THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

No. 215-2022-CV-00167

Steven Rand, et al.

v.

The State of New Hampshire

MEMORANDUM OF LAW IN SUPPORT OF THE STATE OF NEW HAMPSHIRE'S OBJECTION TO PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

Introduction

The plaintiffs seek summary judgment on their claim that the Statewide Education Property Tax ("SWEPT") violates the uniformity and proportionality requirements of Part II, Article 5 of the State Constitution. The plaintiffs premise this claim on two theories. First, the plaintiffs contend that the SWEPT violates Part II, Article 5 because it generates revenues in a small number of municipalities that exceed the amount those municipalities receive in total education grants from the State, and the municipalities retain the excess SWEPT revenues. Second, the plaintiffs contend that the SWEPT violates Part II, Article 5 because the Department of Revenue Administration ("DRA") sets negative local education tax rates in an even smaller number of unincorporated places, many of which are uninhabited, and all of which have few, if any, education-related expenses.

The plaintiffs' complaint with respect to so-called "excess SWEPT" towns does not implicate Part II, Article 5 at all. The plaintiffs do not contend that the SWEPT is set or assessed in a disproportionate or nonuniform matter. Rather, they are concerned with what happens to

SWEPT revenues after they are generated. The New Hampshire Supreme Court has made clear that "[t]axes 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 proportion to the amount of their taxes." *Duncan v. Jaffrey*, 98 N.H. 305, 307–08 (1953). How funds generated through a proportionate and uniform tax are distributed *after* they are collected implicates Part I, Article 12 and Part II, Article 6, not Part II, Article 5. *See, e.g.*, *Opinion of the Justices*, 111 N.H. 136, 142 (1971); *Opinion of the Justices*, 85 N.H. 562, 563 (1931). The requirements of Part I, Article 12 and Part II, Article 6 are satisfied as long as funds are "devoted to a public use." *Manchester Fed. Sav. & Loan Ass'n v. State Tax Comm'n*, 105 N.H. 17, 21 (1963). By statute, SWEPT revenues must be "pai[d] . . . to the municipality for use of the school district or districts," RSA 76:8, II, which is a recognized public purpose, *see, e.g.*, N.H. Const. pt. II, art. 83; *Manchester Fed. Sav. & Loan Ass'n*, 105 N.H. at 21; *Opinion of the Justices*, 99 N.H. 536, 538 (1955). The plaintiffs' challenge to the SWEPT based on their concerns about so-called "excess SWEPT" towns accordingly fails even under the correct legal theory.

The same is true of the plaintiffs' Part II, Article 5 claim to the extent it is based on the existence of negative local education tax rates in a small number of unincorporated places. This theory likewise does not concern whether the SWEPT is set and assessed in a uniform and proportionate manner. It instead concerns the class of property that is subject to the SWEPT. "Strictly speaking, 'the rule of equality and proportionality does not apply to the selection of the subjects of taxation, provided just reasons exist for the selection made.'" *Smith v. N.H. Dep't of Revenue Admin.*, 141 N.H. 681, 686 (1997) (quoting *Opinion of the Justices,* 94 N.H. 506, 508 (1947)). A court's "review of legislative taxation classifications" is limited "to a determination

whether there are 'just reasons' for the classification." *Id.* (quoting *Opinion of the Justices*, 115 N.H. 306, 308 (1975)). Only property in *municipalities* is subject to the SWEPT. RSA 76:3; RSA 76:8. Unincorporated places are not municipalities, and the property there is therefore not subject to the SWEPT. There are "just reasons" for this distinction, as unincorporated places do not have school districts and have few, if any, inhabitants and education-related expenses. The use of negative local education tax rates reflects this reality. The plaintiffs' challenge to the SWEPT based on negative local tax rates therefore also satisfies the constitutional standard that actually applies to it.

For these reasons, and those further explained below, the plaintiffs' challenge to the SWEPT fails as a matter of law. The Court should therefore deny the plaintiffs' motion for summary judgment and grant the State's cross-motion for summary judgment as to the validity of the SWEPT.

