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THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

No. 215-2022-CV-00167

Steven Rand, et al.

v.

The State of New Hampshire

THE STATE'S REPLY TO THE PLAINTIFFS' RESPONSE TO THE STATE'S AND INTERVENOR'S OBJECTIONS AND CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT REGARDING THE SWEPT

The State of New Hampshire, by and through counsel, submits the following reply to the plaintiffs' "Response to the State's and Intervenor's Objections and Cross-Motions for Partial Summary Judgment Regarding the SWEPT":

1. The State has set forth in detail in its underlying objection and cross-motion why the Statewide Education Property Tax ("SWEPT") is constitutional. The State does not replicate those arguments here, and limits this reply to the following six points.

2. **First**, it is not "novel," *see* Pls.' Response at 2, for the State to point out that challenges to how tax revenues are distributed once generated arise, if at all, under Part I, Article 12 and Part II, Article 6, and not Part II, Article 5. To the contrary, the New Hampshire Supreme Court has for decades drawn a distinction between how taxes are assessed and how money raised by taxation is distributed. *See, e.g.*, *Duncan v. Jaffrey*, 98 N.H. 305, 307–08 (1953) ("Taxes must be proportionally assessed on persons and property; but there is no constitutional provision that money raised by taxation must be appropriated in such a manner that the several taxpayers, or districts of taxpayers, will be directly benefited in proportional to the amount of their taxes."). The Supreme Court has not, in any of the cases the plaintiffs cite, held that taxes administered to

fund education are subject to different constitutional rules than are other taxes. Nor has the Supreme Court addressed a tax that operates in the manner that the SWEPT currently does. The plaintiffs do not meaningfully dispute that their concerns with respect to the SWEPT, at least insofar as they relate to so-called "excess SWEPT" municipalities, stem from how the legislature has chosen to distribute SWEPT revenues. Pointing out that these concerns do not implicate the legal theory upon which the plaintiffs have premised their challenge does not "elevate form over substance." Pls.' Response at 9.

3. **Second**, the plaintiffs' reliance on RSA 198:39, I, is a red herring. Contrary to the plaintiffs' assertion, funds that the SWEPT generates in a municipality in excess of what that municipality receives in total education grants are *not* deposited into the education trust fund. RSA 198:39, I, identifies eight separate taxes that generate revenues that are deposited into the education trust fund, and the SWEPT is not among them. RSA 198:39, I(a)–(f), (j). Moreover, as discussed in the State's objection and cross motion, the legislature repealed the statutory authority for excess revenues generated by the SWEPT to be deposited into the education trust fund in 2011. *See* RSA 198:48, I (2009) (repeated 2011); RSA 76:8, II (2009) (amended 2011). As part of that effort, the legislature also repealed RSA 198:39, I(g), which had previously included "[t]he full amount of excess statewide enhanced education tax payments from the department of revenue administration pursuant to RSA 198:48" among the funds "[t]he state treasurer shall deposit into [the education trust] fund immediately upon receipt." RSA 198:39, I(g) (Lexis 2010); *see* 2011 House Bill 339, § 258:9 (effectuating repeal). Since those repeals, *all* revenues generated by the SWEPT are held by the municipality and "pa[id]" directly "to the municipality for the use of the school district or districts." RSA 76:8, II. In other words, revenues

generated by the SWEPT—excess are otherwise—are not deposited in the education trust fund at all, and are therefore not subject to RSA 198:39, I.[1]

4. **Third**, the plaintiffs' contention that exempting unincorporated places from the class of property subject to the SWEPT "would destroy the statewide nature of the tax and be unconstitutional," Pls.' Response at 5, conflates the classification of property subject to a tax with the nature of the tax itself. The Supreme Court has made clear that Part II, Article 6 "grants the legislature broad power to declare property to be taxable based upon classification of the property's kind or use, but not based upon a classification of a property's owner." *N. Country Envt'l Servs. v. State*, 157 N.H. 15, 19 (2008) (citation and quotation marks omitted). The plaintiffs point to no authority for the proposition that this "broad power" cannot extend to state taxes. The SWEPT's enabling statute, RSA 76:3, dispels any notion that the SWEPT reaches all property within the state. Rather, RSA 76:3 specifically excludes railroad property and utility property from the class of property subject to the SWEPT. *See* RSA 76:3; 76:8, I. The plaintiffs do not appear to take issue with these exclusions. Nor do they address the implications of their argument on other property not typically subject to taxation, including property held by the federal government, the State, counties, municipalities, or school districts themselves, or property held by charitable organizations, schools, or religious entities for religious purposes.[2]

[1] For this same reason, the plaintiffs' contention that any remedy this Court imposes should include excess revenues being deposited to the education trust fund, Pls.' Response at 14, as opposed to being held in escrow, should be rejected. There is no statutory authority for such deposits.

[2] RSA 72:23, I-II (exempting certain real property owned by the State, counties, municipalities, school districts, and village districts from taxation); RSA 72:23, III (exempting real property held by religious entities for religious purposes); RSA 72:23, IV (exempting buildings and structures of all schools, including the land thereto appertaining); RSA 72:23, V (exempting "[t]he buildings, lands and personal property of charitable organizations and societies organized, incorporated, or legally doing business in this state, owned, used and occupied by them directly for the purposes for which they are established, provided that none of the income or profits thereof is used for any other purpose than the purpose for which they are established").

Under the plaintiffs' argument, however, the existence of each of these classifications would render a broad tax unconstitutional. As explained in the State's objection and cross-motion, that is not the law.

