

In Re:
Public Service Company of New Hampshire and
NH Electric Cooperative, Inc.
(See Attached Case List)

ORDER

The board's May 31, 2013 Structuring Conference Order directed the parties in these property tax appeals to file:

- (i) by September 3, 2013, any motions and supporting briefs concerning the use in these appeals of certain "DRA Appraisals" [prepared annually by the department of revenue administration ("DRA") pursuant to RSA ch. 83-F, which prescribes a separate "Utility Property Tax"]; and
- (ii) by September 16, 2013, any "reply briefs" regarding the use of the DRA appraisals.

This Order addresses the timely responsive pleadings identified below.

The Taxpayers' filings consist of a September 3, 2013 "Joint Memorandum of Law Regarding [the] Admissibility and Probative Value of the [DRA] Appraisals. . ." (hereinafter, the "Joint Memorandum") and a September 16, 2013 "Objection" (to the municipalities' submittal). The municipalities' filings consist of a September 3, 2013 "Motion in Limine Objecting to Use of DRA 83-F Reports. . ." (the "Motion in Limine") and a September 16, 2013 "Joint Reply."

These pleadings plow common and increasingly familiar ground in the same field: whether the DRA Appraisals should be admitted as evidence in these tax abatement appeals and,

if so, whether and under what circumstances the municipalities can undertake discovery (through a deposition) and questioning (at the hearing on the merits) of the preparer of the DRA Appraisals (Scott Dickman, a DRA employee). The Taxpayers ask the board to rule the DRA Appraisals are admissible as probative evidence of the market value of the Taxpayers' "Property" in each municipality "without requiring" Mr. Dickman "or any other representative of the DRA" to be deposed or to testify. (Joint Memorandum, p. 14; and Objection, p. 11.) The municipalities oppose these requests and ask the board to "exclude" the DRA appraisals or, "[a]lternatively," if the board rules they are admissible, "schedule a deposition" of Mr. Dickman "after full production of all work papers associated with the [DRA appraisals]" and recognize their "right to cross examine him on his opinions, methodologies and basis" for the appraisals. (Motion in Limine, p. 17; and Joint Reply, p. 8.)

The parties make a number of arguments and counter-arguments in support of their respective assertions regarding what should and should not be permitted with respect to the DRA Appraisals. The board has considered all of these arguments and is also guided by its own rulings on similar objections to the admissibility of the DRA Appraisals presented by the Town of Gorham in the recent "Portland Pipe Line" appeals (BTLA Docket Nos. 24198-08PT, 25123-09PT and 25539-10PT). In addition, and although not binding in light of the concurrent jurisdiction statutes for property tax appeals (see RSA 76:16-a and RSA 76:17), the board has considered the February 13, 2013 Order issued by Superior Court Judge Timothy J. Vaughan in four 2011 tax appeals filed by one of the Taxpayers (New Hampshire Electric Cooperative, Inc.) in Grafton County Superior Court, Docket Nos. 11-CV-375, 11-CV-377, 11-CV-378 and 11-CV-379 (hereinafter, the "Superior Court Order"). As the parties recognize, the Superior Court Order addresses in detail very similar, if not identical, issues pertaining to the DRA Appraisals.

Based on its own review of all of the arguments and authorities presented, the board finds:

- A. The Taxpayers can introduce the DRA Appraisals as evidence in these appeals without the pre-condition of calling its preparer as a witness;
- B. The municipalities are not precluded from conducting lawful discovery and presenting evidence of their own pertaining to the DRA Appraisals, including a deposition of its preparer and/or calling him as a witness for themselves; and
- C. No useful purpose would be served by placing any a priori limits on the scope of that discovery or the preparer's testimony except to note the board finds the concerns articulated in the Superior Court Order (see pp. 3-4 and 7-8) regarding discovery of his "work papers" in light of the confidentiality protections in RSA 21-J:14 to have merit and equal force in these appeals.

Each of these points is discussed below.

