THE STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

CRS 16-219

NORTHERN NEW ENGLAND TELEPHONE OPERATIONS, LLC.

Petition For Licenses To Maintain Utility Cables Over And Across Public Lands And Waters Of The State Of New Hampshire

COMMENTS SUBMITTED BY
THE TOWNS OF BARRINGTON, BELMONT, HOLDERNESS, JEFFERSON, MEREDITH, MERRIMACK, SUNAPEE, WATERVILLE VALLEY and THE CITY OF LACONIA

NOW COMES the Towns of Barrington, Belmont, Holderness, Jefferson, Meredith, Sunapee and Waterville Valley, and the City of Laconia, by and through their attorneys, Mitchell Municipal Group, P.A., and hereby submit their Comments to the petition by Northern New England Telephone Operations, LLC ("FairPoint") for licenses under RSA 371:17 to maintain certain existing telecommunications cable crossings over public water and/or state-owned lands and to the provisions of the Order *Nisi* dated September 30, 2016 (Order No. 25,940):

1. The municipalities herein are listed as "interested parties" in Commission Order No. 25,949 in this matter. They are also, except for the towns of Holderness and Meredith, co-defendants in tax abatement litigation brought by FairPoint. *See Northern New England Telephone Operations, LLC d/b/a FairPoint Communications - NNE v Town of Acworth*, Consolidated Docket No. 2012-CV-100 (Merrimack County Superior Court)(hereinafter "FairPoint Litigation").[1] FairPoint owns poles, conduit and other

[1] The FairPoint litigation involves property tax abatement appeals for tax years 2011-2015, involving 135 municipalities. FairPoint filed the appeals in all ten counties; they were collectively transferred to Merrimack County Superior Court. The 2012-2015 appeals have been stayed pending resolution of the 2011 appeals. The trial was bifurcated, with Phase I addressing issues regarding authority to tax and Phase II dealing with the valuation of the taxable property. Phase I was conducted through summary judgment practice; the Court issued an order on December 14, 2015, ruling in part for FairPoint and in part for the municipalities. The parties and the Court are currently addressing interlocutory appeals issues and also moving forward

property which is installed within the public rights-of-way located within the municipalities. FairPoint asserted in the FairPoint Litigation, in part, that the municipalities did not have the authority to assess *ad valorum* taxes against its use and occupation (hereinafter collectively "use") of the public rights-of-way unless its use was pursuant to an agreement which met the requirements of RSA 72:23, I.

2. The statute provides that land, structures, buildings and personal property owned by the state, city, town, school district or village district is exempt from taxation unless the property is used or occupied by "other than the state or a city, town, school district, or village district under a lease or other agreement the terms of which provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property." In addition it requires that the agreement specify whether the licensee shall be responsible for paying taxes on structures or improvements added by the licensee and notify the licensee that failure to timely pay constitutes cause for terminating the agreement. RSA 72:23, I (b).

3. The Superior Court agreed with FairPoint, and held that the municipalities did not have authority to assess FairPoint's use of the public rights-of-way unless its use or occupancy was pursuant to an agreement containing the requisite language. *Order* on Motions for Summary Judgment, December 14, 2015 (Attachment A); *Order* on Motions for Reconsideration, March 1, 2016 (Attachment B). The municipalities herein submit Comments both to inform the Commission of the taxing language requirement and to request that any licenses issued pursuant to FairPoint's specifically include the statutory language set forth in RSA 72:23, I.

4. The municipalities request that the Commission amend its Order *Nisi* to include the following taxing language pursuant to RSA 72:23, I:

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with Phase II on valuation.

In accordance with the requirement of RSA 72:23, I(b), this license is granted to the licensee(s) subject to the condition that the licensee(s) and any other entity using or occupying property of the state pursuant to this license shall be responsible for the payment of, and shall pay, all properly assessed real and personal property taxes no later than the due date. Furthermore, in accordance with the requirements of RSA 72:23, I (b), the licensee(s) and any other entity using and/or occupying property of the state pursuant to this license shall be obligated to pay real and personal property taxes on structures or improvements added by the licensee(s) or any other entity using or occupying the property of the licensor pursuant to this license. Failure of the licensee(s) to pay duly assessed personal and real property taxes when due shall be cause to terminate this license.

5. The Commission's inclusion of the statutorily required taxing language will not impose additional review or other obligations on the Commission in its review of FairPoint's petition.

Respectfully submitted,

THE TOWNS OF BARRINGTON, BELMONT, HOLDERNESS, JEFFERSON, MEREDITH, MERRIMACK, SUNAPEE, WATERVILLE VALLEY and THE CITY OF LACONIA

By Their Attorneys,
MITCHELL MUNICIPAL GROUP, P.A.

Dated: 10/11/16 By: Judith E. Whitelaw

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Certificate of Service

I hereby certify that pursuant to Puc 203.02(a), a copy of these *Comments* has been forwarded to the Service List via email this 11th day of October, 2016.

By: Judith E. Whitelaw
Judith E. Whitelaw

THE STATE OF NEW HAMPSHIRE

Merrimack County Superior Court
163 N. Main St.
P.O. Box 2880
Concord, NH 03301-2880
1-855-212-1234

NOTICE OF DECISION

LEAD FILE 220-2012-CV-100
Northern New England Telephone Operations, LLC d/b/a FairPoint Communications, NNE
v. Town of Acworth

Enclosed please find a copy of the Court's Order dated December 14, 2015 relative to:

ORDER

12/14/2015

Tracy A. Uhrin
Clerk of Court

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Northern New England Telephone Operations LLC
d/b/a FairPoint Communications NNE

v.

Town of Acworth

No. 220-2012-CV-100

ORDER

The Petitioner, Northern New England Telephone Operations LLC d/b/a FairPoint Communications NNE ("FairPoint"), brought actions against a number of New Hampshire municipalities alleging that the municipalities acted *ultra vires* in assessing taxes in a manner that failed to comply with the statutorily prescribed procedure. The Court's May 12, 2014 Order consolidated the actions into a "test case" structure in which certain municipalities would act as representative municipalities. FairPoint now moves for summary judgment on eight test case *ultra vires* claims against certain representative municipalities, including the Town of Alexandria, the Town of Alstead, the Town of Belmont, the Town of Dublin, the Town of Durham, the Town of Landaff,[1] the City of Manchester, and the City of Portsmouth (collectively the "Municipalities"). The Municipalities object and cross-move for summary judgment. The Court held a hearing on October 23, 2015. Based on the following, FairPoint's

[1] The Town of Landaff fully abated FairPoint's tax year 2011 taxes after FairPoint filed its Motion for Summary Judgment. FairPoint has represented it would soon file a nonsuit against the Town of Landaff, thereby rendering the motion moot as to the Town of Landaff. (FairPoint's Consol. Obj. 1 n.1.)

Motion for Summary Judgment is GRANTED in part and DENIED in part, and the Municipalities' Cross-Motions for Summary Judgment are GRANTED in part and DENIED in part.

I

On cross-motions for summary judgment, the Court must consider the evidence in the light most favorable to each party in its capacity as the nonmoving party, and, if no genuine issue of material fact exists, determine whether the moving party is entitled to judgment as a matter of law. Granite State Mgmt. Resources v. City of Concord, 165 N.H. 277, 282 (2013).