5. **Fourth**, the plaintiffs' heavy reliance on the Supreme Court's statement in *Opinion of the Justices (Sch. Fin.)*, that the special abatement addressed in that opinion could not be justified by the fact that some towns have "few children" or "a wealth of property value, including wealth generated by the presence of heavy industry," 142 N.H. 892, 901 (1998), is misplaced. There can be no doubt that the special abatement at issue in the *Opinion of the Justices* applied to property within municipalities that the legislature had already determined to be within the class of property subject to the statewide education tax. *See id.* ("The residents of one *municipality* should not be compelled to bear greater burden than are borne by others." (emphasis added; citation omitted). The Supreme Court was therefore not presented with the threshold question under Part II, Article 6 of whether a certain class of property is subject to the SWEPT in the first place. Instead, the Supreme Court assessed the special abatement solely under Part II, Article 5. Here, however, the threshold question of classification is directly presented. It implicates a different constitutional provision and is subject to a different legal standard under which "the legislature has broad authority to classify types of property for taxation so long as the classification is sufficiently inclusive to constitute a distinctive class." *N. Country Envt'l Servs.*, 157 N.H. at 19. The plaintiffs offer no analysis for why the SWEPT is unconstitutional under the correct standard, and nothing in the *Opinion of the Justices* speaks to this issue.

6. **Fifth**, the State has not argued that the term "municipality" is ambiguous, as the plaintiffs suggest in their response. *See* Pls.' Response at 5. As explained in the State's objection and cross-motion, an "unincorporated place" is not a "municipality" under the plain and

unambiguous meaning of the latter term. *See* State's Obj. and Cross-Mot. at 14–16. The State's reliance on relevant dictionary definitions and context clues in other related statutes does not undermine this conclusion. Rather, both are common tools of interpretation that the Supreme Court has employed to determine the unambiguous meaning of a statute. *See, e.g.*, *N.H. Alpha of SAE Trust v. Town of Hanover*, 172 N.H. 69, 74 (2019) ("Relying on the dictionary definition of the word 'conjunction,' we held in *Alpha Delta* that the *plain and unambiguous* meaning of the word, as used in the ordinance, mean that the property's use must have some union, association, or combination with the College." (citations and quotation marks omitted; emphasis added)); *Lally v. Flieder*, 159 N.H. 350, 352 (2009) (concluding that a provision was unambiguous "when read in the context of the statute as a whole").[3]

7. **Sixth**, if this Court ultimately concludes that the SWEPT is unconstitutional—and it should not for the reasons stated above and previously—the plaintiffs have offered no reason to reject the remedy the State has proposed. The plaintiffs bear the burden of demonstrating they are entitled to the relief they seek. *N.H. Dep't of Envtl. Servs. v. Mottolo*, 155 N.H. 57, 63 (2007). "It is within the trial court's sound discretion to grant an injunction after consideration of the facts and established principles of equity." *Id.* Factors such as irreparable harm and the balance of the equities remain relevant to the permanent-injunction analysis. *See, e.g.*, *Pike v.*

[3] The Department of Revenue Administration has not, as the plaintiffs suggest, implemented the SWEPT in a manner inconsistent with the statutory construction advanced in the State's objection and cross-motion. As explained in that filing, the Department of Revenue Administration's use of a negative local tax rate helps ensure that unincorporated places are functionally exempt from the SWEPT because they cannot utilize the SWEPT. *See* State's Obj. and Cross-Mot. at 16–18. This system is wholly in keeping with the notion that unincorporated places are not municipalities subject to the SWEPT. *See id.* Regardless, an administrative agency's interpretation or implementation of a statute cannot overcome what that statute unambiguously prescribes. *See, e.g.*, *Doe v. Comm'r, N.H. Dep't of Health and Human Servs.*, 174 N.H. 239, 254 (2021) (noting that courts do not defer to an agency's statutory interpretation when it "contravenes the plain meaning of the statutory scheme"); *Appeal of N. Pass Transmission*, 172 N.H. 385, 413 (2019) (observing that the administrative-gloss doctrine only applies to ambiguous statutes).

Deutsche Bank Nat'l Trust Co., 168 N.H. 40, 45–46 (2015); *Nordic Inn Condo. Owners Ass'n v. Ventullo*, 151 N.H. 571, 580 (2004); *see also Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 156–57 (2010) ("A plaintiff seeking a permanent injunction . . . must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." (cleaned up)).

8. The State has proposed a remedy that, in its view, would mitigate disruption to the municipal budget cycle in the event this Court determines the SWEPT is unconstitutional as currently administered. Although the plaintiffs seemingly disagree with the State's proposal, they offer no alternative. Nor do they explain why they would suffer irreparable harm if the Court were to impose the remedy the State has proposed, why that remedy is against the public interest, or why the balance of the equities weighs against that remedy. The plaintiffs have therefore failed to meet their burden with respect to *any* form of injunctive relief. *Mottolo*, 155 N.H. at 63. If, however, the Court were inclined to enter a remedy with respect to the SWEPT, it should roll that remedy out in the manner described in the State's underlying objection and cross-motion to minimize the harm to the public.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorney,

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Date: March 6, 2023

/s/ *Samuel Garland*

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Certificate of Service

I hereby certify that a copy of the foregoing motion was sent via the Court's electronic-filing system to all parties of record.

Date: March 6, 2023

/s/ *Samuel Garland*
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