A. The DRA Appraisals are admissible in these RSA 76:16-a Tax Abatement Appeals

In the Taxpayers' Joint Memorandum (p. 4 and 12), they confirm their intention to present "appraisal reports prepared by independent appraisers" of their own choosing to establish the disproportionality of the assessments in each tax year in each municipality. While they also wish to present the DRA Appraisals to corroborate their claims of disproportionality, the Taxpayers, in their own words, "do not intend to simply rely on the DRA [A]ppraisal reports, without more, to support their abatement appeals but rather plan to present their own independent experts as well as other relevant and probative evidence. . ." (Id.; see also Objection, p. 6: "the Taxpayers are not solely relying on the DRA's appraisals in these appeals. Both NHEC and PSNH plan to present their own, independent appraisal experts, along with other relevant and probative evidence to support their claims.")

In this context, the board does not agree with the contention that the DRA Appraisals are inadmissible. The board ruled on their admissibility in the recent (July 22, 2013) Portland Pipe Line Decision, after considering the Town of Gorham's repeated objections, as follows :

The board made a number of rulings prior to the hearing to confirm the DRA Appraisals would be admissible in these appeals. (See the board's March 22, 2012, August 24, 2012, October 1, 2012 and November 29, 2012 Orders.) The board therefore disagrees with the Town's continuing arguments that they should be excluded and should not be considered at all. [Footnote citing the Superior Court Order omitted.]

These Portland Pipe Line rulings provide additional elaboration of the board's reasoning and conclusions.

To the extent the municipalities now contend there is some inherent conflict or contradiction between a ruling of admissibility and the so-called "2010 Statement of Legislative Intent" pertaining to RSA ch. 83-F, the board does not agree. This "Statement" is not codified in the statute but is part of the 2010 Session Laws. (Laws 2010, Chapter 219:1.) The Statement is set forth as Exhibit A and discussed in the Municipalities' Motion in Limine (pp. 2-4), the Objection (pp. 2-5) and the Joint Reply (pp. 2-3).

The Statement simply recognizes the Utility Property Tax administered by the DRA is separate and distinct from the "locally administered municipal, county, school, or district taxes" over which each municipality has direct jurisdiction and therefore confirms this separate tax administered by the State was not intended to "restrict the ability of any municipality to independently assess utility property" for those purposes. In other words, municipalities are not bound to accept the DRA's value determinations (for purposes of the RSA ch. 83-F Utility Property Tax), but are rather permitted, under the statutory framework, to arrive at values "independently" pursuant to their own local assessing responsibilities. (See, e.g., RSA 75:1.)

While understanding the municipalities' concerns, the board does not agree with their conclusion that allowing the Taxpayers to introduce the DRA Appraisals as evidence violates in

any way this Statement or, for that matter, any statute or constitutional provision cited in the Motion in Limine. In issuing these appraisals, the DRA expressly recognized the independent authority of the municipalities to determine market value. As noted in the Taxpayers' Joint Memorandum (p. 3), each appraisal at p. 4 states one of its functions is "[t]o provide assistance to the selectmen/assessors in determining the value of utility property at the local level."

The municipalities are free to disregard the values in the DRA Appraisals and present their own evidence of how the assessments under appeal were determined using alternative methodologies or assumptions. Municipal independence in selecting a valuation method should not, however, result in preclusion of the presentation of an alternative method of estimating market value. The board is capable of evaluating the relevance and weight to be given to conflicting appraisals or other evidence and will base its findings on the record presented. What probative weight the DRA Appraisals deserve is a question best answered at a hearing on the merits based on the presentations of each party.

The board notes the "client" named in each appraisal is the "State of New Hampshire," signifying that it was prepared for the principal purpose of helping the State calculate the amount of the Utility Property Tax due under RSA ch. 83-F. The parties agree the values estimated by DRA are also used for equalization purposes. (See Objection, p. 4; and Joint Reply, p. 2, citing RSA 21-J:3, XIII.)

