties’ respective motions. (See fn. 3.) The Town, not the board, concluded the Taxpayer had a charitable purpose in tax years 2011, 2012 and 2013, as it had for more than one hundred years.⁶ If the Town had reason to question the Taxpayer’s charitable purpose, in any of those years, it could have then made a further investigation of the relevant facts prior to granting an exemption in each year. (See also the Taxpayer’s discussion of these points in the Memorandum, pp. 12-16⁷.)

The many arguments in the Motion are presented in three sections. Each section is specifically addressed below.

Section I argues the board “has no jurisdiction” over the 2011, 2012 and 2013 “abatement” appeals. The board does not agree, for all the reasons previously stated (see, March 26, 2013 Order) and those presented in the Memorandum (pp. 7-11).

Section II argues the Discovery Order “unreasonably limits the scope of the Town’s Discovery.” Again, the board does not agree for the reasons already stated in the Discovery

⁵ See, e.g., the Town’s February 12, 2013 “Motion to Dismiss,” denied in a March 26, 2013 Order; and the Town’s June 28, 2013 “Motion in Limine,” denied in a July 24, 2013 Order. As the Memorandum (pp. 4-7 and 22-23) correctly points out, although the Town made similar arguments in those 2013 pleadings to those made in the Motion, it did not seek reconsideration of the board’s rulings at that time.

⁶ The Taxpayer was formed as a charitable organization in 1906 and the Town has exempted much of the hospital property from taxation since that time. Until the recent pleadings in these appeals there is no record the Town ever questioned the hospital’s charitable purpose or any other element needed to qualify for an RSA 72:23, V tax exemption. Cf. the Taxpayer’s recently filed “Requests for Admission of Facts,” especially pp. 4 and 6.

⁷ Where the Taxpayer also notes the “untenable and absurd conundrum for charitable organizations” inherent in the Town’s arguments.

Order (pp. 4-7). Further, as noted in the Memorandum (p. 17), the relevant case law, including Hartford Acc. Indem. Co. v. Cutter, 108 N.H. 112, 114 (1967) cited in the Motion (pp. 20-21), is to the effect that “while the discovery rules are to be given a broad and liberal interpretation, ‘the [discovery] process must be kept within reasonable limits.’” As further noted in Hartford, id., the extent of discovery to be permitted is subject to the “exercise of discretion” by the tribunal and Hartford has been understood to reflect this principle. See also Scarborough v. R.T.P. Enterprises, Inc., 120 N.H. 707, 711 (1980): “the trial court has the discretion to determine the limits of discovery [citing Hartford] . . . and was well within its discretion in refusing to allow the defendant’s discovery requests.” The board, exercising this discretion, is not persuaded by the arguments presented in the Motion for expanding the scope of discovery that should be compelled in these appeals.⁸

The board finds the Motion’s extended discussion of ElderTrust overlooks one essential distinction. In ElderTrust, the municipality denied a charitable exemption to an organization in toto, causing the fact-finder (and ultimately the supreme court) to review all four of the “factors” mentioned. In this appeal, the Town granted the Taxpayer a charitable exemption for almost all of the property it owns. While the Town seeks to reexamine and compel discovery on all four

⁸ In asserting otherwise, the Motion places undue reliance on selective quotations from several supreme court rulings on discovery. In fact, the quoted text from Hartford, 108 N.H. 112, 114 (1967) in the Motion (p. 21) is misleading insofar as the italicized “weapon” metaphor was one stated rationale for why discovery (disclosure) of a prior statement made by a witness should not be compelled (to allow for effective impeachment), rather than a rationale for why that discovery should be permitted, because, as the supreme court explained:

On the record before us we cannot hold the statement of the defendant assured, made to the plaintiff’s agent shortly after the accident, exempt from discovery under the work product rule. [Citations omitted.] An argument has been advanced that such statements nevertheless should not be subject to discovery ‘if impeachment is not to become a hollow sham.’ 7 Arizona L.Rev., 283, 295. The underlying reason given is that as long as we operate under the adversary system it is essential that a party possess some weapon which will prevent the other party from overstating his case. Id., p. 293. In other words, the taker of a statement should not, in the absence of fraud, imposition or other such circumstances, be deprived of the right to compare the testimony given at the trial with the statement previously signed by that person, which right would be jeopardized by pre-trial disclosure. [Citation omitted.] [Emphasis added.]

factors with respect to tax years 2011, 2012 and 2013, it is far too late to do so.

Section III of the Motion (pp. 19-20) argues such a rehash of issues should be allowed because tax appeals are “de novo” proceedings, but this argument is seriously flawed: if this argument was correct, every municipality defending a tax appeal would be able to argue, not simply that a challenged assessment was proportional, but that it should be *increased*; that latter argument, however, is contrary to New Hampshire law. See, in addition to the authorities cited in the Memorandum (pp. 16 and 20-21), LSP Assn. v. Town of Gilford, 142 N.H. 369, 373-75 (1997).⁹ Accord, Brewster Academy v. Town of Wolfeboro, 142 N.H. 382, 384-85 (1997).

⁹ As this portion of LSP carefully explains:

We agree with the [taxpayer] that the trial court lacked authority to increase the . . . assessment.