The parties have stipulated to the historical facts relevant to each municipality's taxation of FairPoint and do not dispute the following relevant material facts. As a provider of telecommunication services, FairPoint owns poles, conduit, and other related personal property located within each of the named Municipalities. The Municipalities are permitted to assess two types of ad valorem property tax on FairPoint's property: (1) a tax measured by the value of FairPoint's use and occupation of the public rights-of way assessed pursuant to RSA 72:6; and (2) a value tax measured by the value of FairPoint's poles and conduit assessed pursuant to RSA 72:8-a.

A

When assessing these taxes against FairPoint, the Municipalities must comply with the prescribed statutory scheme. In New Hampshire, "taxation must be authorized by statute." In re Reid, 143 N.H. 246, 252 (1998) (quoting Indian Head Nat'l Bank v. Portsmouth, 117 N.H. 954, 955 (1966)). The Legislature has provided, "All real estate, whether improved or unimproved, shall be taxed except as otherwise provided." RSA 72:6. In defining "real estate," RSA 72:8-a states, "Except as provided in RSA 72:8-b, all

structures, poles, towers, and conduits employed in the transmission of telecommunication, cable, or commercial mobile radio services shall be taxed as real estate in the town in which such property or any part of it is situated."[2]

There are certain statutory tax exemptions delineated in RSA 72:23, I(a)–(b), which states:

> The following real estate and personal property shall, unless otherwise provided by statute, be exempt from taxation:
>
> (a) Lands and the buildings and structures thereon and therein and the personal property owned by the state of New Hampshire or by a New Hampshire city, town, school district, or village district *unless* said real or personal property is used or occupied by other than the state or a city, town, school district, or village district under a lease *or other agreement the terms of which provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property.* The exemption provided herein shall apply to any and all taxes against lands and buildings and structures thereon and therein and the personal property owned by the state, cities, towns, school districts, and village districts, which have or may have accrued since March 31, 1975, and to any and all future taxes which, but for the exemption provided herein, would accrue against lands and buildings and structures thereon and therein and the personal property owned by the state, cities, towns, school districts, and village districts.
>
> (b) *All leases and other agreements*, the terms of which provide for the use or occupation by others of real or personal property owned by the state or a city, town, school district, or village district, entered into after July 1, 1979, *shall provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property* no later than the due date . . . . All such leases and agreements shall include a provision that "failure of the lessee to pay the duly assessed personal and real estate taxes when due shall be cause to terminate said lease or agreement by the lessor." All such leases and agreements entered into on or after January 1, 1994, shall clearly state the lessee's obligations regarding the payment of both current and potential real and personal property taxes, and shall also state whether the lessee has an obligation to pay real and personal property taxes on structures and improvements added by the lessee.

(Emphasis added).

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[2] The legislature repealed RSA 72:8-b in 1998.

"[T]elephone . . . poles and structures and underground conduits and cables, with their respective attachments and appurtenances may be erected, installed and maintained in any public highways," if the party seeking to erect such equipment secures a permit or license. RSA 231: 160–161. RSA 231:161 establishes a licensing scheme for parties to place telephone equipment in public rights-of-way. Jurisdiction for issuing such licenses lies with the selectboard of the town in which such right-of-way is located or the board of mayor and council of the city in which such right-of-way is located. RSA 231:161, I(a)–(b). "The selectmen, after notice to any such licensee and hearing, may from time to time revoke or change the terms and conditions of any such license, whenever the public good requires." RSA 231:163; see Rochester II, 151 N.H. at 269–70 ("Under the plain language of [RSA 231:163], a city may change the terms and conditions of a license that it has issued whenever the public good requires.")

In New England Tel. & Tel. Co. v. City of Rochester, the New Hampshire Supreme Court addressed the effect of RSA 72:23, I, on the licensing procedure set forth in RSA 231:160–163. 144 N.H. 118 (1999) [hereinafter Rochester I]. The parties in that case disputed whether licenses issued under RSA 231:161 constituted "agreements" within the meaning of RSA 72:23, I(b). Id. at 121–22. The Supreme Court held that "[t]he terms of RSA 72:23, I(b) are applicable to the [telephone company's] pole licenses" and "requires [the municipality] to shift the tax burden imposed by RSA 72:6 to the [telephone company] by making tax liability a condition of the pole licenses." Id. The Supreme Court also held in Verizon New England Inc. v. City of Rochester that RSA 72:23 "does not include an exemption for private companies that use or occupy public property to provide a public service." 151 N.H. 263, 267 (2004) [hereinafter Rochester II]. The holding observed that "[a]ccording to the plain language of the statute, leases

and other agreements which permit the use or occupation of public property must provide for the payment of properly assessed real estate taxes." Id. at 266–67.

Municipal property tax assessments adhere to a statutorily mandated schedule. "The property tax year shall be April 1 to March 31 and all property taxes shall be assessed on the inventory taken in April of that year . . . ." RSA 76:2. In other words, "real estate taxes are assessed as of April 1 in each year and the tax year begins on that date. The tax for the whole year is an obligation of the owner as of April 1 and the tax becomes due and payable as of that date." Town of Gilford v. State Tax Comm'n, 108 N.H. 167, 169 (1967) (internal citations omitted). However, "[i]f the selectmen, before the expiration of the year for which a tax has been assessed" discovers a person liable for a tax by law has not been so taxed, they may impose the tax "upon abatement of such tax and upon notice to the person liable for such tax." RSA 76:14. A select board's failure to correct an assessment or add excluded property must occur before the expiration of the tax year in order to be effective. Granite State Mgmt. & Resources v. City of Concord, 165 N.H. 277, 293 (2013).

B

FairPoint has identified four general, recurring factual scenarios and the municipality representative of each of those scenarios. The first three broad scenarios contain variations, each with a representative municipality. The fourth broad scenario was represented by the Town of Landaff, against which FairPoint has represented it would file a nonsuit. (FairPoint's Consol. Obj. 1 n.1.)

The first broad category ("Scenario 1") involves the tax on the value of the use and occupation of a public right-of-way. Under this factual scenario, all RSA 231:161 licenses lack any form of RSA 72:23, I(b) language prior to the assessment of the use tax, and the

municipality has not undertaken a universal amendment of existing 231:161 licenses. The Town of Dublin is the representative test municipality for this factual scenario. FairPoint's 231:161 licenses in Dublin do not "provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property," RSA 72:23, I(b), and Dublin has not sought to enact a universal amendment. For the 2011 tax year, Dublin valued FairPoint's use and occupation of public rights-of-way at $431,900 and assessed $9,735.03 of taxes for the same.

In the first variation of the first category ("Scenario 1(a)"), the fact relating to the universal amendment is the only variation. Rather than undertaking no universal amendment, the municipality amended the licenses after the 2011 tax year. The City of Manchester is the representative municipality for this variation. Initially, FairPoint's 231:161 licenses in Manchester did not "provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property." RSA 72:23, I(b). However, on October 29, 2013, Manchester approved a universal amendment of existing licenses to state: "The Licensee shall pay all properly assessed real and personal property taxes including real and personal property taxes on structures or improvements added by the Licensee no later than the due date." For the 2011 tax year, Manchester valued FairPoint's use and occupation of public rights-of-way at $8,000,000 and assessed $175,680 of taxes for the same.