Background

The SWEPT is established under RSA chapter 76, which governs "Apportionment, Assessment, and Abatement of Taxes." RSA 76:3 provides in relevant part that "the commissioner of the department of revenue administration [DRA] shall set the education tax rate at a level sufficient to generate revenue of $363,000,000 when imposed on all persons and property taxable pursuant to RSA 76:8, except property subject to tax under RSA 82 and RSA 83-F." This amount has been lowered to $263 million for Fiscal Year 2023 only. Laws 2021, 91:332.

RSA 76:8 sets forth how the SWEPT is calculated. The Commissioner of the DRA first determines a municipality's tax base for education, then multiplies the equalized tax rate set under RSA 76:3 by that tax base to determine the total amount of revenue generated by the

SWEPT in that municipality. RSA 76:8, I(a), (b). The Commissioner then "issue[s] a warrant under [her] hand and official seal for the amount computed in [RSA 76:8, I] to the selectmen or assessors of each municipality . . . directing them to assess such sum and pay it to the municipality for the use of the school district or districts." RSA 76:8, II. The rate in the Commissioner's warrant is the same for every municipality. *See* Affidavit of Bruce K. Kneuer, dated October 28, 2022 ("Kneuer Aff."), Ex. A & B.

The amount each municipality generates for the State through the SWEPT factors into how the State calculates total education grants under RSA 198:41. Those grants are how the State provides municipalities with the amounts to cover the cost of an opportunity for an adequate education in each municipality. *See* RSA 198:40-a, RSA 198:41, RSA 198:42. Under the formula used to calculate the grants, the Department of Education first determines the total cost of providing the opportunity for an adequate education in a municipality based on the per-pupil cost set forth in RSA 198:40-a. RSA 198:41, I(a). The Department of Education then subtracts from that total the amount of revenues generated in and paid to that municipality under RSA 76:8. RSA 198:41, I(b). The Department then adds certain additional aid provided under RSA 198:40-e [Relief Funding] and RSA 198:40-f [Extraordinary Need Grants]. RSA 198:41, I(d)–(e).

This amount is then distributed to school districts across four payments through total education grants. *See* RSA 198:42, I. When the amount of state revenues the SWEPT generates in a municipality under RSA 76:8, II, offsets the total amount the State otherwise owes to the municipality under RSA 198:41, I(a), (d), and (e), then that municipality receives its adequate education funding solely from those SWEPT revenues. SWEPT revenues are "pa[id]" directly "to the municipality for the use of the school district or districts" under RSA 76:8, II, regardless

of whether they exceed the amount a municipality is entitled to through total education grants under RSA 198:41, I.

While the plaintiffs are principally focused on municipalities where the revenues generated by the SWEPT exceed the total education grants those municipalities would receive under RSA 198:41, I, they also complain that a small number of unincorporated places where the DRA sets negative local education tax rates to offset the SWEPT rate. These places are not incorporated and do not have school districts, and many have no residents (much less resident students) at all. *See, e.g.*, State's Statement of Additional Material Facts ¶¶ 20–47; Kneuer Aff ¶ 18. In these places, negative tax rates operate essentially as an accounting mechanism to address the reality that the SWEPT generates unneeded education revenues, Affidavit of Lindsey M. Stepp ("Stepp. Aff.") ¶ 21, that if returned to the place for "school district" purposes only, could not be used and would functionally be stranded. 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 payments in lieu of taxes or an unexpended fund balance from a prior year carried forward, exceed the amount that would need to be generated through the tax effort. *Id.*[1]

Standard of Review

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. "An issue of fact is material if it affects the outcome of the litigation."

[1] In 2022 DRA set a negative education rate for the Town of Windsor. This anomaly resulted from the fact that the Windsor school district had a significant unexpended fund balance that carried over from the prior year, which had nothing to do with SWEPT.

Porter v. City of Manchester, 155 N.H. 149, 153 (2007). A dispute of fact is "genuine" if the evidence "is such that a reasonable fact finder could return a verdict for the nonmoving party." *Pennichuck Corp. v. City of Nashua*, 152 N.H. 729, 739 (2005) (citation and brackets omitted). Conclusory assertions—even those made by an expert witness—will not satisfy the nonmoving party's burden in opposing summary judgment. *New England Tel. & Tel. Co. v. City of Franklin*, 141 N.H. 449, 454 (1996). "Mere denials or general allegations of expected proof are [also] not enough" to overcome a motion for summary judgment. *Blagbrough v. Town of Wilton*, 145 N.H. 118, 121 (2000) (citation omitted). Only admissible evidence may be considered by the court on such a motion. RSA 491:8-a, II.

