S&H Legal Matters
News and Announcements from Sulloway & Hollis February - 2021

Real Property Tax Abatement Updates for 2020

A Year in Review

In 2020, the New Hampshire Supreme Court and the Board of Tax and Land Appeals (the "BTLA") issued a number of significant decisions regarding property owners' requests to reduce their real estate taxes – known in legal parlance as an "abatement." These decisions include significant developments in the law, clarification of various standards and reinforcement of key prior decisions. As we enter into a new calendar year and tax year 2020 abatement requests start to be filed on the local level, it is critical for taxpayers, municipal officials and their representatives to be aware of recent developments in the law to ensure that abatements are resolved on fair, consistent and up-to-date legal bases.

By: *Margaret H. Nelson, Derek D. Lick & Trevor J. Brown*

Supreme Court: Taxpayer Signatures Required, But Some Limited Leeway Permitted

In the *Appeal of Keith R. Mader 2000 Revocable Trust, et al.*, 173 N.H. 362 (2020), the Town of Bartlett denied abatement requests of a group of eighteen taxpayers; the taxpayers appealed to the BTLA. The BTLA dismissed their appeals, noting that the taxpayers had not signed their abatement applications when filed with the Town and that their attorney had done so on their behalf. The taxpayers then appealed the BTLA's dismissal to the New Hampshire Supreme Court.

The BTLA requested the taxpayers provide "written proof" that they had "signed the abatement applications" as required by the BTLA's Rules. The taxpayers acknowledged that they had not personally signed the applications, but argued the omissions were "due to reasonable cause and not willful neglect." All but one of the taxpayers lived out-of-state and counsel had not been formally retained until close to the filing deadline. Further, the taxpayers filed a motion seeking an exception from the BTLA's signature requirement. The BTLA denied the motion for exception and dismissed the appeals, finding that the petitioners failed to comply with the controlling rule and had not shown the failure was "due to reasonable cause and not willful neglect."

On appeal, the Supreme Court began its analysis by noting the importance of construing the BTLA's rules liberally in order to advance the "rule of remedial justice." The Court held that the "reasonable cause and not willful neglect" exception to the BTLA's signature requirement permitted abatement appeals to be filed with the BTLA despite the lack of a taxpayer's signature and certification, if the taxpayer can show that it was not reasonably possible to submit the application with the taxpayer's signature despite "exercising ordinary business care and prudence" and that the taxpayer "was not recklessly indifferent to the signature

and certification requirement in preparing the application." The Supreme Court vacated the BTLA's dismissal of the appeals and remanded for further review. In doing so, the Court provided important new guidance regarding the procedural requirements to pursuing an appeal under New Hampshire law.

Supreme Court: Licenses Not Deemed Perpetual Leases So as to be Subject to Real Estate Taxes

In *Northern New Eng. Tel. Operations, LLC v. Town of Acworth*, FairPoint Communications ("FairPoint") brought suit against a number of New Hampshire municipalities asserting ultra vires taxation and disproportionate taxation of its real property in those municipalities, namely utility poles and conduits and the use of the public right-of-way ("ROW"). No. 2018-0570, 2020 N.H. LEXIS 191 (Nov. 6, 2020). Suits against three municipalities were chosen as "test cases" by the parties. Following a bench trial before the Superior Court, two of the defendant municipalities appealed to the Supreme Court. The municipal appeal focused on two distinct issues: (1) the Superior Court's ruling on summary judgment that the taxation of FairPoint's use or occupation of the PROW was ultra vires because the agreements authorizing the use/occupation did not satisfy the requirements of RSA 72:23, I(b); and (2) the Superior Court's ruling after trial, concluding that FairPoint was entitled to abatements for certain tax years in certain communities.

On the first point, the Superior Court ruled that the imposition of taxes on FairPoint's use of the public ROW was ultra vires taxation to the extent that licenses issued for the placement of property (poles and conduits) in the PROW did not contain a specific provision mandating payment of taxes as required by RSA 72:23, I(b). A majority of the Supreme Court, including two retired Superior Court judges sitting by special appointment, reversed the Superior Court on this question. The Court found that the required language was, in effect, incorporated into the existing licenses as a matter of law, looking to RSA 231:160-a for support. Two members of the Court dissented on this issue. Ultimately, however, the full Court agreed that the Superior Court, which had determined that the licenses did not constitute perpetual leases equivalent to fee ownership, an alternative argument raised by Fairpoint.