Whatever strengths, flaws and limitations are inherent in these appraisals or the parties' use of them can be addressed by the parties at the hearing on the merits. To rule the DRA Appraisals are admissible as evidence, as the board has done, does not imply they are the best evidence of the market value of each Taxpayer's property or that, considering them in isolation is

sufficient to satisfy each Taxpayer's burden of proving each municipal assessment is disproportional.

Insofar as the rules of evidence are concerned, Judge Vaughan in the Superior Court Order (p. 4-8) considered whether the DRA Appraisals are hearsay and whether several of its exceptions (business records and public records) apply to govern their admissibility. The parties have revisited these evidentiary issues in their pleadings, but the board finds RSA 71-B:7 and Tax 201.30 are of key relevance. This statute and rule provide the board "shall not be bound by the strict rules of evidence adhered to in the superior court" and shall "give due regard to the principles behind the rules and to the board's statutory function and purpose."¹

While the parties discuss the evidentiary rules at some length in their respective pleadings, the board finds merit in Judge Vaughan's reasoned conclusions that the DRA Appraisals, based on fairness principles and "in the best interest of justice," are admissible and the municipalities should be provided an opportunity to depose Mr. Dickman regarding them. (Id. at pp. 6-7.) This ruling was based, in part, on Judge Vaughan's finding (apparently without dispute by the municipalities in those superior court actions) that "the DRA [Appraisals] are relevant because they go directly to [the taxpayer's] claim regarding the market value of its properties." (Id. at p. 3.)

In the board's view, every appraisal can and should be judged on its own merits, based on the soundness of the assumptions, methodologies and conclusions presented. The board has followed a very consistent practice of not excluding an appraisal simply because the preparer was not called as a witness by any party to the appeal. The absence of the appraiser can, of course, impact the credibility of the submitted document, especially when legitimate questions

¹ Cf. Objection, p. 8, citing RSA 541-A:33, II: "The rules of evidence shall not apply in adjudicative proceedings. Any oral or documentary evidence may be received. . . ."

are raised regarding its methodology or assumptions by the party seeking to discredit its probative value. It is therefore up to each party to decide how best to present its evidence, including whether to call Mr. Dickman, the preparer of the DRA Appraisals, as a witness.

As noted above, the Town of Gorham recently made similar objections to the use of the DRA Appraisals in recent tax abatement appeals heard and decided by the board. Following the board's preliminary rulings, however, the Town of Gorham did not depose Mr. Dickman and did not call him as a witness to testify in the Portland Pipe Line appeals. (See July 22, 2013 Decision, p. 18.)

B. Lawful Discovery is Permissible Regarding the DRA Appraisals

On the record presented, the board finds no such discovery has yet been attempted in these appeals. Upon review of the Superior Court Order, the board agrees with Judge Vaughan's ruling that the municipalities should be given an opportunity to depose Mr. Dickman regarding the DRA Appraisals should they choose to do so. (See Superior Court Order, p. 7: "Admitting the DRA [Appraisals] without allowing the municipalities] the opportunity to depose Mr. Dickman would be unfairly prejudicial. . . .") Judge Vaughan also considered arguments pertaining to RSA 21-J:14 (Confidentiality of Department Records)² and ruled Mr. Dickman cannot be compelled "to produce or discuss any internal DRA documents." (Id., at pp. 7-8.)

² In addition to paragraphs I and V(a) of this statute, quoted in the Superior Court Order (pp. 3-4), see also paragraph V(c), which states the following "exception" to the statute's "confidentiality and privileged" provisions:

Disclosure of department records, files, returns, or information in a New Hampshire state administrative proceeding pertaining to a state tax administration where the information is directly related to a tax issue in the proceeding, or the taxpayer whom the information concerns is a party to such proceeding, or the information concerns a transactional relationship between a person who is a party to the proceeding and the taxpayer.

