STATE OF VERMONT
WINDSOR COUNTY, SS.

ASCUTNEY MOUNTAIN RESORT, L.P. v. TOWN OF WEST WINDSOR	)))))	WINDSOR SUPERIOR COURT DOCKET NO. S331-96 WrCa
ASCUTNEY MOUNTAIN RESORT HOTEL, L.P. v. TOWN OF WEST WINDSOR	)))))	WINDSOR SUPERIOR COURT DOCKET NO. S332-96 WrCa
ASCUTNEY MOUNTAIN RESORT REALTY, L.P. v. TOWN OF WEST WINDSOR	)))))	WINDSOR SUPERIOR COURT DOCKET NO. S333-96 WrCa

CONFORMED COPY

NOTICE OF DECISION AND ORDER

These three consolidated cases concern three parcels of real property owned by three related limited partnerships who collectively operate Ascutney Mountain Resort, and who are hereinafter referred to collectively as "Resort." The owners requested abatement of a portion of the property taxes payable to the Town of West Windsor for the tax year 1993. The Board of Abatement of the Town denied the requests after a series of events described more fully below. The Resort filed this action for court review of the decision of the Board of Abatement pursuant to Rule 75, Review of Governmental Action, of the Vermont Rules of Civil Procedure. The Resort petitions the court to overrule the decisions of the Board of Abatement and to issue a judgment order in its favor for a specified amount of claimed overpayment of taxes plus interest, or alternatively to order the Board of Abatement to abate the taxes in the requested amount. For the reasons set forth below, the court declines to do so, and denies the petitions.

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FACTS

Ascutney Mountain Resort operates a ski resort on the three parcels of land. This resort was in existence for many years prior to June 25, 1993, when the Resort acquired the right to buy it. Beginning in 1989, the resort property was on the Grand List, after an appeal had been taken, at $47 million. In 1990, the then owner experienced financial difficulty and went into bankruptcy. The property was put in the hands of a Trustee in Bankruptcy in April 1991, and the ski resort stopped operating. The Trustee made efforts to sell it through private sale and sealed-bid auctions through May of 1993. Potential buyers expressed interest at a price in the $3 million to $8 million range, which the Trustee rejected as insufficient. Creditors were owed more than $42 million. In the late summer of 1992, Petitioner Resort made an offer for the property that the Trustee rejected. The offer was for $1.5 million initially, plus further payments in amounts to be determined up to an additional $ 1.5 million. Throughout the bankruptcy proceedings (*i.e.* for the years 1990, 1991, 1992 and 1993), the property tax assessment of $47 million remained unchanged. The Trustee in bankruptcy had the legal status that would have entitled him to grieve the assessment, but he did not do so. On June 3, 1993, the Bankruptcy Court ordered the property to be sold at auction to the highest bidder at an auction to be held on June 25, 1993, with no minimum bid required. An auction was held on June 25, 1993. At that time, the opportunity for grieving the 1993 tax assessment, which remained at $47 million, had closed. As a result, at the time of the auction, a property tax liability to the Town of West Windsor was established in an amount based on the 1993 Grand List value of $47 million. This obligation was secured by a lien against the property as a matter of law. 32 V.S.A. §§ 5061 *et seq.*; Findings, Conclusions, and Order, Ascutney Mountain Resort, L.P., S345-94 WrCa (Fisher, J., March 4, 1996).

Petitioner Resort was the successful bidder for the property at the auction on June 25, 1993 at $1.1 million. On July 15, 1993, the Bankruptcy Court issued an Order confirming the sale. In September 1993 the Resort completed the purchase for the stated price plus a required 3% buyer's premium of $33,000, or a total purchase price of $1,133,000.00.

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The Resort then sought abatement of taxes of approximately $204,969.[1] On October 29, 1993, the Resort paid its partial-year share of the tax bills for 1993 for the three properties in the amount of $285,000, "under protest." The request for abatement was pending.

In 1994, the Plausteiners, on behalf of the Resort, worked with the Town to establish an agreement on taxes. The Town was going though its first town-wide reappraisal in over 20 years. In March of 1994, the listers assessed the property at $12 million. By that time the ski resort had been reopened and resumed operations. Appraisals obtained by the Resort showed a value of approximately $4 million. The Resort appealed to the State Board of Appraisers, who set the assessment at about $6 million for the tax year 1994 and the two following years.

On August 29, 1994, the Board of Abatement denied the Plaintiff's requests for abatement of the 1993 tax, and the Board's decision was appealed to this court (Docket Nos. S345-94 WrCa, S346-94 WrCa, and S347-94 WrCa). On March 4, 1996, after two days of hearings, the court issued its Findings, Conclusions, and Order. It found that the validity and finality of the listed values on the 1993 Grand List are not in question, but that the Board of Abatement had failed to exercise discretion in the manner that it was required by statute to do, and had instead relied on a principle of law. The court ordered the case remanded to the Board of Abatement for further action consistent with the court's opinion.

