

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

NEW CASTLE COUNTY,)
)
 Appellant,)
)
 v.) C.A. No. 07A-03-005-JEB
)
)
 NEW CASTLE BOARD OF)
 ASSESSMENT, and VERIZON)
 DELAWARE, INC.)
)
)
 Appellee.)

Submitted: August 8, 2007
Decided: April 30, 2008

*Petition for a Writ of Certiorari.
Dismissed.*

OPINION

Appearances:

Laura T. Hay, Esquire, Wilmington, DE.
Attorney for New Castle County.

Judith Ann Hildick, Esquire, Wilmington, DE.
Attorney for NCC Board of Assessment Review.

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Attorneys for Respondent Verizon Delaware, Inc.

This is a certiorari proceeding in which Petitioner New Castle County seeks review of a decision of the New Castle County Board of Assessment Review. In the proceedings below, the Board granted Respondent Verizon's appeal of its property tax assessment for the 2006-2007 tax year, reducing the assessment by depreciating the value of Verizon's outside equipment¹ by approximately \$80,000,000. The Board's granting of an annual depreciation is a departure from the County's practice of applying a 5-percent depreciation rate to each property at the time of a general reassessment and not making further adjustments for depreciation until the next general reassessment. The last general reassessment in New Castle County was conducted in 1983.

The County seeks review of the Board's decision by a writ of certiorari because the County has no statutory right to appeal a decision of the Board of Assessment Review.² Verizon argues that a decision of the Board of Assessment Review is not subject to certiorari review. As to procedure, the Court holds that it has jurisdiction over a petition for a writ of certiorari filed by the County to review a decision of the Board of Assessment Review. As to the merits of the petition, the County has raised

¹Outside equipment includes poles, cables, lines, boxes, conduit and other equipment. By statute, these and similar items are referred to as "special betterments." Del. Code Ann. tit. 9, § 8101.

²Del. Code Ann. tit. 9, § 8312 (c) (2006). *New Castle County v. Chrysler Corp.*, 681 A.2d 1077, 1081 (Del. 1995), *aff'd* 1996 WL 145806 (Del.).

factual matters that are not subject to the limited review available on certiorari, and the petition is therefore dismissed.

When hearing a taxpayer's appeal, the role of the Board of Assessment Review is to determine whether the County's assessment is correct "in light of the facts produced at [the] hearing."³ There is an presumption of accuracy in favor of the existing assessment which is rebutted only by evidence of substantial overvaluation.⁴ The Board is required to accept competent evidence of overvaluation, even if the evidence is based a different appraisal method than the County usually uses.⁵ In this case, the Board heard evidence at two hearings. The expert witnesses testified on various aspects of Verizon's appraisal, but the relevant portions pertain to the method of accounting for depreciation.

Verizon presented expert testimony from two appraisers who specialize in telecommunications equipment. They challenged the accuracy of the County's method of applying a one-time 5% depreciation deduction and making no further adjustment for depreciation until the time of the next general reassessment. Verizon's

³Del. Code Ann. tit. 9, § 1318(2).

⁴*Fitzsimmons v. McCorkle*, 214 A.2d 334, 337 (Del. 1965).

⁵*Tatten Partners, L.P. v. New Castle County Bd. of Assessment Review*, 642 A.2d 1251, 1262, (citing (*Seaford Assoc., L.P. v. Bd. of Assessment Review*, 539 A.2d 1045, 1046-47 (1988))).

experts found this method to be arbitrary and inaccurate because it did not account for wear and tear or obsolescence of outdoor equipment. For this reason as well as others which are not part of this inquiry, Verizon argued that its assessment should be reduced from \$190,179,300 to \$110,803,300.

The County presented expert testimony from its certified residential appraiser. He testified that the County had applied a one-time depreciation rate of 5% to Verizon's property, as it does for all utility plants in NCC. In response to Verizon's argument for an annual depreciation, the County's appraiser stated his opinion that depreciating properties annually would constitute preferential treatment to the detriment of other property owners.

The Board accepted Verizon's argument that an annual depreciation deduction is more accurate than taking a one-time 5 % deduction at the time of a general reassessment. The Board's decision provides five reasons for granting the appeal, three of which are relevant to this inquiry:

2. The values presented by Verizon were factored back to the base year of 1983 to ensure uniformity;
4. The use by New Castle County of a one-time 5% depreciation reduction was not logical because it does not take into account wear and tear and obsolescence of equipment; and
5. The inequities that arise from deterioration are normally addressed through periodic general assessments, but since no

reassessment has been done since 1983, the Board is otherwise unable to correct the inequities.⁶

Jurisdiction must be addressed first. Verizon argues that the Court has no jurisdiction over the petition for two reasons. First, there is no avenue for the County to challenge a Board decision, either by statute or by common law writ, and second, if certiorari does lie, the petition raises factual issues that are not appropriate subject matter for certiorari review. The County concedes that it has no recourse to an appeal but asserts that it has met the requirements for certiorari to lie.

The Delaware Constitution confers jurisdiction over certiorari proceedings to the Superior Court.⁷ Tax boards act in a quasi-judicial capacity when making tax assessments, and their decisions are generally subject to review by the common law writ of certiorari.⁸ There are two requirements for certiorari review -- that the judgment below is final and that there is no other available basis for review.⁹ In this case, there is no dispute that the Board's decision became final on April 6, 2007, which was 30 days after it was issued. Nor is there any debate about the County's

⁶Decision of the Bd. of Assessment Review of NCC (March 6, 2007) at 2.

⁷Del. Const. Art. I, § 3. *See also Reise v. Bd. of Building Appeals of the City of Newark*, 746 A.2d 271, 273 (Del. 2000)

⁸*Delaware Barrel & Drum Co. v. Mayor and Council of City of Wilmington*, 175 A.2d 403, 405 (Del. Super. Ct. 1961).

