Vermont Supreme Court Clarifies Abatement Process

During a 2007 town-wide reappraisal, Michael Garbitelli refused to allow the Brookfield listers to inspect his entire property, allowing them entry only into his foyer and basement. The listers assessed his property at $1.6 million. Mr. Garbitelli appealed his assessment all the way to the Vermont Supreme Court. The Court upheld Mr. Garbitelli's assessment, noting that he had refused entry to the listers and had therefore failed to provide an adequate basis to demonstrate that the assessment was erroneous. *Garbitelli v. Town of Brookfield*, 2009 VT 109 (mem.)

In 2009, Mr. Garbitelli changed his approach and allowed the Brookfield listers to enter his property. Thereafter, the listers reduced his 2009 assessment to $957,000. Not satisfied with this result, Mr. Garbitelli filed for an abatement for the years 2007 and 2008 under 24 V.S.A. § 1535(a)(4), which authorizes an abatement in cases involving "a manifest error or a mistake of the listers." The Brookfield Board of Abatement denied the request, finding that there was no mistake attributable to the listers since they were denied entry and were forced to use the best information available to them. The board also stated that an abatement procedure is not the appropriate vehicle for appealing property valuations.

Mr. Garbitelli appealed the board's decision to superior court. The superior court affirmed the board's decision, holding that Mr. Garbitelli failed to demonstrate an abuse of discretion by the board of abatement. The superior court also agreed with the board that abatement procedures are not meant to provide a second opportunity to appeal property valuations. Mr. Garbitelli appealed the superior court's decision to the Vermont Supreme Court, arguing, among other things, that the superior court had erred in conducting an on the record review, rather than affording him a *de novo* hearing and concluding that the board did not abuse its discretion by holding there was no "manifest error or a mistake of the listers." *Garbitelli v. Town of Brookfield*, 2011 VT 122.

The Supreme Court noted that appeals of decisions of the board of abatement are brought by taxpayers under Rule 75 of the Vermont Rules of Civil Procedure. Rule 75 allows judicial review of any action or failure to act by a state agency or subdivision. Rule 75 is in essence a default rule – where legislation is silent as to the manner review, an appeal is taken to superior court under Rule 75. Since Vermont's abatement statutes do not specify the manner of review of decisions of the board of abatement, Rule 75 applies.

According to the Supreme Court, a trial court reviewing governmental action under Rule 75 is typically limited to review of questions of law and review of evidentiary questions is limited to whether there is any competent evidence to justify the adjudication. In the circumstance where the record is inadequate – such as when a transcript from the administrative proceeding is unavailable or incomplete – evidence may be admitted to establish facts necessary for the trial court's review but generally, a *de novo* hearing is inappropriate following a quasi-judicial procedure in which the plaintiff has freely participated and the record is complete. Since Mr. Garbitelli had attended and participated in his abatement hearing in 2009 and conceded that there were no disputed issues of fact and no additional evidence that he wanted to present in his case, the Supreme Court concluded that the superior court did not err in conducting an on-the-record review under Rule 75.

Mr. Garbitelli also argued that the superior court had erred in applying 24 V.S.A. § 1535(a)(4), which allows abatement of "taxes in which there is manifest error or a mistake of the listers." The superior court interpreted the statute to mean that any error or mistake must be *attributable to* the listers and concluded that error of the listers is required for abatement under the law. Mr. Garbitelli contended

that a "manifest error" need not be attributable to the listers, but may exist independently – as here – as a result of disparate tax assessments. The Court agreed, noting that the prior version of the statute was stated in the disjunctive and was clear that "of the listers" did not modify "manifest error." In amending the statute to its present form, the Vermont Legislature merely intended to streamline the language by removing surplus words in the clause providing for abatement where there is error or mistake. Thus, the superior court was incorrect in concluding that a manifest error must be attributable to the listers.

Even though the Supreme Court agreed with Mr. Garbitelli's interpretation of 24 V.S.A. § 1535(a)(4), it did not agree that the disparity between $1.6 million and $957,000 entitled Mr. Garbitelli to an abatement. The Court noted that Mr. Garbitelli had refused to let the Brookfield listers enter his property and had engaged in unfair and inequitable conduct over a period of years by refusing them reasonable access to the property. Since tax abatement is an equitable remedy, the Brookfield Board of Abatement was entitled to weigh the equities and take into account any bad conduct of a taxpayer, including Mr. Garbitelli's refusal to let the Brookfield listers enter his property. The maxim that a party seeking an equitable remedy must come to court with "clean hands" was applicable to Mr. Garbitelli.

The *Garbitelli* decision marks the first time in nearly four decades that the Vermont Supreme Court has addressed the property tax abatement process, and, given the number of abatement requests expected around the state this year, the timing of the decision couldn't be better. The decision affirms some commonly held opinions about abatement, including the conventional wisdom that a "manifest error" under 24 V.S.A. § 1535(a)(4) does not have to be attributable to the listers. A manifest error in the property tax collection process can arise in any number of ways, and where the statute is interpreted to apply only to errors caused by the listers, it would leave a host of potential problems without a mechanism for resolution. The decision also confirms the notion that a taxpayer can't play hide-the-ball by denying listers access to property and then seeking an abatement when the resulting assessment is thought to be too high.

In the future, boards of abatement will need to keep in mind that generating adequate records to support their decisions is nearly as important as the decision itself. If the taxpayer participated in the abatement hearing and an adequate record of the abatement hearing is present, a trial court acting under Rule 75 will generally only address questions of law and determine whether there is any competent evidence to justify the board's decision. On the other hand, if the record is inadequate, the trial court will hold a *de novo* hearing. Last month's *Ask the League* article has an extensive discussion of the process for holding abatement hearings.

A copy of the decision is available at http://info.libraries.vermont.gov/supct/current/op2011-020.html

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