In the next variation of the first category ("Scenario 1(b)"), the municipality undertook a universal amendment, but the amendment did not include RSA 72:23, I(b) language. The City of Portsmouth is the representative municipality for this variation. Initially, FairPoint's 231:161 licenses in Portsmouth did not "provide for the payment of properly assessed real and personal property taxes by the party using or occupying said

property." RSA 72:23, I(b). On November 21, 2011, Portsmouth approved a universal amendment "to amend all leases and other agreements, the terms of which provide for the use or occupation of others of real or personal property owned by the city to include payment on properly assessed taxes" effective tax year 2011 and all years after. For the 2011 tax year, Portsmouth valued FairPoint's use and occupation of public rights-of-way at $9,029,200 and assessed $155,934.28 of taxes for the same. For the same tax year for the airport district, Portsmouth valued FairPoint's use and occupation of public rights-of-way at $1,455,200 and assessed $13,780.74 of taxes for the same.

In the third variation of the first broad category ("Scenario 1(c)"), the municipality undertook a universal amendment of the licenses during the 2011 tax year, after April 1, 2011, but before March 31, 2012. Portsmouth is the representative municipality for this variation under the undisputed facts iterated above.

The fourth and final variation of the first category ("Scenario 1(d)") involves a municipality's attempt to approve a universal amendment of the licenses but did not provide prior notice of the proposed amendment to FairPoint. The Town of Belmont is the representative municipality. Initially, FairPoint's 231:161 licenses in Belmont did not "provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property." RSA 72:23, I(b). On September 11, 2013, the Belmont Board of Selectmen held a public hearing determined that it would be in the public good to amend all RSA 231:161 licenses to include the language in RSA 72:23, I(b). FairPoint did not have prior notice of the meeting, but was sent a notification via certified mail on September 17, 2013, that the licenses had been amended. For the 2011 tax year, Belmont valued FairPoint's use and occupation of public rights-of-way at $195,000 and assessed $4,204.20 of taxes for the same.

The second broad category ("Scenario 2") tracks the first category but involves the tax on the value FairPoints's poles and conduits. Under this factual scenario, all RSA 231:161 licenses lack any form of RSA 72:23, I(b) language prior to the assessment of taxes under RSA 72:8-a, and the municipality has not undertaken a universal amendment of existing 231:161 licenses. The Town of Alstead is the representative test municipality for this factual scenario. FairPoint's 231:161 licenses in Alstead do not "provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property," and do not "state whether the lessee has an obligation to pay real and personal property taxes on structures or improvements added by the lessee." RSA 72:23, I(b). Alstead has not sought to enact a universal amendment. For the 2011 tax year, Alstead valued FairPoint's property taxable pursuant to RSA 72:8-a at $922,831 and assessed $20,789.88 of taxes for the same.

In the first variation of the second category ("Scenario 2(a)"), rather than not enacting a universal amendment, the municipality enacted a universal amendment after the 2011 tax year. Manchester is the representative municipality for this scenario. In addition to the facts relating to Manchester previously iterated, prior to the October 29, 2013 universal amendment and for the tax year 2011, Manchester valued FairPoint's property taxable pursuant to RSA 72:8-a at $7,899,500 and assessed $173,473.02 of taxes for the same.

In the second variation ("Scenario 2(b)"), the municipality enacted a universal amendment but the amendment did not include the RSA 72:23, I(b) language concerning "structures or improvements added by the lessee." Portsmouth is the representative municipality for this factual variation. In addition to the facts relating to Portsmouth set forth above, for the tax year 2011, Portsmouth valued FairPoint's

property taxable pursuant to RSA 72:8-a at $6,120,500 and assessed $105,701.06 of taxes for the same.

In the third variation of the second broad category ("Scenario 2(c)"), the municipality undertook a universal amendment of the licenses during the 2011 tax year, after April 1, 2011, but before March 31, 2012. Portsmouth is the representative municipality for this variation under the undisputed facts iterated above.

Finally, the fourth variation of the second category ("Scenario 2(d)") involves a municipality's attempt to approve a universal amendment of the licenses but did not provide prior notice of the proposed amendment to FairPoint. The Town of Belmont is the representative municipality. In addition to the facts relating to Belmont set forth above, prior to the universal amendment approved on September 11, 2013, the RSA 231:161 licenses did not "state whether the lessee has an obligation to pay real and personal property taxes on structures or improvements added by the lessee." RSA 72:23, I(b). For the tax year 2011, Belmont valued FairPoint's property taxable pursuant to RSA 72:8-a at $952,400 and assessed $20,533.74 of taxes for the same.

The third general factual category ("Scenario 3") involves a municipality enacting a universal amendment of RSA 231:161 licenses, but, on a going forward basis, not including any RSA 72:23, I(b) language regarding payment of taxes. The Town of Durham is the representative municipality for this variation. FairPoint's has property taxable pursuant to RSA 72:8-a licensed by Durham pursuant to RSA 231:161. Effective March 21, 2005, Durham approved a universal amendment that included language substantially similar to the language of RSA 72:23, I(b). Since the universal amendment, Durham has issued RSA 231:161 licenses that do not contain any reference to RSA 72:23, I(b). For the tax year 2011, Durham issued a single tax valuation of $2,532,300,

including both the value of FairPoint's use of public rights-of-way and the value of its property taxable pursuant to RSA 72:8-a, and Durham assessed a total of $65,510.60 of taxes for the same. This assessment was based partly on RSA 231:161 licenses issued to FairPoint after the universal amendment.

One variation of the third broad category ("Scenario 3(a)") involves when a municipality never effectuated a universal amendment but has issued past RSA 231:161 licenses with language referencing the payment of taxes. The Town of Alexandria is an example of this variation. FairPoint's has property taxable pursuant to RSA 72:8-a licensed by Alexandria pursuant to RSA 231:161. Although Alexandria has not approved a universal amendment, it has issued RSA 231:161 licenses to FairPoint in the past referencing RSA 72:23, I(b) and requiring payment of "all properly assessed real and personal taxes." However, Alexandria has also issued licenses to FairPoint that do not include the same language. For tax year 2011, Alexandria valued FairPoint's use and occupation of public rights-of-way at $1,236,500 and assessed $27,661 of taxes for the same.

C

FairPoint contends that the language of RSA 72:23, I(a)–(b), permits taxation of municipal-owned property only when that property is occupied by a party other than the state or municipal corporation if there exists an agreement that expressly provides for the taxation of that property. FairPoint argues that municipalities must strictly comply with the statutory requirements for assessing taxes, including the requirement that all RSA 231:161 licenses include the language FairPoint maintains is mandated by RSA 72:23, I(a)–(b). Consequently, FairPoint concludes the municipalities that have not strictly complied with the statutory requirements for assessing taxes have acted *ultra*

vires by assessing such taxes without the mandated language in the licenses. In addition, FairPoint contends with respect to timing, that tax-shifting language must be included within any pole licenses no later than April 1, 2011 to form a basis for any tax year 2011.

