

STATE OF NEW HAMPSHIRE
Superior Court
Rockingham, ss.
Case No. 215-2022-CV-00167

Steven Rand et al.

Plaintiffs,

v.

The State of New Hampshire,

Defendant.

**PLAINTIFFS' RESPONSE TO THE STATE OF NEW HAMPSHIRE'S AND
INTERVENOR'S STATEMENT OF MATERIAL FACTS**

Pursuant to Superior Court Civil Rule 12(g), Plaintiffs, by and through their counsel, submit the following response to the State's and Intervenor's statement of material facts.

RESPONSE TO STATE'S STATEMENT OF MATERIAL FACTS

1. All property subject to the SWEPT is valued and the SWEPT tax rate is set at a uniform and proportionate matter. Affidavit of Bruce K. Kneuer ("Kneuer Aff.") ¶ 14.

Plaintiffs' Response: Disputed. The first statement "[a]ll property subject to the SWEPT" is a tautology. The court is to decide what property is subject to SWEPT. The second phrase that the SWEPT tax rate is set in a uniform and proportionate manner is a matter of legal analysis to be determined by the Court.

2. A negative Local Education Tax Rate may occur in a very limited set of circumstances when a municipal entity, generally an unincorporated place, has minimal or no public education responsibilities within its boundaries, i.e., no school budget or a very small school budget. Kneuer Aff. ¶ 18.

Plaintiffs' Response: Undisputed

3. Each spring, municipalities typically vote on their budgets for the “current” year, which can begin on January 1 or July 1. Affidavit of Lindsey M. Stepp (“Stepp Aff.”) ¶ 9.

Plaintiffs' Response: Undisputed

4. Municipal and school officials begin meeting in the fall of the year before the budget vote to determine what the appropriation needs are for the coming year and the availability of revenue sources to cover the appropriations and determine the anticipated level of “tax efforts” that may be required. Stepp Aff. ¶ 10.

Plaintiffs' Response: Undisputed

5. In SB 2 towns, deliberative sessions or hearings will typically occur in January through March in advance of town meeting. Stepp Aff. ¶ 11.

Plaintiffs' Response: Undisputed

6. In non-SB2 towns, a budget warrant is issued 14 days before the annual meeting and voted on during the meeting. Stepp Aff. ¶ 12.

Plaintiffs' Response: Undisputed

7. Once the budget is approved, the municipality issues a first tax bill in June, which is in essence the first payment on the tax effort for the entire period covered by the budget. Stepp Aff. ¶ 13.

Plaintiffs' Response: Undisputed

8. By September 1, the municipality reports to DRA its budget and other reports. Stepp Aff. ¶ 14.

Plaintiffs' Response: Undisputed

9. The DRA also gathers information from other sources, including the Department of Education, in inform the rate-setting process. Stepp Aff. ¶ 14.

Plaintiffs' Response: Undisputed

10. The DRA then sets rates for municipal uses, the SWEPT, the local education tax, and county apportionments and communicates those rates to the municipality during the last three months of the year. Stepp Aff. ¶ 15.

Plaintiffs' Response: Undisputed

11. Using these rates, the municipality issues a tax bill in December for the second half of the period covered by the budget, which reconciles the estimates incorporated into the June bill to ensure that revenues are generated for the total amount the municipality budgeted. Stepp Aff. ¶ 16.

Plaintiffs' Response: Undisputed

12. Between the June and December tax bills, the municipality has already begun to expend funds to meet local needs, including education. Stepp Aff. ¶ 17.

Plaintiffs' Response: Undisputed

13. At the time of this filing, municipal entities are already well into creating their budgets for the current year. Stepp Aff. ¶ 18. Many municipalities will have completed the required public hearing and procedural requirements, and voters will have seen the recommended budgets, which will subsequently be printed and identified on warrants or ballots that will be provided to voters at or prior to municipalities' annual meetings. *Id.*

Plaintiffs' Response: Undisputed

14. In so-called “excess SWEPT” municipalities, these budgets will likely include anticipate revenues from the amount the SWEPT generates in those municipalities above what those municipalities would receive in total education grants under RSA 198:41. Stepp Aff. ¶ 19.