Argument

I. The plaintiffs are not entitled to summary judgment on their Part II, Article 5 claim to the extent it is based on a small number of municipalities retaining excess revenues generated by the SWEPT.

"Establishing 'the rules by which each individual's just and equal proportion of a tax shall be determined is a task of much difficulty, and a very considerable latitude must be left to the legislature on the subject.'" *Sirrell v. State*, 146 N.H. 364, 369 (2001) (quoting *Opinion of the Justices*, 77 N.H. 611, 615 (1915)). "In reviewing the statewide property tax, [a court] determine[s] only whether there is a 'clear conflict with the Constitution' in the tax as applied, and do[es] not concern . . . [itself] with whether the tax is 'wise, reasonable, or expedient.'" *Id.* (quoting *Petition of Boston & Maine Corp.*, 109 N.H. 324, 325-26 (1969)). A court's "task is neither to establish educational policy nor to determine the appropriate mechanism for its funding." *Id.* "The statewide property tax law, like any legislative act, is presumed constitutional and will not be declared invalid except upon 'unescapable grounds.'" *Sirrell*, 146 N.H. at 369-70 (quoting *Niemiec v. King*, 109 N.H. 586, 587 (1969)).

Part II, Article 5 "provides that the legislature has the power 'to impose and levy proportional and reasonable assessments, rates, and taxes, upon all of the inhabitants of, and residents within, said state.'" *Starr v. Governor*, 148 N.H. 72, 74 (2002) (quoting N.H. Const., pt. II, art. 5). "This article requires that all taxation be proportionate and reasonable[,] equal in valuation and uniform in rate, and just." *Id.* (cleaned up). The Supreme Court has held that the taxes levied to fund the opportunity for an adequate education are state taxes, and that the taxing district is therefore the State. *See Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 469–70 (1997). Accordingly, if a "property tax is used . . . to fund the provision of an adequate education, the tax must be administered in a manner that is equal in valuation and uniform in rate throughout the State." *Id.* at 471; *see Sirrell*, 146 N.H. at 370 ("In order for a tax to be proportional, all property in the taxing district must be valued alike and taxed at the same rate.").

As previously discussed, the SWEPT is established under RSA chapter 76, which governs "Apportionment, Assessment, and Abatement of Taxes." RSA 76:3 provides in relevant part that "the commissioner of the [DRA] shall set the education tax rate at a level sufficient to generate revenue of $363,000,000 when imposed on all persons and property taxable pursuant to RSA 76:8, except property subject to tax under RSA 82 and RSA 83-F."[2] RSA 76:8 focuses on municipalities and sets forth how the SWEPT is calculated with respect to them: the Commissioner of the DRA first determines a municipality's tax base for education, then multiplies the equalized tax rate set under RSA 76:3 by that tax base to determine the total amount of revenue generated by the SWEPT in that municipality. RSA 76:8, I(a), (b). The Commissioner then "issue[s] a warrant under [her] hand and official seal for the amount

[2] The legislature lowered this amount to $263 million for Fiscal Year 2023, but did not alter how the Department of Revenue Administration sets the rate to generate that amount or how the tax is assessed or collected. Laws 2021, 91:332.

computed in [RSA 76:8, I] to the selectmen or assessors of each municipality . . . directing them to assess such sum and pay it to the municipality for the use of the school district or districts." RSA 76:8, II.