On June 17, 1996, the Board of Abatement reconvened to consider anew the Plaintiff's request for abatement. It held a new hearing during which it took testimony, and Board members asked questions. Board members then engaged in discussion for over an hour, after which they voted 7-3 to deny the abatement based on the following reasons:

1. The Trustee didn't ask for an appeal.
2. They were aware of the assessment prior to the bid.
3. The assessment could have been factored into there [*sic*] bid.

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[1] This figure comes from the pleadings in this case. Mr. Plausteiner, a principal in the ownership of the Resort, testified before the Board of Abatement below that he was seeking abatement of $240,000.

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4. They could have but didn't request the Trustee to appeal.
5. The value of the bid is significantly less then [*sic*] the estimate of value.

These are the reasons as recorded in the minutes. A slightly more elaborate version is contained in the Decision of Board of Abatement signed by the Chair on June 28, 1996:

> 1. The Resort, or its agents had knowledge of the assessment of the properties prior to making a bid on June 25, 1993. Indeed, in the findings of fact in the Superior Court Decision (Finding No. 17) the Court found that the Resort (through Mr. Plausteiner) had made an offer on the property in the late summer of 1992.
> 2. The Resort could have factored the assessment, of which it was aware, into its bid price.
> 3. The Resort came into the bidding in June of 1993 with access to all relevant information.
> 4. The Resort could have, but did not, request the Trustee to grieve the 1993 assessments as a condition to its bid.
> 5. The values indicated in Exhibit 1 and testified to by Mr. Plausteiner all greatly exceed the $1.1 million that the applicants bid for the property.
>
> The majority of the Board is of the opinion that the Resort, having access to all relevant information and having voluntarily elected to make a bid on the property without requiring that the taxes be grieved, should not now be heard to argue that it is entitled to relief from a situation it purposefully and calculatingly entered into. The Resort knew, or should have known what it was getting into and could have taken steps to attempt to have a grievance of the tax assessment for 1993 filed. It did not. Rather, it bid on the properties with knowledge of or access to all information relevant to the assessments and elected to close on the purchase knowing the assessment had not been grieved.
>
> After consideration of all the matters set forth above and having exercised the discretion afforded it under 24 VSA §1535, the majority of the Board is not inclined to grant any abatement.
>
> Accordingly, the Resort's request for abatement is hereby denied.

DISCUSSION

This court has previously issued an opinion in this case entitled Decisions on Standards and Procedures of Review (filed February 24, 1997), and the court herein incorporates the contents of that opinion in this opinion and decision.

As stated therein, a high degree of deference is due to the Board of Abatement in this case for several reasons. First, the validity of the Grand List assessment may be tested through the grievance and appeal process, which is available as the proper forum in which to adjudicate

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substantive legal rights with respect to the level of property tax liability. Proceedings before the Board of Abatement are not to be pursued as an alternate or substitute for that procedure. Second, the Board of Abatement is a governmental body constituted of persons with specialized knowledge and familiarity with the valuation of property, the Grand List and the effect of adjustments to it on the Town, the tax appeal process, the local community, and the circumstances of individual taxpayers within the Town as they relate to hardship claims. It is accountable to the public for its actions through the electoral process, the open meeting process, and the statutory requirement of stating reasons for its decisions. Third, the statutory grant of authority to the Board of Abatement is specifically to make discretionary decisions, taking into account all factors within its knowledge and experience. The type of decision delegated to it is the kind that calls for the exercise of direction. Ascutney Mountain Resort, L.P., S345-94 WrCa (Fisher, J. March 4, 1996).

The superior court has jurisdiction to review the decision by the Board of Abatement under V.R.C.P. 75. This review is "in the nature of *certiorari*." Chapin Hill Estates, Inc. v. Town of Stowe, 131 Vt. 10 (1972). Review by *certiorari* "is not the same as review by appeal, . . . and it may not be used as a substitute for an appeal to correct mere errors in the exercise of a lawful jurisdiction." Rhodes v. Town of Woodstock, 132 Vt. 323, 325 (1974). The Vermont Supreme Court has been mindful in its decisions of the principle that the governmental authority to make discretionary judgments is delegated to specific bodies for particular purposes, and it would be an unwarranted shift of power within our delicately balanced structure if the court were to assume responsibility for actively reviewing the merits of discretionary decisions made by the many governmental bodies charged with the responsibility of making such decisions, where no right of appeal has been established by Statute. Proctor v. Hufnail, 111 Vt. 365 (1940).

In this case the review involves examining the governmental action for an abuse of discretion. The standard of review is very narrow, "as narrow as any in our law." State v. Forte, 159 Vt. 550, 557 (1993) (context of request to vacate grant of new trial in criminal proceedings). Abuse of discretion requires a showing that the decision maker withheld its discretion entirely, or that the discretion was

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exercised for clearly untenable reasons or to a clearly untenable extent. In re Chittenden Recycling Services, 162 Vt. 84 (1994). The Board acted within its discretion if it gave appropriate consideration to the relevant factors. In re Petition of Town of Bennington, 161 Vt. 573, 574 (1993).