The Municipalities' cross-motions contain a number of overlapping arguments briefly summarized as follows: (1) RSA 72:23, I, does not apply to taxation of poles and conduit; (2) RSA 72:23, I, applies only to property owned by the Municipalities; (3) lack of strict compliance with RSA 72:23, I, does not result in FairPoint being tax exempt; (4) the requirements of RSA 72:23, I, can be read into pole licenses by operation of law; (5) the Municipalities have independent authority to tax perpetual leases pursuant to RSA 72:6 and 73:10; (6) pole licenses silent to the requirements of RSA 72:23, I, may nonetheless serve as a basis for taxation; (7) universal amendments to pole licenses provide a basis for taxation; and (8) universal amendments undertaken after April 1, 2011, may operate retroactively to form the basis for taxation.[3]

Durham's objection also contends that FairPoint is estopped from asserting that its property is exempt because FairPoint submitted licenses without the language of RSA 72:23, I(b) after the 2005 universal amendment, even though FairPoint knew the amendment required all future licenses to include the language. In Belmont's Cross-Motion for Summary Judgment, it also seeks summary judgment in its favor that (1) the unlicensed poles and their use of the rights-of-way are taxable, and (2) the poles licensed as a matter of law pursuant to RSA 231:160-a necessarily include the language set forth in RSA 72:23, I, and are taxable as such.

[3] Several of the Municipalities also assert FairPoint's Motion for Summary Judgment must be denied because it fails to meet the requirements of RSA 491:8-a, III. The Court finds this argument unpersuasive because the Court's May 23, 2014 Order required the parties to confer and agree upon stipulated facts for the summary judgment proceedings.

III

The central issue is whether RSA 72:23, I(a)–(b) acts as a tax exemption that requires municipalities to include tax-shifting language in FairPoint's RSA 231:161 licenses in order to impose taxes on FairPoint's use of public rights-of-ways and poles and conduit. Resolving the parties' cross-motions for summary judgment requires interpreting RSA 72:23, I(a) & (b). When construing a statute, the Court first examines "the language of the statute, and, where possible, ascribe[s] the plain and ordinary meaning to the words used." Gen. Insulation Co. v. Eckman Constr., 159 N.H. 601, 605–06 (2010). The Court must not "consider what the legislature might have said nor add words that [the legislature] did not see fit to include." Rochester II, 151 N.H. at 266. "When a statute's language is plain and unambiguous, [the Court will] not look beyond it for further indication of legislative intent." Gen. Insulation Co., 159 N.H. at 606 (citations omitted). "[A]n interpretation that renders statutory language superfluous and irrelevant is not proper interpretation." State v. Duran, 158 N.H. 146, 155 (2008).

When interpreting a tax statute, "the right to tax must be found within the letter of the law and is not to be extended by implication." Pheasant Lane Realty Tr. v. City of Nashua, 143 N.H. 140, 143 (1998) (quotation omitted). "If a taxing statute . . . is ambiguous, [the court will] construe it against the government and in favor of the taxpayer." N.H. Resident Ltd. Partners of Lyme Timber Co. v. N.H. Dept. of Rev., 162 N.H. 98, 102 (2011). However, "[a] tax exemption statute is construed not with rigorous strictness but 'to give full effect to the legislative intent of the statute,' and, absent formal legislative history, intent must be gleaned from the plain language of the statute." Wolfeboro Camp School, Inc. v. Town of Wolfeboro, 138 N.H. 496, 499 (1994) (quoting In re Estate of Martin, 125 N.H. 690, 691 (1984)); see also Say Pease IV, LLC v.

N.H. Dept. of Rev. Admin., 163 N.H. 415, 417 (2012) (citing First Berkshire Bus. Tr. v. Commissioner, N.H. Dept. of Rev. Admin., 161 N.H. 176, 180 (2010)) (stating that the Court will not "strictly construe statutes that impose taxes, but instead examine their language in the light of their purposes and objectives"); In re Town of Pelham, 143 N.H. 536, 538 (1999) (interpreting RSA 72:7, which defined "buildings" as taxable real estate, to determine whether trailers were taxable property within the meaning of RSA chapter 72). Exemptions provided by RSA 72:23 "shall be construed to confer exemption only upon property which meets the requirements of the statute under which the exemption is claimed. The burden of demonstrating the applicability of any exemption shall be upon the claimant." RSA 72:23-m.

Whether a statute grants a municipality the authority to levy a tax must be construed strictly. However, whether an exemption applies is not construed with rigorous strictness but with the goal of giving full effect to the legislative intent. The central issue in this case is not whether the municipalities have the authority to assess the taxes at issue, because pursuant to RSA 72:6, which provides that "[a]ll real estate . . . shall be taxed except as otherwise provided," municipalities plainly have the broad authority to tax real estate. Moreover, under RSA 72:8-a, telecommunication poles and conduits "shall be taxed as real estate". There is nothing ambiguous about either statute, and no reason to construe them strictly. Further, it is not clear that the Court need apply the rule of strict statutory construction to RSA 72:23, I, because in interpreting the statute, the Court is actually interpreting an exception to the general rule of taxation.

A

With respect to the tax on the value of FairPoint's use of the public rights-of-way, the plain language of RSA 72:23, I(b), unambiguously requires municipalities to tax private use of public property by expressly including tax-shifting language in RSA 231:161 licenses. RSA 72:23, I(a), provides a real estate tax exemption for "[l]ands . . . *owned* by the state of New Hampshire or by a New Hampshire city [or] town." (Emphasis added). However, an exception to the exemption exists where "said real or personal property is used or occupied by other than the state or a city [or] town . . . *under a lease or other agreement the terms of which provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property.*" RSA 72:23, I(a) (emphasis added). RSA 72:23, I(b) elaborates on the requirements of leases and agreements that permit parties other than the state or municipality to use or occupy the public rights-of-way by stating:

> *All leases and other agreements*, the terms of which provide for the use or occupation by others of real or personal property owned by the state or a city, town, school district, or village district, entered into after July 1, 1979, *shall provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property* no later than the due date . . . . *All such leases and agreements* entered into on or after January 1, 1994, *shall clearly state the lessee's obligations regarding the payment of both current and potential real and personal property taxes*, and shall also state whether the lessee has an obligation to pay real and personal property taxes on structures and improvements added by the lessee . . . .

(Emphasis added).

The plain language of RSA 72:23, I(a) & (b) unambiguously conveys the statute's intent. The exemption in RSA 72:23, I(a) exists to require municipalities to tax private use of public rights-of-way. This is evident by the language mandating that agreements allowing for private use of public property require the private parties to pay property taxes. The language unequivocally mandates that the taxing municipality include

specific language that shifts the tax burden imposed by RSA 72:6 to the licensee as a condition of RSA 231:161 licenses—which, pursuant to the holding in Rochester I, 144 N.H. at 121–22, constitute "agreements" within the meaning of RSA 72:23, I(b). The portion of RSA 72:23, I(b) that states that all agreements or leases "shall clearly state the lessee's obligations regarding the payment of both current and potential real and personal property taxes," is most reasonably construed as a notice provision. In re Reid, 143 N.H. 246, 253 (1998). The legislative intent expressed is plainly to put private parties on notice of their tax obligations. The Supreme Court has stated that its "review of the plain language of RSA 72:23, I, reveals that it contains both an enabling provision that simply allows municipalities to collect tax revenues on land that is otherwise tax exempt when it is leased to third parties, and a tax provision that ensures that the lessees are aware of, and consent to, taxation of their leasehold." Reid, 143 N.H. at 253. In Reid, the Supreme Court held that leases that did not include a tax provision were not taxable. Id.