While the Supreme Court's decision addressed a number of issues specific to utility valuation, such as the estimated life of a utility pole for depreciation purposes, whether "guys and anchors" should be considered "structures" for the purposes of real estate taxation, among other issues, the Court affirmed the Superior Court's decision granting abatements to FairPoint in several communities for several tax years. In its decision, the Court noted that deference will be given to the finder of fact's findings unless erroneous as a matter of law. Though this point is particularly apt given the complex field of utility valuation, this holding is equally applicable to the valuation of other real property.

Supreme Court: A Town Appraiser's Flawed Methodology is Not Enough To Prevail

In *Ventas Realty v. City of Dover*, 172 N.H. 752 (2020), the taxpayer appealed a Superior Court order denying its request for an abatement. The property at issue, a skilled nursing facility, was valued by both Ventas' and Dover's experts using the income capitalization approach. While the Superior Court noted that the income capitalization approach is a well-accepted method for determining the value of income-producing property such as the facility at issue, it rejected Ventas' expert's approach as not accurately reflecting the "overall value of the property based on forecasted net income" generated on the open market. Accordingly, the trial court held that Ventas did not meet its burden.

On appeal, Ventas made a number of arguments, including taking the position that the municipality's expert's methodology was flawed. Noting that "Ventas had the burden of proof, not the City," the Supreme Court quoted its prior holdings for the proposition that while a flawed methodology may possibly lead to a disproportionate tax burden, "flawed methodology does not, in and of itself, prove the disproportionate result." Ultimately, however, the Court found that "all of Ventas's arguments fault the trial court for finding [Dover's expert's] valuations more credible." The Supreme Court affirmed the Superior Court's ruling, noting that the trial court's findings were supported by the records and not erroneous as a matter of law. The *Ventas* case further illustrates the deference given to findings made by the finder of fact.

BLTA Opinion: Multiple Avenues of Relief Exist for Taxpayers of Damaged Buildings

In *Kathryn O'Donnell v. Town of Chichester*, No. 29334-18T, 2020 N.H. Tax LEXIS 30 (Aug. 28, 2020), the BTLA provided important insights into RSA 76:21, a relatively new provision of New Hampshire's tax abatement scheme. The taxpayer, O'Donnell, filed for an abatement with Chichester on her 2018 abated assessment. In March 2018, the taxpayer's property suffered a fire resulting in significant physical damage and "toxic chemical soot" throughout the building. The building was uninhabitable. The Town was notified of the fire in August 2018 and "decided a depreciation for areas of the home requiring renovating of 30% was appropriate" and granted an abatement of $46,600. The taxpayer argued this was insufficient, point to, among other bases, an estimate showing repairs totaling $225,000.

The BTLA's decision first addressed the dispute between the parties as to the extent of damage to the property. In finding that the taxpayer met her burden, the BTLA rejected the Town's 30% temporary reduction, stating that the Town presented "no credible support" for the figure and was not sufficient to account for the loss in value based on the taxpayer's evidence.

The BTLA then addressed the interplay between RSA 76:16 and 76:21. RSA 76:16 provides that any person aggrieved may file for an abatement; RSA 76:21 provides for assessments to be prorated for buildings damaged due to "unintended fire or natural disaster." Under RSA 76:21, a person aggrieved by "unintended fire or natural disaster" must file an application with the municipality "within 60 days of the event...or by March 1, whichever is later." The Town took the position that because the taxpayer did not notify the Town of the fire within 60 days, that she was precluded from relief under the statute. In rejecting this position, the BTLA focused in on the "March 1" provision. "As the fire occurred on March 22, 2018, 'the March 1' would have been March 1, 2019..." The Town further argued that because RSA 76:21 specifically governs tax relief for fire-related loss, that a taxpayer cannot simultaneously look to RSA 76:16 for relief. After going through a lengthy statutory interpretation, the BTLA rejected this position, finding that RSA 76:21 explicitly provides that it is not an exclusive remedy for fire-related loss.