The legislature has further set forth a formula by which the State calculates total education grants that are distributed to school districts within municipalities. *See* RSA 198:41; RSA 198:42. Under that formula, the Department of Education first determines the total cost of providing the opportunity for an adequate education in a municipality based on the per-pupil cost set forth in RSA 198:40-a. RSA 198:41, I(a). The Department of Education then subtracts from that total the amount of revenues generated by the SWEPT revenues generated in that municipality under RSA 76:8. RSA 198:41, I(b). The Department then adds certain additional aid provided under RSA 198:40-e [Relief Funding] and RSA 198:40-f [Extraordinary Need Grants]. RSA 198:41, I. This amount is then distributed to the school district or school department within the municipality across four payments through total education grants. *See* RSA 198:42, I. When the amount of SWEPT funds generated in and paid to a municipality under RSA 78:6, II, offsets the total amount the State otherwise owes to the municipality under RSA 198:41, I(a), I(d), and I(e), then that municipality functionally receives its total education grant solely from SWEPT revenues. Those revenues are paid directly "to the municipality for the use of the school district or districts" regardless of whether they exceed the amount a municipality is entitled to through total education grants under RSA 198:41, I.

The plaintiffs do not contend that the way the SWEPT rate is set under RSA chapter 76 is disproportionate. Such a claim would not succeed because all property subject to the SWEPT is valued and the tax rate is set in a uniform and proportionate manner. *See* Kneuer Aff. ¶ 14. Rather, the plaintiffs principally premise their challenge to the SWEPT on the fact that some

municipalities generate revenues from the SWEPT that exceed the amount those municipalities receive from the State in total education grants under RSA 198:41 and :42, and that, under RSA 76:8, II, those revenues are still "pa[id] . . to the municipality for the use of the school district or districts." To the extent the plaintiffs' challenge to the SWEPT is based on this practice, then, their claim concerns the legislature's chosen mechanism by which to provide state revenues to the municipalities for school district purposes *after* those revenues are generated by the SWEPT, not how SWEPT revenues are generated in the first place. The plaintiffs' Part II, Article 5 claim therefore does not implicate reasonable and proportionate *taxation*, *i.e.*, "the means by which the state obtains the revenue required for its activities," Taxation Definition, *Black's Law Dictionary* (11th ed. 2019); it implicates how funds generated by a proportionate and reasonable SWEPT are *distributed* by the legislature once obtained.

The plaintiffs point to no binding authority for the proposition that the proportionality and uniformity requirements in Part II, Article 5 extend to how revenues are distributed by the legislature once they are generated by a tax. For its part, the Supreme Court has made clear that "[t]axes 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 proportion to the amount of their taxes." *Duncan v. Jaffrey*, 98 N.H. 305, 307–08 (1953). "[S]uch a provision, if it existed, could not be executed." *Id.* In essence, this would require that every appropriation the legislature approved and every expenditure the executive branch made using tax revenues operate uniformly and proportionately to the benefit of the tax base from which those revenues were collected, essentially that every taxpayer must experience an equal benefit for the dollars raised from them. Even setting aside the inherent difficulty in determining whether different people have uniformly

and proportionately benefited from a government program (and the litigation around that question that would no doubt ensue), such a requirement would materially hamper the government's ability to fund services that are targeted to specific portions of the population, including those that provide services to underserved or underrepresented communities. It would also raise a question as to whether tax revenues could ever be used to fund programs for persons who are not taxpayers. Accordingly, "a state tax at a uniform rate levied at the state level" can be "returned to the school districts of the state without regard to the proportions in which payments are made by taxpayers in those districts." *Opinion of the Justices*, 112 N.H. 32, 35 (1972).

To be sure, neither the *Opinion of the Justices*, 142 N.H. 892 (1998), nor *Claremont School District v. Governor*, 144 N.H. 210 (1999), require a contrary conclusion. The bill at issue in the *Opinion of the Justices* directed the Commissioner of the DRA "to calculate each town's tax by multiplying the State education tax rate by the total equalized value of property within it, *less* any special abatement. 142 N.H. at 899. The special abatement therefore "applie[d] before any taxpayer within a given town receive[d] a tax bill." *Id.* Similarly, *Claremont School District* concerned a five-year phase-in provision that decreased on the front end the amount of state education tax certain municipalities were required to collect, resulting in the state education tax rate in those municipalities being lower than it was in municipalities that had to collect the full amount of the tax from the outset. *See* 144 N.H. at 213. In other words, both cases concerned a state education tax regime that lacked proportionality and uniformity in how the tax itself was set or calculated, not how funds that were generated through a proportionate and uniform tax were distributed after they were collected.