Therefore, the Court concludes that the statute requires municipalities to shift the tax burden to private parties using or occupying public property, and the tax-shifting language serves as notice of the private parties' tax obligations. The absence of the language required by RSA 72:23, I(b) precludes a municipality's statutory authority to collect taxes assessed based on the value of a private party's use of a public right-of-way.

B

Analysis of RSA 72:23, I, yields a different result when applied to taxes based on the value of FairPoint's poles and conduit. The plain language of RSA 72:23, I, unambiguously applies only to real and personal property *owned* by the municipality. The language of RSA 72:23, I(a) & (b) repeatedly states that the exemption only applies

to"[l]ands and the buildings and structures thereon and therein and the personal property *owned* by the state of New Hampshire or by a New Hampshire city [or] town." (Emphasis added). The only reference to structures added by the licensee is in the last sentence of RSA 72:23, I(b), which states, "All such leases and agreements . . . shall also state whether the lessee has an obligation to pay real and personal property taxes on structures or improvements added by the lessee"-a less exacting record

As noted, paragraphs (a) and (b) of RSA 72:23, I, serve distinct functions. RSA 72:23, I(a) is "an enabling provision that simply allows municipalities to collect tax revenues on land that is otherwise tax exempt when it is leased to third parties," while RSA 72:23, I(b) is a "tax provision that ensures that the lessees are aware of, and consent to, taxation of their leasehold." Reid, 143 N.H. at 253. In essence, paragraph (a) refers to *what* property may be taxed despite being otherwise exempt, and paragraph (b) refers to *how* that property is to be taxed when the exemption does not apply. Because paragraph (a) only exempts property owned by the municipalities, structures owned by private parties occupying a right-of-way is not exempt property, and the taxation provision in paragraph (b) does not apply to a municipality's authority to tax the property owned by the private party. Consequently, the authority to tax the property owned by the private party occupying a right-of-way is not conditional on providing notice in the lease or agreement. Instead, the more reasonable interpretation is that the legislature intended the language in RSA 72:23, I(b) to provide clarification to members of the public that the tax exemption does not apply if they use or occupy municipal or public property.

This conclusion is consistent with the New Hampshire Supreme Court's conclusion in Reid. The petitioners in Reid leased property owned by a municipality, but

the terms of the leases did not address the types of taxes for which the petitioners were liable. 143 N.H. 247–48. Although the municipality assessed taxes based on the value of the structures owned by the petitioners built on the leased property, the petitioners did not challenge those taxes. Id. at 248. Rather, the only tax challenged was the tax based on the value of the petitioners' leasehold interest. Id. The Supreme Court reasoned that its interpretation of RSA 72:23, I, to require notice in order for leaseholds to be taxable was consistent with RSA 73:10, which provides that "[r]eal and personal property shall be taxed to the person claiming the same, or to the person . . . in possession and actual occupancy thereof, if such person will consent to be taxed." Id. at 252. Extending this reasoning to the present issue demonstrates that notice in the lease or agreement is not a condition of taxing private property located in a public right-of-way. If real property is to be taxed to the person claiming to own the property and consent to taxation is only required if the person does not actually claim to own the property, then requiring tax-shifting language in the lease or agreement as evidence of consent to taxation is not a logical interpretation of RSA 72:23, I, when applied to property owned by a private party and located in a public right-of-way.

Therefore, when the statute is construed with the goal of giving full effect to the legislative intent, the Court concludes that the exemption in RSA 72:23, I(a) does not apply to taxes assessed pursuant to RSA 72:8-a based on the value of FairPoint's poles and conduit located within public rights-of-way, and the absence of language in RSA 231:161 licenses relating to the taxability of structures added to public property by private parties does not preclude the Municipalities from assessing taxes based on the value of FairPoint's poles and conduit as long as the license states "whether the lessee has an obligation to pay real and personal property taxes on structures or improvements

added by the lessee". RSA 72:23, I(b). Indeed, even if the statute were analyzed more strictly as a taxing statute, the result would be the same. RSA 72:23, I(a) simply does not address lease of property which is not owned by a municipality.

IV

Part I, Article 23 of the New Hampshire Constitution states, "Retrospective laws are highly injurious, oppressive and unjust." The New Hampshire Supreme Court has interpreted this provision stating "that a statute, or its application, that 'creates a new obligation . . . in respect to transactions . . . already past, must be deemed retrospective.'" Cagan's, Inc. v. N.H. Dep't of Rev. Admin., 126 N.H. 239, 249 (1985) (quoting Woart v. Winnick, 3 N.H. 473, 479 (1826)). However, retroactivity of a taxing statute alone does not render a statute unconstitutional "when there was clear legislative intent" to apply it retroactively. Id. (citing Estate of Kennett v. State, 115 N.H. 50, 55 (1975)).

Pursuant to RSA 76:14, "[i]f the selectmen, before the expiration of the year for which a tax has been assessed" discovers a person liable for a tax by law has not been so taxed, they may impose the tax "upon abatement of such tax and upon notice to the person liable for such tax." This statutory language makes clear that the legislature intended that a tax is not necessarily unconstitutionally retroactive if it was not assessed as of April 1 of that tax year so long as the following conditions are met: (1) the municipality must be required to assess the tax; (2) the selectmen must provide notice; and (3) the selectmen must abate the tax to apply only after notice was provided. Additionally, any correction must occur before the expiration of the tax year. Granite State Mgmt. & Resources v. City of Concord, 165 N.H. 277, 293 (2013). With respect to when municipalities may amend pole licenses, thereby providing notice of intent to

correct tax assessments and the notice required by RSA 72:23, I(b), RSA 231:163 states, "The selectmen, *after notice to any such licensee* and hearing, may from time to time revoke or change the terms and conditions of any such license, whenever the public good requires."

In applying these rules to the universal amendments at issue in this case, the Court finds that a municipality without the required RSA 72:23, I(b) language in its pole licenses may correct that deficiency before the expiration of the tax year and properly assess a tax based on the value of FairPoint's use of the municipality's public rights-of-way for the 2011 tax year if it complies with certain statutory requirements: (1) FairPoint must actually be liable for the use tax; (2) FairPoint must receive notice of the universal amendment prior to the approval of the amendment; and (3) the municipality must abate the tax to reflect only the portion of the year during which the universal amendment was effective. Because the Court finds both that RSA 72:23, I(a) mandates that municipalities are required to assess this use tax and that the lack of the tax-shifting language in RSA 72:23, I(b) precludes that assessment, the requirement under RSA 76:14 that the untaxed party actually be taxed is satisfied.

V

Applying this analysis to the designated factual scenarios renders varying results. The Court addresses each scenario and any variation in turn.