The parties can and should work out for themselves the manner, time and place for any discovery pertaining to the DRA Appraisals. As in the Portland Pipe Line appeals, however, if the municipalities choose not to depose Mr. Dickman or call him as a witness at the hearing on the merits, the Taxpayers will not be precluded from presenting the DRA Appraisals.

C. More Detailed Rulings on the Scope of Anticipated Discovery Should Not be Necessary

It should not be necessary for the board to rule, in advance, concerning all possible discovery issues that may arise regarding the DRA Appraisals. The DRA is not a party to these appeals and Mr. Dickman, its employee, can either appear for a noticed deposition voluntarily or pursuant to a duly issued subpoena.

In the Superior Court Order (p. 2), Judge Vaughan states the DRA and Mr. Dickman had “moved to quash” a “subpoena” for a “deposition,” but he denied this motion “without prejudice.” The Taxpayers’ Joint Memorandum (p. 14) states that deposition “is currently scheduled for September 24, 2013, with September 30th reserved as an additional date if necessary,” apparently without further objection from the DRA or Mr. Dickman (following issuance of that order).

The record does not reflect whether the parties and the DRA have reached any further agreement regarding the date(s) of this deposition or whether it can be structured and conducted in a manner giving all municipalities (including those not named as parties in those superior court appeals) a reasonable opportunity to participate. If not, it is possible another deposition may be scheduled in these appeals, but the parties should proceed without unnecessary redundancy or repetitiveness to insure efficiency and reduce the time and costs involved.

The board further finds the concerns articulated by Judge Vaughan in the Superior Court Order (see pp. 3-4 and 7-8) regarding the confidentiality of Mr. Dickman’s “work papers” in light of the provisions in RSA 21-J:14 to have merit and equal force in these appeals. In

addition, a review of the DRA Appraisal attached as Exhibit A to the Joint Memorandum indicates Mr. Dickman prepared a “summary appraisal” that is reasonably transparent, diminishing the force of any contentions regarding mandatory disclosure of his work papers.

Finally, the board notes that, while Mr. Dickman may be an “expert” employed by the DRA for the specific purpose of preparing the DRA Appraisals, he is not an expert retained by any of the parties to these appeals and his independence from each of them has not been questioned. Consequently, there is no inherent need to delay any permissible discovery regarding the DRA Appraisals until after the time scheduled for the parties to make their own “Expert Disclosures.” (Cf. Taxpayers’ Joint Memorandum, pp. 14 – 15; and Structuring Conference Order, p. 2.)