The plaintiffs' reliance on advisory dictum in the *Opinion of the Justices* that "even if the bill provided for the actual collection of revenue raised through the uniform State education tax,

and thereafter reimbursed certain qualified taxpayers pursuant to the special abatement, [the Court's] conclusions . . . would remain unchanged," 142 N.H. at 899,[3] is misplaced. The current SWEPT regime does not provide a "special abatement" to "reimburse certain qualified taxpayers" a portion of the tax. It requires the municipalities to raise the SWEPT from taxpayers for the State's benefit and then distributes all SWEPT revenues to the municipalities, not the taxpayers, for school district purposes only. The scenario described in that one sentence of advisory dictum[4] does not describe, and is not analogous to, the present SWEPT regime.

The Supreme Court has made clear that how funds generated through a proportionate and uniform tax are distributed after they are collected concerns the protections conferred under Part I, Article 12 and Part II, Article 6, not those in Part II, Article 5. *See, e.g.*, *Opinion of the Justices*, 111 N.H. 136, 142 (1971); *Opinion of the Justices*, 85 N.H. 562, 563 (1931). As noted, those cases specify that "[t]axes 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 proportion to the amount of their taxes." *Duncan*, 98 N.H. at 307–08. As discussed above, "such a provision, if it existed, could not be executed." *Id.* at 308. Thus, Part I, Article 12, and Part II,

[3] "Because an opinion of the justices is an advisory opinion issued to a branch of the legislature, Governor, or Executive Council, and is not an opinion of the court in a litigated case, an opinion of the justices does not constitute binding precedent." *Opinion of the Justices*, 167 N.H. 539, 542 (2015) (citations and quotation marks omitted).

[4] The statement itself is dictum, as it was not essential to the resolution of the questions presented to the Court. *See Burt v. Speaker of the House of Representatives*, 173 N.H. 522, 527 (2020) (noting that statements in an opinion that were not "necessary" to the resolution of the issue before the Court are dicta); *see also* 20 Am. Jur. 2d *Courts* § 130 ("An appellate decision is not an authority for everything said in the court's opinion but only for the points actually involved and actually decided."). And the statement is not the sort of "carefully considered statement [that], though technically dictum, must carry great weight and even may be regarded as conclusive." *McCoy v. Mass. Inst. Of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991). Rather, it is a single sentence in a nonbinding opinion that addresses a question not before the Court without any citation to authority.

Article 6 "have always been understood to deny the power to the legislature to authorize the assignment of public funds to other than public purposes." *Opinion of the Justices*, 111 N.H. at 142 (citation and quotation marks omitted). "The requirements of the constitution, in this respect, are answered if the public money is applied to the public uses of the political division for which it is raised." *Sch.-District No. 1 in Walpole v. Prentiss*, 66 N.H. 145, 146 (1889). A taxpayer cannot "complain that the distribution of a valid tax after its collection must be allocated to a specific purpose so long as it is devoted to a public use." *Manchester Fed. Sav. & Loan Ass'n v. State Tax Comm'n*, 105 N.H. 17, 21 (1963). "So long as the use is a proper one, allocation to a particular use of a part or all of a general or special tax is in the legislative discretion." *Id.* at 21–22.

RSA 76:8, II, requires the Commissioner of the DRA to "issue a warrant under [her] hand and official seal for the amount [of the revenues] computed in [RSA 76:8, I] to the selectmen or assessors of each municipality . . . directing them to assess such sum and pay it to the municipality *for use of the school district or districts*." RSA 76:8, II (emphasis added). The distribution of funds for public education is a recognized public purpose. *See, e.g.*, N.H. Const. pt. II, art. 83; *Manchester Fed. Sav. & Loan Ass'n*, 105 N.H. at 21; *Opinion of the Justices*, 99 N.H. 536, 538 (1955) ("The furtherance of education is universally regarded as a public purpose . . . ."). As it pertains to the so-called "excess SWEPT" towns, the plaintiffs' concern is solely with how the legislature has allocated public funds for that public purpose once they are generated by the SWEPT. "Neither the plaintiffs nor any taxpayer can complain that the distribution of a valid tax after its collection must be allocated to a specific purpose so long as it is devoted to a public use." *Manchester Fed. Sav. & Loan Ass'n*, 105 N.H. at 21. This concern is, in other words, not one of constitutional magnitude; it is a question of policy reserved to the

legislature for resolution. *See Anderson v. Robitalle*, 172 N.H. 20, 26 (2019) (explain that plaintiff's policy arguments "are made to the wrong forum as matters of policy are reserved for the legislature").