Scenario 1 involves the tax on the value of the use and occupation of a public right-of-way. Under this scenario, all RSA 231:161 licenses lack the language required by RSA 72:23, I(b), and no universal amendment has been undertaken. Because the Court finds that RSA 72:23, I(b) requires municipalities to include specific language in FairPoint's pole licenses to put FairPoint on notice of its tax obligations, the

municipality may not assess the use tax in this scenario. Consequently, the Town of Dublin, the Scenario 1 test municipality, acted *ultra vires* in assessing a tax on the value of FairPoint's use and occupation of public rights-of-way for the 2011 tax year.

In Scenario 1(a), the City of Manchester attempted to enact a universal amendment on October 29, 2013. Because the enacted universal amendment was after the expiration of the 2011 tax year, it does not effectively correct the 2011 assessment. Consequently, Manchester's universal amendment cannot serve as a basis for the 2011 use tax assessment.

The City of Portsmouth in Scenarios 1(b) and (c) approved on November 21, 2011, a universal amendment "to amend all leases and other agreements, the terms of which provide for the use or occupation of others of real or personal property owned by the city to include payment on properly assessed taxes." This language mirrors the language in RSA 72:23, I(a). This language substantially complies with the language required by RSA 72:23, I(b) because it provides sufficient notice of the licensee's tax obligations to satisfy the notice requirements of RSA 72:23, I(b). The Court therefore finds that Portsmouth's universal amendment is not defective, and because the correction was before the expiration of the 2011 tax year, the amendment operates pursuant to RSA 76:14 to correct Portsmouth's erroneous assessment for the 2011 tax year. However, Portsmouth is required to abate the tax to reflect only the portion of the year during which the universal amendment was effective. Accordingly, Portsmouth's assessment of the use tax after the approval of the universal amendment was not *ultra vires*.

In Scenario 1(d), the Town of Belmont sent notice of its universal amendment to FairPoint *after* the meeting where the Belmont Board of Selectmen approved the

amendment. Because the Court finds that RSA 231:163 requires municipalities to send notice *prior* to amending RSA 231:161 licenses, Belmont's universal amendment was improper and cannot serve as a basis for the 2011 use tax assessment.

With respect to Scenario 2 and all of its variations, because the RSA 72:23, I(a) exemption does not apply to personal property owned by parties other than the Municipalities, this lack of language does not preclude the Municipalities from assessing taxes against FairPoint based on the value of FairPoint's poles and conduit located in public rights-of-way. Consequently, Alstead, Manchester, Portsmouth, and Belmont did not act *ultra vires* when assessing taxes against FairPoint based on the value of FairPoint's poles and conduit.

Turning to Scenario 3, which involves Durham previously approving a universal amendment but subsequently issuing licenses that do not contain the tax-shifting language required by RSA 72:23, I(b), the Court finds that Durham did not act *ultra vires* when assessing taxes based on the value of FairPoint's poles and conduit. Nor did Durham act *ultra vires* by assessing taxes based on the value of FairPoint's use of public rights-of-way pursuant to licenses issued prior to the universal amendment on March 21, 2005. However, any assessment of taxes based on the value of FairPoint's use of public rights-of-way pursuant to licenses issued after the universal amendment that do not contain the required tax-shifting language would be *ultra vires*.

Similarly, with respect to Scenario 3(a), in which some of FairPoint's licenses issued by Alexandria contain tax-shifting language while others do not, the Court finds that Alexandria did not act *ultra vires* when assessing taxes based on the value of FairPoint's poles and conduit or when assessing taxes based on the value of FairPoint's use of public rights-of-way pursuant to licenses containing the tax-shifting language.

But any assessment of taxes based on the value of FairPoint's use of public rights-of-way pursuant to licenses that do not contain the required tax-shifting language would be *ultra vires*.

VI

The Town of Belmont also moves for summary judgment on two additional issues: (1) whether unlicensed poles located within Belmont's rights-of-way are taxable; and (2) whether a pole located within a public right-of-way shown on a plan approved by the planning board is licensed as a matter of law pursuant to RSA 231:160-a with all statutorily required provisions included.

A

Belmont first argues that FairPoint is estopped from asserting that unlicensed poles located in public rights-of-way are exempt from taxation because there is no agreement as FairPoint contends is required by RSA 72:23, I. Belmont reasons that the lack of a license is caused solely by FairPoint's failure to comply with the statutory requirement that it obtain licenses for its poles. FairPoint counters that requiring the removal of the equipment, not taxation, is appropriate remedy for unlicensed poles. For the purposes of summary judgment, the parties have stipulated that FairPoint owns at least one unlicensed pole in Belmont.

RSA 231:173 states, "If any such pole, or structure, or underground conduit or cable, or any attachment or appurtenance thereto, is willfully placed or maintained in any highway without valid license therefor, it shall be removed upon demand by the authority having jurisdiction to issue licenses pursuant to this subdivision . . . ." The language of RSA 231:173 unambiguously provides the remedy for unlicensed poles, and

the Court will not therefore conclude that the unlicensed poles are taxable because of FairPoint's failure to obtain a license.

B

Belmont next argues that poles licensed as a matter of law pursuant to RSA 231:160-a are licensed with all the statutorily required provisions included. Belmont reasons that when poles are licensed by operation of law, then it follows that statutory requirements are read into the license by operation of law. FairPoint responds that the language of RSA 72:23, I(b) cannot be imputed to these licenses because the default outcome is not the ability to tax.

RSA 231:160-a states, "Any poles, structures, conduits, cables or wires, the location of which have already been approved by the local land use board as part of a subdivision, site plan, or other development approval, shall, if such location becomes a public highway, be deemed legally permitted or licensed without further proceedings." When read in conjunction with RSA 231:173, which allows municipalities to require the removal of unlicensed equipment, the most reasonable statutory interpretation of this provision does not lend to the conclusion that the notice requirements of RSA 72:23, I(b) are imputed to the licensees. RSA 231:160-a intends to protect the equipment from forced removal. It does not follow that it intends that the use tax may automatically be imposed. This is particularly true because the plain intent of RSA 72:23, I(b) is to ensure the licensee is aware of its taxation obligations. Moreover, as FairPoint notes, it would not be unduly burdensome for a municipality to comply with RSA 72:23, I. Therefore, the Court finds that a pole licensed as a matter of law pursuant to RSA 231:160-a does not automatically include the statutorily required tax-shifting language.

VII

Consistent with the foregoing, FairPoint's Motion for Summary Judgment is GRANTED in part and DENIED in part, and the Municipalities' Cross-Motions for Summary Judgment are GRANTED in part and DENIED in part.

SO ORDERED

12/14/15
Date

Richard B. McNamara
Richard B. McNamara
Presiding Justice

THE STATE OF NEW HAMPSHIRE

Merrimack County Superior Court
163 N. Main St.
P.O. Box 2880
Concord, NH 03301-2880
1-855-212-1234

NOTICE OF DECISION

LEAD FILE 220-2012-CV-100
Northern New England Telephone Operations, LLC d/b/a FairPoint Communications, NNE
v. Town of Acworth

Enclosed please find a copy of the Court's Order dated March 1, 2016 relative to:

ORDER

3/2/2016

Tracy A. Uhrin
Clerk of Court

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Northern New England Telephone Operations LLC
d/b/a FairPoint Communications NNE

v.