Plaintiffs' Response: Undisputed

15. A loss of these anticipated revenues would create a cash-flow problem for municipalities, the potential remedies for which would be highly disruptive mid-cycle. Stepp Aff. ¶ 19.

Plaintiffs' Response: Undisputed

16. School districts would likely need to seek approval from the superior court under RSA 197:3 to hold special meetings to amend their school budgets to reflect the reduced revenues caused by the unavailability of these revenues. Stepp Aff. ¶ 19.

Plaintiffs' Response: Undisputed

17. Alternatively, the DRA might need to increase the local education tax rate in these municipalities during the rate-setting process, resulting in an unanticipated tax-rate spike for residents of these municipalities in the fall. Stepp Aff. ¶ 19.

Plaintiffs' Response: Undisputed, but see *Claremont v. Governor (Statewide Property Tax Phase-In)*, 144 N.H. 210, 216 (1999) (holding that the fact that the state education tax may subject “property rich” communities to “serious adverse consequences by the immediate implementation” is “neither [a] reasonable nor fair” basis for awarding a tax exemption).

18. Limiting any remedy this Court were to impose to the next budget cycle would provide the DRA time to inform municipalities in Fall 2023 that the revenues they should anticipate when

building their next proposed budgets should not include any revenues generated by the SWEPT in excess of the amount they would receive in total education grants under RSA 198:41. Stepp Aff. ¶ 20.

Plaintiffs' Response: This statement concerns a legal remedy to be imposed by this Court and not a fact relevant to the disposition of the underlying motion. Accordingly, no response is warranted. To the extent a response is warranted, Plaintiffs note that the State has been on notice that Plaintiffs are challenging the constitutionality of SWEPT since September 2022, well in advance of the upcoming budget cycle.

19. Municipalities typically have, or belong to, one or more school districts; unincorporated places do not. Kneuer Aff. ¶ 18.

Plaintiffs' Response: Undisputed

20. The unincorporated places in which the DRA sets negative local education tax rates do not have school districts and do not belong to school districts, and many have no residents at all. Kneuer Aff. ¶ 18

Plaintiffs' Response: Undisputed.

21. The following is a list of unincorporated places in New Hampshire: Atkinson and Gilmanton Academy Grant; Bean's Grant; Bean's Purchase; Cambridge; Chandler's Purchase; Crawford's Purchase; Cutt's Grant; Dix's Grant; Dixville; Erving's Location; Green's Grant; Hadley's Purchase; Hale's Location; Kilkenny; Livermore; Low and Burbank's Grant; Martin's Location; Millsfield; Odell; Pinkham's Grant; Sargent's Purchase; Second College Grant; Success; Thompson and Meserve's Purchase; and Wentworth Location. See New Hampshire Employment Security, NHES Home, ELMI Tools, Geo Areas, NH cities, towns, and unincorporated places, <https://www.nhes.nh.gov/elmi/tools/documents/nh-geo-areas-town.pdf>, at pp. 6, 9-10, 17, 21, 27-28, 32, 40, 50-52, 64, 70, 72, 76, 80, 92, 96, 106-107, 113, 118, and 125 of 130 (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

22. According to the 2020 census, Atkinson and Gilmanton Academy Grant had a total population of zero. See United States Census Bureau, 1 Filter (Atkinson and Gilmanton Academy Grant, Coos County, New Hampshire), <https://data.census.gov/table?q=&g=0600000US3300702420&tid=DECENNIALPL2020.P1> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

23. According to the 2020 census, Bean's Grant had a total population of zero. United States Census Bureau, 1 Filter (Beans Grant, Coos County, New Hampshire), <https://data.census.gov/table?q=&g=0600000US3300704100&tid=DECENNIALPL2020.P1> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

24. According to the 2020 census, Bean's Purchase had a total population of zero. United States Census Bureau, 1 Filter (Beans Purchase, Coos County, New Hampshire), <https://data.census.gov/all?q=Beans+purchase,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

25. According to the 2020 census, Cambridge Township had a total population of 16. United States Census Bureau, 1 Filter (Cambridge township, Coos County, New Hampshire), <https://data.census.gov/all?q=Cambridge+township,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