The plaintiffs' reliance on *Londonderry School District SAU #12 v. State*, No. 05-E-0406, 2006 N.H. Super LEXIS 4 (N.H. Super. Mar. 8, 2006), is also misplaced.[5] There, the trial court concluded that allowing municipalities to retain excess funds generated by the state education tax violated Part II, Article 5. *Id.* at *35–42. But in reaching this conclusion, the trial court, like the plaintiffs here, improperly conflated whether the tax was levied in a proportionate and uniform rate on the front end with whether the revenue generated by that tax was distributed in a uniform and proportionate manner after it was assessed and collected. *See id.* The trial court did *not* evaluate the plaintiffs' challenge under Part I, Article 12 or Part II, Article 6; those provisions are not referenced anywhere in the trial court's decision. And on appeal, the Supreme Court did not reach the plaintiffs' Part II, Article 5 claim, much less endorsed the trial court's analysis. *See Londonderry Sch. Dist. SAU No. 12 v. State*, 154 N.H. 153, 162 (2006) (declining to reach this issue); *Londonderry Sch. Dist. SAU #12 v. State*, 157 N.H. 734, 737 (2008) (dismissing the case as moot). Given these circumstances, the trial court's analysis of Part II, Article 5 in *Londonderry School District SAU #12* is of little persuasive value.

For these reasons, the Court should therefore deny the plaintiffs' partial motion for summary judgment and enter summary judgment in the State's favor on the plaintiffs' Part II, Article 5 claim to the extent the plaintiffs premise that claim on the fact that some municipalities

[5] This was one of two decisions issued by the same judge on the same day concerning the education-funding system. *See City of Nashua v. State*, No. 05-E-0257, 2006 N.H. Super. LEXIS 7 (N.H. Super. Mar. 8, 2006)

retain revenues generated by the SWEPT exceeding what they would otherwise receive in total education grants under RSA 198:41.

II. The plaintiffs are also not entitled to summary judgment on their Part II, Article 5 claim to the extent it is premised on the DRA setting negative local education tax rates in a small number of unincorporated places.

The plaintiffs are likewise not entitled to summary judgment on their Part II, Article 5 claim based on the fact that the DRA will occasionally set negative local education tax rates in a small number of unincorporated places. The plaintiffs appear to premise this theory on underlying assumptions that unincorporated places are part of the tax base that is subject to the SWEPT or that, if they are not, that they are somehow required to be. Both assumptions are incorrect.

RSA 76:3 establishes an "education tax" and requires the Commissioner of the DRA "to set the education tax rate at a level sufficient to generate revenue of $363,000,000 when imposed on all persons and property taxable pursuant to RSA 76:8, except property subject to tax under RSA 82 and RSA 83-F." In doing so, RSA 76:3 defines the class of property taxed to be "all persons and property taxable pursuant to RSA 76:8." RSA 76:8 indicates that only the property in municipalities is taxable under RSA 76:8. *See* RSA 76:8, II ("The commissioner shall issue a warrant under the commissioner's hand and official seal for the amount computed in paragraph I to the selectmen or assessors of each municipality by December 15 directing them to assess such sum and pay it to the municipality for the use of the school district or districts. Such sums shall be assessed at such times as may be prescribed for other taxes assessed by such selectmen or assessors of the municipality.").

The legislature has not defined the term "municipality," as used in RSA 76:8. When a statute does not define a term, courts will "construe the term according to its common and

approved usage," and may turn to dictionary definitions as guidance. *Kassotis v. Town of Fitzwilliam*, 166 N.H. 648, 651 (2014). *Black's Law Dictionary* defines "municipality" as:

> A legally incorporated or duly authorized association of inhabitants of limited area for local governmental or other public purposes. A body politic created by the incorporation of the people of a prescribe locality invested with subordinate powers of legislation to assist in the civil government of the state and regulate and administer local and internal affairs of the community.