Town of Acworth

No. 220-2012-CV-100

ORDER

The Petitioner, Northern New England Telephone Operations LLC d/b/a FairPoint Communications NNE ("FairPoint"), brought actions against a number of New Hampshire municipalities alleging that the municipalities acted ultra vires in assessing taxes in a manner that failed to comply with the statutorily prescribed procedure. The parties cross-moved for summary judgment on the test cases' ultra vires claims. The Court's December 14, 2015 Order held that the municipalities, including the Town of Alexandria, the Town of Alstead, the Town of Belmont, the Town of Dublin, the Town of Durham, the City of Manchester, and the City of Portsmouth (collectively the "Municipalities"), did not act ultra vires when assessing taxes based on the value of FairPoint's poles and conduit or when assessing taxes based on the value of FairPoint's use of public rights-of-way pursuant to licenses containing the tax-shifting language required by RSA 72:23, I; however, any assessment of taxes based on the value of FairPoint's use of public rights-of-way pursuant to licenses without the required tax-shifting language would be ultra vires. The Alexandria, Belmont, Durham, and

Portsmouth now move for clarification and reconsideration.[1] FairPoint objects. Based on the foregoing, the motions are GRANTED as to the inconsistency on pages 17 and 18 of the Order, and are otherwise DENIED.

I

A motion for reconsideration "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended." Super. Ct. R. 12(e). Reconsideration is appropriate if the movant sustains its burden of showing that the court overlooked or misapprehended any points of law or fact that warrant a different result than that determined by the Court.

The Town of Alexandria raises five issues in its Motion for Clarification and/or Reconsideration and its supplement to that motion. First, it seeks clarification of the language on pages 17–18 of the Order because it is inconsistent with the Court's ultimate ruling. The Court agrees. The language "as long as the license states 'whether the lessee has an obligation to pay real and personal property taxes on structures and improvements added by the lessee'" shall be stricken. Alexandria's motion to clarify is therefore granted to that extent.

Second, Alexandria contends the Order did not explicitly address its argument that taxing the value of FairPoint's use of the Alexandria's rights-of-way is not ultra vires because the use was analogous to a "perpetual lease." It renews its argument that perpetual leases are taxable under RSA 72:6 and RSA 73:10 regardless of the presence of RSA 72:23, I(b) tax-shifting language. It cites In re Reid, which stated that perpetual

[1] The City of Manchester also moved for clarification and reconsideration. However, FairPoint later filed an assented to motion to stay resolution of Manchester's motion because the parties have reached a settlement in principle and are working on memorializing that settlement in a written agreement. The Court therefore does not address Manchester's motion.

leases "are taxable to the lessee because the lessee 'enjoys all the benefits of ownership, [and therefore] . . . should bear an owner's share of the public expense.'" 143 N.H. 246, 249 (1998) (quoting Piper v. Meredith, 83 N.H. 107, 110 (1927)).

Although the Court acknowledged Alexandria's perpetual lease argument, it now takes the opportunity to expand upon it. As FairPoint points out in its objection, licenses are not leases. Unlike leases, "a license does not ordinarily constitute a property interest." New England Tel. & Tel. Co. v. City of Rochester, 144 N.H. 118, 120 (1999) [hereinafter Rochester I]. Nor are the licenses necessarily perpetual interests. Under RSA 231:163, a municipality has the authority to "revoke or change the terms and conditions of any such license." See also Verizon New England Inc. v. City of Rochester, 151 N.H. 263, 269–70 (2004) [hereinafter Rochester II] ("Under the plain language of [RSA 231:163], a city may change the terms and conditions of a license that it has issued whenever the public good requires.").

Alexandria points out that it has never terminated any of FairPoint's licenses, and some of those licenses date back to the 1930s and 1940s. It further argues, relying on Parker Young Co. v. State, 83 N.H. 551, 555–57 (1929), that it cannot terminate FairPoint's use of the rights-of-way because doing so would interfere with FairPoint's franchise rights granted by the Public Utilities Commission (PUC). However, both arguments are inapposite. A municipality choosing not to exercise the power to revoke or change a license does not amount to granting a perpetual interest when the municipality retains discretion to exercise that power. Further, Parker Young does not stand for the proposition that a municipality may never terminate a license. Rather, it states that, while municipalities may not determine who may or may not occupy the rights-of-way with poles and wires, licensing power nonetheless allows a municipality to

regulate and control the use of its rights-of-way to ensure the utility does not unduly interfere with other public purposes. Id. In other words, while Alexandria may not entirely forbid FairPoint's use of the rights-of-way, Alexandria may control the manner of use, such as location and size. See also N.H. Code of Admin. Rules, Puc 1301.01 ("Nothing in this rule shall be construed to supersede, overrule, or replace any other law, rule or regulation, including municipal and state authority over public highways pursuant to RSA 231:159 et seq."); RSA 362:7, III(d) (stating that the PUC's authority to regulate telephone franchises "shall not be construed to . . . [a]ffect the authority of the state or its political subdivisions . . . to manage the use of public rights-of-way"). Accordingly, Alexandria's perpetual lease argument lacks merit and is not a point of law that warrants a different conclusion from the Court's December 14, 2015 Order.

Third, Alexandria requests reconsideration based on FairPoint's alleged failure to comply with RSA 491:8-a. Because FairPoint did not submit any affidavits or discovery evidence, Alexandria concludes FairPoint could not demonstrate an absence of any genuine issue of material fact. It points out that the parties did not actually agree to stipulated facts. This argument, however, is overly technical. RSA 491:8-a, III explicitly provides that "[s]ummary judgment shall be rendered forthwith 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". Alexandria has pointed to no issue of fact which is in dispute, and indeed, has itself moved for summary judgment. Therefore, Alexandria's RSA 491:8-a argument is not a point of law overlooked or misapprehended in the Court's December 14, 2015 Order.

Fourth, Alexandria requests reconsideration as to the statement on page 10 of the Order indicating that "Alexandria has not approved a universal amendment" of FairPoint's pole and conduit licenses. It contends this statement is untrue because it approved a universal amendment on December 17, 2013. But, as FairPoint notes, whether Alexandria approved an amendment in 2013 is immaterial to whether it assessed taxes ultra vires in 2011 because the universal amendments are not retroactive. Therefore, this point of fact does not merit reconsideration or clarification.

Finally, Alexandria's supplement to its motion requests reconsideration that it did not provide FairPoint the necessary notice to tax FairPoint for its use of the rights-of-way. It points to a single pole and conduit license that includes the language of RSA 72:23, I(b), and concludes that this license was sufficient notice to tax all every licensed pole regardless of whether the other licenses included the same language. Even assuming this argument could be implicit in Alexandria's prior pleadings, this argument lacks merit. The plain language of RSA 72:23, I(b) requires that "All leases and other agreements" shall include tax-shifting language. (Emphasis added). Alexandria's conclusion that only one license's inclusion of the tax-shifting language is sufficient notice for all licenses contravenes the plain language of the statute. Therefore, it is not a point of law or fact overlooked or misapprehended in the Court's December 14, 2015 Order.