26. According to the 2020 census, Chandler's Purchase had a total population of zero. United States Census Bureau, 1 Filter (Chandler's purchase, Coos County, New Hampshire), <https://data.census.gov/all?q=Chandler's+purchase,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

27. According to the 2020 census, Crawford's Purchase had a total population of zero. United States Census Bureau, 1 Filter (Crawford's purchase, Coos County, New Hampshire), <https://data.census.gov/all?q=crawford's+purchase,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

28. According to the 2020 census, Cutt's Grant had a total population of zero. United States Census Bureau, 1 Filter (Cutt's grant, Coos County, New Hampshire), <https://data.census.gov/all?q=cutt's+grant,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

29. According to the 2020 census, Dix's Grant had a total population of zero. United States Census Bureau, 1 Filter (Dix's grant, Coos County, New Hampshire), <https://data.census.gov/all?q=dix's+grant,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

30. According to the 2020 census, Dixville had a total population of four. United States Census Bureau, 1 Filter (Dixville township, Coos County, New Hampshire), <https://data.census.gov/all?q=dixville+township,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

31. According to the 2020 census, Erving's Location had a total population of zero. United States Census Bureau, 1 Filter (Erving's location, Coos County, New Hampshire), <https://data.census.gov/all?q=ervings+location,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

32. According to the 2020 census, Green's Grant had a total population of zero. United States Census Bureau, 1 Filter (Greens grant, Coos County, New Hampshire), <https://data.census.gov/all?q=greens+grant,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

33. According to the 2020 census, Hadley's Purchase had a total population of zero. United States Census Bureau, 1 Filter (Hadley's purchase, Coos County, New Hampshire), <https://data.census.gov/all?q=hadleys+purchase,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

34. According to the 2020 census, Hale's Location had a total population of 132. United States Census Bureau, 1 Filter (Hale's location, Carroll County, New Hampshire), <https://data.census.gov/all?q=hales+location,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

35. According to the 2020 census, Kilkenny had a total population of zero. United States Census Bureau, 1 Filter (Kilkenny township, Coos County, New Hampshire),

<https://data.census.gov/all?q=kilkenny+township,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

36. According to the 2020 census, Livermore had a total population of two. United States Census Bureau, 1 Filter (Livermore town, Grafton County, New Hampshire), <https://data.census.gov/all?q=livermore+town,+Grafton+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

37. According to the 2020 census, Low and Burbank's Grant had a total population of zero. United States Census Bureau, 1 Filter (Low and Burbanks grant, Coos County, New Hampshire), <https://data.census.gov/all?q=low+and+burnbanks+grant,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

38. According to the 2020 census, Martin's Location had a total population of two. United States Census Bureau, 1 Filter (Martins location, Coos County, New Hampshire), <https://data.census.gov/all?q=martins+location,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

39. According to the 2020 census, Millsfield had a total population of 25. United States Census Bureau, 1 Filter (Millsfield township, Coos County, New Hampshire), <https://data.census.gov/all?q=millsfield+township,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

40. According to the 2020 census, Odell had a total population of one. United States Census Bureau, 1 Filter (Odell Township, Coos County, New Hampshire), <https://data.census.gov/all?q=odell+township,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

41. According to the 2020 census, Pinkham's Grant had a total population of zero. United States Census Bureau, 1 Filter (Pinkhams grant, Coos County, New Hampshire), <https://data.census.gov/all?q=pinkhams+grant,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

42. According to the 2020 census, Sargent's Purchase had a total population of zero. United States Census Bureau, 1 Filter (Sargents purchase, Coos County, New Hampshire), <https://data.census.gov/all?q=sargents+purchase,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

43. According to the 2020 census, Second College Grant had a total population of one. United States Census Bureau, 1 Filter (Second College grant, Coos County, New Hampshire), <https://data.census.gov/all?q=second+college+grant,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

44. According to the 2020 census, Success had a total population of four. United States Census Bureau, 1 Filter (Success township, Coos County, New Hampshire), <https://data.census.gov/all?q=success+township,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

45. According to the 2020 census, Thompson and Meserve's Purchase had a total population of one. United States Census Bureau, 1 Filter (Thompson and Meserve's purchase, Coos County, New Hampshire), <https://data.census.gov/all?q=thompson+and+meserves+purchase,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

46. According to the 2020 census, Wentworth Location had a total population of 28. United States Census Bureau, 1 Filter (Wentworth location Coos County, New Hampshire), <https://data.census.gov/all?q=Wentworth+location,+Coos+County,+New+Hampshire> (last visited Feb. 6, 2023).