Black's Law Dictionary 1510 (6th ed. 1990). This definition finds support in other places in the New Hampshire Revised Statutes. For instance, the Municipal Finance Act defines "[m]unicipality" or "municipal corporation," as "town, city, school district, or village district." RSA 33:1, I. Similarly, RSA chapter 31 provides that "[e]very town is a body corporate and politic, and by its corporate name may sue and be sued, prosecute and defend, in any court or elsewhere." Municipalities typically have, or belong to, one or more school districts. Kneuer Aff. ¶ 18.

An "unincorporated place" is, by definition, *not* a city or town. *See* RSA 53:1, I (contemplating that "unincorporated places" are "[a]ll places, not incorporated as towns"). They lack the defining feature municipalities possess—they are not incorporated. Unincorporated places, therefore, do not have a regular local government and, most notably for present purposes, do not have school districts as contemplated in RSA 76:8. Moreover, "[n]o unorganized town or unincorporated place, including any such town or place which was previously organized and the organization of which has since been abandoned, shall hereafter become incorporated so as to become vested with the powers of towns, except for the purposes of election of local officers or

state, national or county officers, unless such incorporation shall be granted by the general court." RSA 53:1, II.

"Part II, Article 6 . . . provides that '[t]he public charges of government, or any part thereof, may be raised by taxation, upon polls, estates, or other classes of property.'" *N. Country Envt'l Servs. v. State*, 157 N.H. 15, 19 (2008) (ellipsis omitted) (quoting N.H. Const. pt. II, art. 6). "Pursuant to this article, the legislature has the broad authority to classify types of property for taxation so long as the classification is sufficiently inclusive to constitute a distinctive class." *Id.* (citation and quotation marks omitted). "The legislative power to classify property includes the power to exempt property from taxation." *Id.* (citation and quotation marks omitted). "This power is not unlimited, however, and the court will invalidate a classification if it is unreasonable or if its purpose is to discriminate." *Id.* (citation and quotation marks omitted). "In other words, this provision grants the legislature broad power to declare property to be taxable or non-taxable based upon a classification of the property's kind or use, but not based upon a classification of the property's owner." *Id.* (citation and quotation marks omitted).

"Strictly speaking, 'the rule of equality and proportionality does not apply to the selection of the subjects of taxation, provided just reasons exist for the selection made.'" *Smith v. N.H. Dep't of Revenue Admin.*, 141 N.H. 681, 686 (1997) (quoting *Opinion of the Justices,* 94 N.H. 506, 508 (1947)). "'A reasonable classification which is sufficiently inclusive to constitute a distinctive class will be upheld.'" *Id.* at 687 (quoting *Opinion of the Justices*, 114 N.H. 174, 177 (1974)). A court's "review of legislative taxation classifications" is limited "to a determination whether there are 'just reasons' for the classification." *Id.* (quoting *Opinion of the Justices*, 115

N.H. 306, 308 (1975)). "In this context, '[a] just reason is the equivalent of a reasonable or rational basis.'" *Id.* (quoting *Cagan's, Inc. v. Dep't of Rev. Admin.*, 126 N.H. 239, 246 (1985)).

Property in municipalities is different in kind and use from property in unincorporated places. Property in municipalities is used to support a local government and its population and to provide that local population with needed public services through its local government, including the services of one or more school districts. The property of unincorporated places, however, does not support a local government and does not generally provide local public services either because no persons, or a very small number of persons, reside there regularly. Unincorporated places therefore do not have school districts; to the extent that there are education-related expenses at all, they are for paying tuition for children to attend school in other districts. And to the extent they require limited public services, the counties provide those services to those unincorporated places.[6] This difference in use is highlighted by the fact that if an unincorporated place collected SWEPT revenues, those revenues would be returned to them for use solely for school district purposes and thereby be stranded and unusable because the unincorporated places have no school districts. Thus, the legislature's classification of the property to be subject to the SWEPT as limited only to property in municipalities is appropriate and well within legislative authority. RSA 76:3; RSA 76:8.