The right to a tax abatement and the powers of the superior court [or the board] in such proceedings are dictated solely by statute. . . . RSA 76:16 provides, in part, that “[s]electmen or assessors, for good cause shown, may abate any tax assessed by them or their predecessors.” RSA 76:16, I. If the board of selectmen or assessors neglect or refuse to abate any tax assessed by them or their predecessors, a taxpayer is authorized to seek relief from either the board of tax and land appeals, *see* RSA 76:16-a, or the superior court, *see* RSA 76:17. . . .

For purposes of taxation, the term “abate” means “to reduce in value.” *Webster's Third New International Dictionary 2* (unabridged ed.1961). Clearly, the trial court's decision to increase the assessment is contrary to the intended meaning of the term “abate” in the taxation statutes. . . .

The town urges us to interpret [the statutory] language to allow a superior court to increase an assessment in order to avoid an unjust and disproportionate tax burden from being placed on other taxpayers in the community. The town argues that if the legislature had intended to limit the power of the superior court in the manner suggested by the association, it could have done so through explicit statutory language. While it is true that there is no such express limitation on the powers of the superior court, an examination of the nature and purpose of the tax abatement statutes provides additional support for our holding.

The New Hampshire tax abatement statutes are remedial in nature. . . .[J]urisdiction in an abatement proceeding is appellate, and [the tribunal] has the power to review the municipality's decision to determine if an abatement is warranted. The superior court [or the board] may abate taxes for any cause that would justify an abatement by the selectmen. . . .

Nothing in the language of the tax abatement statutes or our case law leads us to conclude that the superior court is authorized to take any action other than to decide whether a taxpayer is entitled to an abatement

Brewster Academy is instructive because it was a tax appeal filed by a nonprofit educational institution (eligible under RSA 72:23, IV) challenging the assessment on “certain real estate.” The supreme court held it was error for the trial court to rule “that a maintenance building and maintenance shed were taxable, where the town had not assessed taxes on those buildings,” for the simple reason that, applying LSP, there is no “statutory authority to assess new taxes on untaxed property.” Id. Similar considerations apply in these appeals.

Many of the arguments in the Motion are premised on beliefs regarding what New Hampshire law “should” be¹⁰ and reflect a desire to use these appeals to reexamine and change

and, if so, in what amount. Indeed, . . . any result to the contrary “is plainly not a result any taxpayer [seeking an abatement] would anticipate.” The town has cited no cases or relevant legislative history contrary to the association's position, and we have found none. . . .

RSA 76:14 (1991) grants to a municipality the right to correct omissions or improper assessments before the expiration of the tax year for which the tax has been assessed. . . .

The rationale for the one-year restriction on making such corrections is that the Legislature may have considered that a revision by selectmen of the doings of their predecessors would produce greater mischief than the occasional escape of taxable property from taxation. . . .

Therefore, we conclude that if a municipality fails to correct an error of undervaluation within the established time constraints, the error is irremediable and the superior court is without power to act. . . .

Although an error of undervaluation may result in as great an inequality of taxation as an error of overvaluation, our statutes provide no remedy for the town for the tax year in question. If one is to be provided, it must come from the legislature.

[Italics in original.]

¹⁰ To the extent the Town’s attorneys believe (see Motion, p. 22) it is the province of an (unidentified) “expert” they may decide to hire in the future (to review the additional information they seek through discovery) to decide under what circumstances a hospital should qualify for a statutory tax exemption, the Town is mistaken: surely, it is up to the tribunal (the board or a superior court) to decide “ultimate issues,” such as those involved in interpreting and applying the New Hampshire statutes governing charitable organizations (RSA 72:23, V and RSA 72:23-1), not an expert hired by either party. Cf. Appeal of Town of Wolfeboro, 152 N.H. 455, 458 (2005); and, generally, McMullin v. Downing, 135 N.H. 675, 679 (1992) (“Generally, a trial court has great discretion to determine whether to permit a witness to offer expert opinion. [Citation omitted.]”)

aspects of taxation and health care policy in New Hampshire.¹¹ Public policy questions are best directed to the legislature, not the board. Cf. In re Plaisted, 149 N.H. 522, 526 (2003) (even where “there are legitimate public policy concerns . . . matters of public policy are reserved for the legislature [citation omitted]”); see also Appeal of Land Acquisition, 145 N.H. 492, 494 (2000) (board’s authority is limited by statute).

In summary, the board does not agree with the Motion that the focus of these appeals should be expanded substantially beyond the questions of whether the “Disputed Offices” (identified in the Discovery Order, p. 2-3, and consisting of a very small part of the Property owned by the Taxpayer and operated as a hospital) were disproportionately assessed in tax years 2011, 2012 and 2013. The board is not persuaded that completing discovery aimed at investigating these questions within the timeframes established in the Discovery Order (and the subsequent January 30, 2015 Order (granting additional time to “complete . . . written discovery”), provided the parties’ attorneys proceed with diligence and in good faith, will be “prejudicial” (see fn. 4.).

For all of these reasons, the Motion is denied.

¹¹ See, e.g., Motion, p. 10, paragraph 33, where the Town asserts: “If two outpatient medical clinics operated side by side, and one is taxed because it is privately owned and the other is taxed because it is owned by [a hospital such as the Taxpayer], there should be a distinction in the way they do business, in how they operate and provide services to the public on the real estate, in order for the latter to qualify for the charitable tax exemption.” (Emphasis added.)

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Michele E. LeBrun, Chair

Albert F. Shamash, Member

Theresa M. Walker, Member

CERTIFICATION

I hereby certify a copy of the foregoing Order 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: 2/20/15

Anne M. Stelmach, Clerk