Plaintiffs' Response: Undisputed

47. In these unincorporated places, negative tax rates operate as an accounting mechanism to address the reality that the SWEPT generates unneeded education revenues. Stepp Aff. ¶ 21.

Plaintiffs' Response: Disputed. SWEPT does not generate “unneeded education revenues” since the revenue generated by SWEPT is tied to Statewide adequacy and not local education needs.

48. The use of negative tax rates to offset unneeded revenues is not confined to situations involving the local education tax rate in unincorporated places, but rather can also be employed when

other revenue sources, such as direct payments from third parties, exceed the amount that would need to be generated through the tax effort. Stepp Aff. ¶ 21.

Plaintiffs' Response: Undisputed, but irrelevant. Adequate education funding is a State responsibility and therefore SWEPT is a state tax subject to Part II, Art. 5 of the New Hampshire Constitution. The cited affidavit refers to situations where negative tax rates are used to offset municipality taxes, not state taxes.

RESPONSE TO INTERVENOR'S STATEMENT OF MATERIAL FACTS

1. A1. N.H. Laws 2011 ch. 258 repealed the portions of prior law that required municipalities that generated SWEPT surpluses to remit the surplus to the State. See N.H. Laws 2011 ch. 258:6-9.

Plaintiffs' Response: Undisputed

2. A2. N.H. Laws 2011 ch. 258 also instituted stabilization grants and capped the education grants for FY2013 to 105.5 percent of grants received in the previous year. See N.H. Laws 2011 ch. 258, Amended Analysis.

Plaintiffs' Response: Undisputed

3. A3. N.H. Laws 2011 ch. 258 did not raise any revenue. See HB337 Fiscal Note, Exhs. 3 and 4 to Turner Aff.

Plaintiffs' Response: Undisputed

4. A4. The projected fiscal impact of HB337 was to decrease education expenditures by approximately \$95 million over the biennium. See Exh. 4 to Turner Aff., at 11.

Plaintiffs' Response: Undisputed

5. A5. The only change made by N.H. Laws 2011 ch. 258 to the SWEPT was to repeal the requirement that surpluses be remitted to the State.

Plaintiffs' Response: Undisputed

6. A6. N.H. Laws 2011 ch. 258 did not change the SWEPT tax rate.

Plaintiffs' Response: Undisputed

7. A6. (*sic*) The SWEPT rate was \$1.825 per \$1,000 applied to all eligible taxpayers for the tax year starting April 2021. See 2021 Education Tax Warrant Summary, Exhibit 7 to Turner Aff.

Plaintiffs' Response: Undisputed that the SWEPT rate issued to all eligible taxpayers was \$1.825 per \$1,000 for the tax year starting April 2021. However, because of the retainer of excess SWEPT revenue and negative local education taxes, the effective tax rates for all eligible taxpayers were not uniform. Statement of Undisputed Facts in Support of Plaintiffs' Motion for Partial Summary Judgment, Exhibit A, Affidavit of Mr. Douglas Hall ("Hall Affidavit") ¶ 24.

8. A7. The SWEPT rate was \$1.23 per \$1,000 applied to all eligible taxpayer the 2022 tax year. See 2022 Education Tax Warrant Summary, Exhibit 8 to Turner Affidavit.

Plaintiffs' Response: Undisputed that the SWEPT rate issued to all eligible taxpayers was \$1.23 per \$1,000 for the tax year starting April 2022. However, because of the retainer of excess SWEPT revenue and negative local education taxes, the effective tax rates for all eligible taxpayers were not uniform. Hall Affidavit ¶ 24.

Dated: Concord, New Hampshire
February 27, 2023

Respectfully submitted,

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**pro hac vice pending*

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Statement of Facts has been served via the court's electronic filing system to all parties of record on this 27th day of February, 2023.

/s/ Natalie Laflamme
Natalie Laflamme