Accordingly, setting negative tax rates for unincorporated places to ensure they do not pay the SWEPT does not render the SWEPT unconstitutional. The Court should deny the plaintiffs' partial motion for summary judgment and grant the State's cross-motion for summary

[6] Taxes that are assessed and collected from unincorporated places are in essence assessed and collected at the county level. *See* RSA 28:7-a through RSA 28:7-d; RSA 21:47; RSA 21:48; RSA 21-J:34. For these places the governing body is the county commission, and the legislative body is the county convention.

judgment to the extent the plaintiffs' Part II, Article 5 claim is premised on negative local education tax rates in unincorporated places.

III. If the Court concludes that the SWEPT, as administered, is unconstitutional in whole or in part, it should impose a remedy that does not disrupt the current municipal budget cycle.

For the reasons stated above, the plaintiffs are not entitled to summary judgment on their claim that the SWEPT violates Part II, Article 5. In the event, however, the Court determines that the SWEPT, as administered, is unconstitutional in whole or in part, it should not impose any remedy that disrupts the current municipal budget cycle.

As set forth in Commissioner Stepp's Affidavit, attached hereto, the current municipal budget cycle is underway. Each spring, municipalities typically vote on their budgets for the "current" year, which can begin on January 1 or July 1. Stepp. Aff. ¶ 9. This vote is the culmination of a process that started months earlier: "[m]unicipal and school officials begin meeting in the fall of the year before 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 effort' that may be required." *Id.* ¶ 10. In SB2 towns, deliberative sessions or hearings will typically occur in January through March, in advance of the town meeting. *Id.* ¶ 11. In non-SB2 towns, a budget warrant is issued 14 days before the annual meeting and voted on during the meeting. *Id.* ¶ 12. 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. *Id.* ¶ 13.

By September 1, the municipality reports to DRA its budget and other reports. *Id.* ¶ 14. The DRA also gathers information from other sources, including the Department of Education, to inform the rate-setting process. *Id.* 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. *Id.* ¶ 15. 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. *Id.* ¶ 16. Between the June and December tax bills, the municipality has already begun to expend funds to meet local needs, including education. *Id.* ¶ 17.

In other words, municipal entities are already well into creating their budgets for the current year. *Id.* ¶ 18. At the time of this filing, 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.* In so-called "excess SWEPT" municipalities, these budgets will likely include anticipated revenues from the amount the SWEPT generates in those municipalities above what those municipalities would receive in total education grants under RSA 198:41. *Id.* ¶ 19. 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. *See id.* 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. *Id.* 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. *Id.* This latter option, though, would not address any cash-flow problem that arose between the June and December tax bills. *See id.*

Again, the plaintiffs are not entitled to any remedy in this case because their challenge to the SWEPT fails as a matter of law for the reasons previously stated. And this Court may well conclude that it would need to hold a further evidentiary hearing to determine an appropriate remedy even if it finds that the SWEPT, as administered, is unconstitutional. If, however, the Court were to impose a remedy upon resolving the pending cross-motions for summary judgment that precluded municipalities from using excess SWEPT revenues then it would be far less disruptive for the remedy to become effective with the next budget cycle, which will commence in late-2023 and culminate in budget votes in March or April 2024. This would provide the DRA time to inform municipalities in Fall 2023 that the revenues they should anticipate when building their 2024f proposed budgets should not include excess SWEPT revenues. *Id.* ¶ 20. Furthermore, because the legislature repealed the statutory authority for excess SWEPT revenues to be remitted to the education trust fund, *see* RSA 198:48, I (2009) (repealed 2011); RSA 76:8, II (2009) (amended 2011), the Court should limit any remedy to requiring that excess SWEPT revenues be held in escrow so that the legislature may have a reasonable opportunity to address any infirmity in the first instance. *See Claremont*, 142 N.H. at 476–77.

Conclusion

For all of the foregoing reasons, the Court should deny the plaintiffs' motion for partial summary judgment on their Part II, Article 5 claim and grant the State's cross-motion for summary judgment on that claim.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorney,

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ATTORNEY GENERAL

Date: February 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: February 6, 2023

/s/ *Samuel Garland*
Samuel R.V. Garland.