Thus, the role of the court in this case is to assure that the Board of Abatement followed all the procedural requirements imposed upon it, and made a decision that is within the range of reasonable decision making under the circumstances. It is not to substitute its own judgment for that of the Board of Abatement.

As to procedural issues, the record clearly shows that the Board of Abatement convened a new hearing in which it took extensive testimony, engaged in a lengthy process of discussion for the purpose of reaching a decision, voted and determined the position of the majority of its members, and explained the position of the majority on the basis of five clearly articulated reasons. The Board complied with all procedural requirements.

The parties differ on whether the decision reached is within a reasonable range of discretionary decision making. The Resort argues that the magnitude of the difference between the $1.1 million purchase price and the $47 million Grand List value is so great that a refusal on the part of the Board of Abatement to acknowledge the actual value of the property in considering the property tax impact on the owner constitutes an abuse of discretion. It argues that the bill was 400% higher than it would have been if based on actual market value, and that it amounted to over 25% of the purchase price of $1.1 million. It notes that in 1993 the property was out of operation as a functioning ski resort, whereas in prior and subsequent years, it was a going concern. It further argues that the grievance process was unavailable to it as an owner, and therefore it should not be charged with the consequences of the failure to grieve. Its position is that a proper range of discretionary decision making on the part of the Board would be to abate all taxes in excess of those based on a property value of a figure between $1.1 million and $12 million, which represents an accurate value range for the property in April of 1993.

The Town's position is that the Board has the authority to make discretionary calls to relieve

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a taxpayer from hardship, and that this case does not represent a case of hardship because Ascutney Mountain Resort elected, with its eyes wide open, to put itself in the position in which it found itself when the 1993 tax bill became due. It further argues that the court should not be second-guessing the Board on its hardship judgment in this case because the reasons relied upon by the Board are sufficient to show that no hardship exists, and the court's review should be narrow.

The court agrees with the Town's position that the Board had, and articulated, sufficient reasons for its conclusion that the Resort was not entitled to an abatement. The majority of the Board was persuaded by the evidence that when the Plaintiff purchased the property, it knew or should have known that the property carried with it a substantial additional cost not reflected in the face amount of the purchase price: a tax liability to the Town based on a high, anachronistic, but unappealed Grand List value, secured by a lien. The amount of a property tax bill typically affects the market value of the property to which it is attached *vis-a-vis* other properties of comparable characteristics, and unpaid liens to third parties affect the amount a purchaser is willing to pay the seller if the purchaser is also going to have to pay the lien. Therefore it was reasonable for the Board to charge Ascutney Mountain Resort with the knowledge that, at the time it made its bid, it had to take into account the fact that the tax bill had to be paid. The purchase price of $1,133,000 plus taxes of $285,000 equal $1,418,000, which is below the Resort's prior bid and well below all appraisals for 1994. There is a sufficient factual basis for the Board to conclude that "[T]he assessment could have been factored into [the Resort's] bid." The Board did not rely on that reason alone, but gave other reasons, which are supported by evidence in the record, which in combination show that the Resort entered into its economic situation voluntarily, relying on factors that were either known or should have been known by persons bidding on business real estate. Therefore, the court cannot conclude that the Board abused its discretion in reaching the result that it did.

The Board clearly had before it a difficult decision. It could have found the reasons it specified compelling, and those reasons were obviously persuasive to 7 out of 10 board members, or a clear majority; or it could have found compelling the reasons advanced by the Resort, *i.e.* that the

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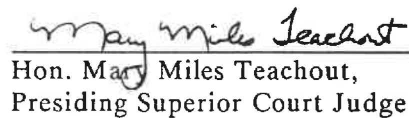
$47 million assessment on which the 1993 tax bill was based was perhaps as much as $35 million higher than the market value of the property that year, leading to the conclusion that some measure of tax relief to the taxpayer was warranted. While it is unusual that there should be such a wide spectrum of outcomes that fall within the range of reasonable discretionary decision making, that happens to be the case under the circumstances presented here.

The court is not in the position of making its own judgment on the merits, but merely ascertaining whether or not it was possible for the Board, on the basis of the evidence before it, to reasonably reach the conclusion that it reached. This court finds that such a result was within the range of reasonable discretionary decision making, and therefore denies the request of the Plaintiff for judgment in the amount requested, and further denies the request of the Plaintiff to order the Board of Abatement to abate a portion of the 1993 tax bills relating to these three properties.

ORDER

For the foregoing reasons, the petition is DENIED with prejudice.

Dated at Woodstock, Vermont this 25th day of July, 1997.



Hon. Mary Miles Teachout,
Presiding Superior Court Judge

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