II

The Town of Belmont and the Town of Durham raise four issues in their Motion for Clarification and/or Reconsideration. First, they contend the December 14, 2015 Order contains an inconsistency on page 21. The Order stated, "Nor did Durham act ultra vires by assessing taxes based on the value of FairPoint's use of public rights-of-

way pursuant to licenses issued prior to the universal amendment on March 21, 2005." As FairPoint's objection correctly notes, this statement is not inconsistent with the Court's ultimate holding. As the preceding sentence in the Order observes, Durham had approved a universal amendment in 2005, but subsequently issued licenses without the tax-shifting language. By approving the universal amendment in 2005, pre-2005 licenses included the tax-shifting language. Therefore, assessing taxes in 2011 based on FairPoint's use of public rights-of-way pursuant to those licenses was not ultra vires. Accordingly, this is not an inconsistency that requires clarification.

Second, Belmont argues that the Order did not specifically address its argument that it had provided FairPoint notice of its 2013 hearing concerning amendments to FairPoint's pole licenses. Contrary to Belmont's assertion, the Order addressed this argument on pages 7 and 20–21 and found that the parties did not dispute that FairPoint did not have notice of the hearing because Belmont sent the notice after the hearing, which contravenes RSA 231:163. Belmont states that paragraph 6 of its affidavit in support of its Objection to FairPoint's Motion for Summary Judgment indicated that it had provided FairPoint prior notice. However, that paragraph says only that the Belmont Town Administrator followed regular mailing procedures; it does not state that those procedures occurred prior to the hearing. Indeed, Exhibit 1 of FairPoint's Consolidated Objection to the Municipalities' Cross-Motions for Summary Judgment included certified mail receipts showing the notice was not sent until after the hearing. Consequently, this is not a point of fact or law overlooked or misapprehended.

Third, Belmont requests reconsideration of the Court's rejection of its argument that FairPoint is estopped from relying on its failure to obtain pole licenses to meet its burden of proving that it is exempt from taxation. The Court reasoned that the remedy

for unlicensed poles was removal. However, Belmont contends that such a remedy is illusory because under Parker Young Co. v. State, 83 N.H. 551, 555–57 (1929), it cannot terminate FairPoint's use of the rights-of-way because doing so would interfere with FairPoint's franchise rights granted by the PUC. Additionally, it states that under the Federal Telecommunications Act of 1996, 47 U.S.C. § 253, it may not prevent a telecommunication provider from providing service. However, as similarly discussed above, these limits on municipalities' authority to regulate the use of their public rights-of-way do not prohibit a municipality from requiring removal of a pole. Such authority regulates the location and manner in which FairPoint may use the public rights-of-way; it does not prevent FairPoint from providing service. Therefore, this is not a point of law that warrants a different conclusion from the Court's December 14, 2015 Order.

Finally, Belmont requests reconsideration of the Court's ruling that licenses arising as a matter of law under RSA 213:160-a do not permit taxing the value of FairPoint's use of the public rights-of-way. Belmont reasons that the ruling brings about unintended consequences because it would have no authority to amend those licenses, and those poles would therefor escape taxation indefinitely, which is contrary to the constitutional and statutory requirements that each property owner pay its fair share of the municipality's total tax burden.

Belmont's assertion that it would have no authority to impose taxes on poles licensed by operation of law under RSA 231:160-1 is contrary to the plain language of the licensing scheme in RSA chapter 231. Belmont reasons that it cannot amend a license that does not exist, which is a result contrary to the constitutional requirements concerning proportional taxation. However, simply because a license does not exist in the traditional form, it does not follow that there is no "license" subject to amendments.

Indeed, even though poles are "deemed" to be licensed, RSA 231:160-1 nonetheless requires "the appropriate utilities' easements, work plans, or other data showing locations of such structures, [to be] submitted to the municipality for recording purposes." As such, there is a record supporting a license by operation of law.

Moreover, there is no indication in RSA 231:163, which provide municipalities' the authority to amend licenses, that the legislature sought to limit municipalities' authority to revoke or amend licenses based on how those licenses were created. Under the statutory scheme, poles and wires may only be "erected, installed and maintained" within public rights-of-way "as provided in this subdivision." RSA 231:160. The subdivision affords two methods to obtain authority to erect poles. First, under RSA 231:160-a, if a local land use board had already approved the location of the poles and that location later becomes a public highway, those poles are to "be deemed legally permitted or licensed without further proceedings under this subdivision." Second, under RSA 231:161, the utility may apply for a permit or license through the statutorily prescribed procedure. In either circumstance, the poles are licensed by the terms of the subdivision. Under RSA 231:163, municipalities may "revoke or change the terms and conditions of any such license." This language is most reasonably interpreted as applying to any license arising under the subdivision's licensing scheme, including licenses arising by operation of law under RSA 231:160-a. Had the legislature sought to limit amending authority to only licenses issued under RSA 231:161, it could have so stated, but the Court will not now "consider what the legislature might have said nor add words that [the legislature] did not see fit to include." Rochester II, 151 N.H. at 266.

Consequently, a reasonable interpretation of the taxing scheme in RSA 72:23, I, and the licensing scheme in RSA chapter 231, concludes that municipalities have the

authority to amend licenses that arise by operation of law. Such an interpretation serves the purposes of both statutory schemes, which is to provide notice of tax obligations, allow municipalities to regulate public rights-of-way, and to protect poles not initially located in public rights-of-way from forced removal. See Wolfeboro Camp School, Inc. v. Town of Wolfeboro, 138 N.H. 496, 499 (1994) (quoting In re Estate of Martin, 125 N.H. 690, 691 (1984)) ("A tax exemption statute is construed not with rigorous strictness but 'to give full effect to the legislative intent of the statute.'"); State Emps. Ass'n of N.H., SEIU, Local 1984 v. N.H. Div. of Pers., 158 N.H. 338, 343 (2009) (quoting Grand China v. United Nat'l Ins. Co., 156 N.H. 429, 431 (2007)) ("When interpreting two statutes that deal with a similar subject matter, [the Court will] construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes."). By exercise of this amending authority over licenses arising by operation of law, it would not be unduly burdensome for municipalities to comply with RSA 72:23, I, while simultaneously ensuring pole owners receive proper notice of their tax obligations. Indeed, common sense dictates that notice of such tax obligations would be particularly important in circumstances where existing pole locations become part of a public right-of-way. Accordingly, this request for reconsideration does not raise any points of law or fact previously overlooked or misapprehended that warrant a different result as that reached in the Court's December 14, 2015 Order.

III

The City of Portsmouth also requests reconsideration of the Court's statement that Portsmouth's universal amendment substantially complied with RSA 72:23, I. Portsmouth argues that the facts show it included all of the statutory language.

However, as FairPoint's objection observes, the amendment failed to include the specific language of RSA 72:23, I(b). Accordingly, this is not a point of law overlooked or misapprehended in the Court's December 14, 2015 Order.

Consistent with the foregoing, Alexandria's Motion for Clarification and/or Reconsideration is GRANTED to the extent that it corrects an inconsistency on pages 17–18 of the December 14, 2015 Order, and DENIED as to the remaining issues; Belmont and Durham's Motion for Clarification and/or Reconsideration is DENIED; and Portsmouth's Motion for Clarification and/or Reconsideration is DENIED.

SO ORDERED

3/1/16
Date

Richard B. McNamara
Presiding Justice