BLTA Opinion: Municipalities Have Independent Legal and Ethical Obligations to Issue an Abatement Upon Learning a Property has Been Over Assessed

Addressing a number of individual RSA 76:16-a abatement appeals filed by Eversource, *In Re: Public Service Company of New Hampshire d/b/a Eversource Energy*, concerns Eversource's challenge to the proportionality of its property located in various municipalities for tax years 2014-2017. Master Docket No. 28873-14-15-16-17PT, 2020 N.H. TAX LEXIS 20 (June 23, 2020). This included electric transmission and distribution assets, fee simply land, use of public rights-of-way and transmission easements, as well as a generating facility (for one municipality).

Prior to hearings being held before the BTLA, a number of individual cases settled. Ultimately, 138 appeals for various municipalities and tax years were heard as a consolidated hearing over a four week period. Eversource and the municipalities each provided appraisal reports and extensive expert testimony.

Following the hearing, the BTLA made a factual determination to not accept Eversource's appraisal, but granted abatements in 91 appeals based on the municipalities' appraisal. The BTLA's decision addresses at length the independent legal and ethical obligations of selectmen, noting that when municipal officials fail to issue an abatement upon learning that property has been over-assessed, subject to tests of materiality and reasonableness, that such failure "is a dereliction of that governmental obligation and professional responsibility."

Four municipalities have appealed the BTLA's decision relating to certain discrete issues relating to them with respect to certain tax years. Those appeals are currently pending before the New Hampshire Supreme Court.

BLTA Opinion: Failure to Follow Administrative Rules Can Result In Exclusion of Appraisal

In *MC&G Inc. v. Town of Tilton*, No. 29039-17PT, 2020 N.H. Tax LEXIS 25 (June 12, 2020), the BTLA denied the taxpayer's appeal for an abatement on a commercial property, a renovated mill building, located in Tilton. In its decision, the BTLA noted that it "considers and weighs all of the evidence, including any

appraisal submitted" in making market value findings, but that the BTLA will apply its "experience, technical competence and specialized knowledge" to the evidence. While generally both the taxpayer and the municipality present appraisals reflecting their opinions of market value, in this case the taxpayer "presented no appraisal because its representative failed to comply with the [BTLA's] rules for submitting an appraisal" as such, the BTLA granted the Town's motion to suppress the taxpayer's expert report – providing a sharp reminder for taxpayers and municipalities alike as to the importance of following administrative rules and procedure so that the merits of each side's position remain the focus.

BLTA Opinion: Value of Sub-Optimal Space Should Be Considered When Considering an Abatement

In *White Duck Realty, LLC v. City of Nashua*, the BTLA granted an abatement to the taxpayer on an owner-occupied retail furniture store and warehouse, though not to the extent estimated by the taxpayer's expert. No. 28940-17PT, 2020 N.H. Tax LEXIS 22 (May 22, 2020).

The BTLA's decision focused, in part, on how a 34,800 square foot mezzanine space affected the property's market value. The taxpayer's expert argued it had a detrimental impact as the mezzanine's specifications were inferior to general market expectations. The City's expert, however, argued that the mezzanine increased the gross building area and gross living area, thereby increasing the property's value. Looking to its previous rulings as to why arguably sub-optimal space can still contribute to market value – such as finished basements or area above a garage – the BTLA concluded that the mezzanine did not increase the market value of the property in direct proportion to the size, but that it did, on balance, add to the market value of the property. For taxpayers with sub-optimal space who are looking to file for an abatement, this decision provides a reminder to take into account the value of that space, whether in the residential or commercial context.

BLTA Opinion: "Judgement is the Touchstone" in Making Factual Determinations

The taxpayer, WKV Realty, appealed Nashua's 2017 assessment on an office building located in the City. *WKV Realty v. City of Nashua*, No. 28936-17PT, 2020 N.H. Tax LEXIS 19 (May 8, 2020). In granting the appeal, the BTLA went through a lengthy analysis of the evidence presented. Noting that "the [BTLA] must utilize its best judgment in analyzing the market data submitted and arriving at its own market value findings," the BTLA ultimately found that several sales utilized in the taxpayer's expert appraisal were the best evidence of the property's market value as of the assessment date. The BTLA placed no value on the City's analysis, specifically highlighting the City's expert's "inability to respond credibly to questions at the hearing on the merits." Highlighting the notion that "judgment is the touchstone" in making factual determinations in tax abatement cases, *WKV Realty v. City of Nashua*, illustrates the importance of weighing market value evidence in determining whether an abatement is warranted.

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