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Michele E. LeBrun, Chair

Albert S. Shamash, Member

Theresa M. Walker, Member

CERTIFICATION

I hereby certify a copy of the foregoing Order has this date been mailed, postage prepaid, to: Margaret H. Nelson, Esq., Sulloway & Hollis, PO Box 1256, Concord, NH 03302, counsel for Taxpayers; Walter L. Mitchell, Esq. and Judith E. Whitelaw, Esq., Mitchell Municipal Group, P.A., 25 Beacon St. East, Laconia, NH 03246; Mr. George E. Sansoucy and Mr. Brian D. Fogg, George E. Sansoucy, PE, LLC, 89 Reed Road, Lancaster, NH 03584; Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258; Mr. George Hildum, 2 Sanborn Road, Concord, NH 03301; Christopher L. Boldt, Esq., Donahue, Tucker & Ciandella, PLLC, 56 NH Route 25, PO Box 214, Meredith, NH 03253; Justin L. Pasay, Esq., Donahue, Tucker & Ciandella, PLLC, 111 Maplewood Avenue - Suite D, Portsmouth, NH 03801; Robert Upton, II, Esq., Upton & Hatfield LLP, 23 Seavey Street, PO Box 2242, North Conway, NH 03860; Shawn M. Tanguay, Esq., Gardner, Fulton & Waugh, PLLC, 78 Bank Street, Lebanon, NH 03766; Mr. Wil Corcoran, Corcoran Consulting Associates, Inc., PO Box 1175, Wolfeboro Falls, NH 03896; Chairman, Board of Selectmen, 756 Dalton Road, Dalton, NH 03598; Chairman, Board of Selectmen, 6 Pinnacle Hill Road, New Hampton, NH 03256; Chairman, Board of Selectmen, 7 Nelson Common Road; Nelson, NH 03457; Chairman, Board of Selectmen, PO Box 72, Wilnot, NH 03287; Chairman, Board of Selectmen, 7 Jefferson Road, Whitefield, NH 03598; Chairman, Board of Selectmen, PO Box 265, Warner, NH 03278; Chairman, Board of Selectmen, Town of Unity - 13 Center Road #1, Charlestown, NH 03603-7500; Chairman, Board of Selectmen, 23 Edgemont Road; Sunapee, NH 03782-2513; Chairman, Board of Selectmen, 1450 Route 123 North, Stoddard, NH 03464; Chairman, Board of Selectmen, PO Box 22, Springfield, NH 03284; Chairman, Board of Selectmen, 3 Hilldale Avenue, South Hampton, NH 03827; Chairman, Board of Selectmen, PO Box 194, Center Sandwich, NH 03227; Chairman, Board of Selectmen, 130 Durand Road, Randolph, NH 03593; Chairman, Board of Selectmen, 311 Pembroke Street, Pembroke, NH 03275; Chairman, Board of Selectmen, 6 Village Green, Pelham, NH 03076-3172; Chairman, Board of Selectmen, 330 Main Street, Hopkinton, NH 03229; Chairman, Board of Selectmen, PO Box 13, Hinsdale, NH 03451; Chairman, Board of Selectmen, 18 Depot Hill Road, Henniker, NH 03242; Chairman, Board of Selectmen, 15 Sunapee Street, Newport, NH 03773; Chairman, Board of Selectmen, 661 Turnpike Road, New Ipswich, NH 03071; Chairman, Board of Selectmen, PO Box 61, Andover, NH 03216; Chairman, Board of Selectmen, PO Box 487, Marlborough, NH 03455; Chairman, Board of Selectmen, PO Box 248, Madison, NH 03849; Chairman, Board of Selectmen, PO Box 25, Lincoln, NH 03251; Chairman, Board of Selectmen, PO Box 125, Landaff, NH 03585; Assessing Office - Mr. James Rice, 15 Newmarket Road, Durham, NH 03824; Chairman, Board of Selectmen, 230 Lake Street, Bristol, NH 03222; Chairman, Board of Selectmen, 11 Main Street, Hampstead, NH 03841; Chairman, Board of Selectmen, PO Box 5, Francestown, NH 03043; Chairman, Board of Selectmen, PO Box 88, Bath, NH 03740; Chairman, Board of Selectmen, 25 Main Street, Lancaster, NH 03584; Brett S. Purvis & Associates, Inc., 3 High Street, 2A, PO Box 767, Sanbornville, NH 03872; Chairman, Board of Selectmen, PO Box 61, Andover, NH 03216; Chairman, Board of Selectmen, 1 Dalton Road, Brentwood, NH 03833; Chairman, Board of Selectmen, 17 Bridge Street, Colebrook, NH 03576; Chairman, Board of Selectmen, 157 Main Street, Epping, NH 03042; Chairman, Board of Selectmen, PO Box 299, Grafton, NH 03240; Chairman, Board of Selectmen, PO Box 33, East Lempster, NH 03605; Chairman, Board of Selectmen, PO Box 126, Lyme, NH 03768; Chairman, Board of Selectmen, 6 Pinnacle Hill Road, New Hampton, NH 03256; Chairman, Board of Selectmen, PO Box 380, Meriden, NH 03770; Chairman, Board of Selectmen, PO Box 194, Center Sandwich, NH 03227; Chairman, Board of Selectmen, 16 Merrill Access Road, Thornton, NH 03285; and Chairman, Board of Selectmen, Town of Unity - 13 Center Road #1, Charlestown, NH 03603-7500.

Dated: 9/26/13

Anne M. Stelmach, Clerk