⁹*Reise v. Bd. of Building Appeals of the City of Newark*, 746 A.2d 271, 273 (Del.

lack of appellate rights. This Court has held that, based on Del. Code Ann. tit. 9, § 8312(c), the General Assembly did not intend to give the County the right to appeal a decision of the Board,¹⁰ and other than by certiorari, there is no means of redress. The two requirements for certiorari review have been met, and the Court therefore has jurisdiction.¹¹ Verizon's argument regarding factual issues is addressed below.

The Court's review on certiorari involves a review only of errors that appear on the fact of the record. The Court may not review the transcript below and may not evaluate the evidence to determine whether it supports the decision.¹² The Court may review only errors or procedural irregularities that appear on the face of the record.¹³ The Court may consider the record only to determine whether the Board exceeded its jurisdiction, committed errors of law, or proceeded irregularly.¹⁴ The Petitioner in

¹⁰*New Castle County v. Chrysler Corp.*, 681 A.2d 1077, 1081 (Del. Super. Ct. 1995) (also noting that a petition for certiorari might be viable under certain circumstances, 1089 at n. 9)

¹¹The County asserts that it is the Board that lacked jurisdiction because the question of depreciation is beyond its authority. The County argues that the Board's action in granting a depreciation deduction was a "disturbing excess of jurisdiction which this Court should restrain." The record does not show that the matter was not within the Board's jurisdiction, and the decision will therefore not be reversed on this ground.

¹²*Green v. Sussex County*, 668 A.2d 770, 773 (Del. Super. Ct. 1995), *aff'd*, 1995 WL 466586 (Del.).

¹³*395 Assoc., LLP v. New Castle County*, 2006 WL 2021623, at *3 (Del. Super.).

¹⁴*Id.* See also *Delaware Barrel & Drum Co. v. Mayor and Council of City of Wilmington*, 175 A.2d 403, 405 (Del. Super. Ct. 1961) (citing 1 Wooley, *Delaware Practice* § 896 (1906)). See also *Di Francesco v. Mayor and Town Council of Elsmere*, 2007 WL 1874761, at *1 (Del.

this case concedes that there was no irregularity in the proceedings and argues instead that the Board exceeded its jurisdiction and committed errors of law of constitutional dimension.

The County argues that in permitting Verizon to take an annual deduction for depreciation, the Board violated the state constitutional requirement that taxation be uniformly applied. Under Delaware law, the principle of uniformity is embodied in Article VIII, § 1 of the Constitution, which provides in part :

All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, except as otherwise permitted herein, and shall be levied and collected under the general laws passed by the General Assembly. . . .¹⁵

The General Assembly has delegated to each county the authority to tax real property within its boundaries.¹⁶ In so doing, each county must adhere to the constitutional requirement for uniformity in taxation. New Castle County has opted to use the base year method of assessment for purposes of uniformity.¹⁷ Under this method, the true

Super.).

¹⁵Del. Constitution of 1897, Art. VIII, Sec. 1. *See also Seaford Assoc., L.P. v. Bd. of Assessment Review*, 539 A.2d 1045, 1049 (Del. 1988) (holding that uniformity is achieved when all taxpayers of the same general class and within the territorial limits of the authority are treated the same).

¹⁶Del. Code Ann. tit 9, § 8101.

¹⁷*Bd. of Assessment Review for New Castle County v. Stewart*, 378 A.2d 113, 116 (Del. 1977).

value in money, that is, fair market value, is determined for each property, then that value is factored back to 1983 values, the year of the last general reassessment.¹⁸ A fixed rate of taxation is then applied to the base year assessment to reach a uniform result.¹⁹

In this case, the Board's decision states that the property values offered by Verizon were factored back to 1983, and neither party disputes that fact. The County argues that depreciation is a necessary component of uniformity, but this position rests on the fact that the County has a practice of applying the one-time 5 percent deduction for depreciation. The County acknowledges that this is not the most accurate method of determining depreciation, but asserts nonetheless that only the County can determine rates of appreciation and depreciation. Despite these arguments, there is nothing on the face of the record which indicates that depreciation is uniformity. In fact, the cases make clear that if the true value of NCC properties are factored back to 1983 uniformity has been achieved.²⁰ On the face of the record,

¹⁸*Id.*

¹⁹*Id.*

²⁰See, e.g., *New Castle County v. Moore*, 1984 Del. Super. LEXIS 622 (reversing Board's decision lowering taxpayers' assessment where Board acted out of sympathy but in the absence of competent evidence); *Bd. of Assessment Review for NCC v. Stewart*, 378 A.2d 113 (Del. 1977) (holding that the County's selection of base year method of property assessment meets constitutional requirement for uniform taxation).

the Board did not violate the uniformity requirement, and there is no error of law on this issue.

Fair market value, or true value in money, is a statutory requirement for making a tax assessment,²¹ and is the value which is factored back to base year values for uniformity. True value in money can be determined by three different appraisal methods, and it is preferable to use at least two of them.²² Each approach has various strengths and weaknesses and uses different variables in determining value. The County uses its own appraisers to determine fair market value, while taxpayers who appeal their property assessment use various appraisal services which in turn use different bases for calculation.²³ In this case, the bases for calculation, or the factors accounted for, are not apparent on the face of the record, but the County's only reason

²¹Del. Code Ann. tit. 9, § 8306(a).

²²The three principal valuation approaches used in determining the fair market value of real estate are: comparable sales (or market), income capitalization, and reproduction cost. Each of these methods has strengths and weaknesses as well as various factors and components. For example, the *Seaford* Court noted that the reliability of the comparable sales approach depends upon there being an adequate number of comparable properties. The capitalization of income method is the preferred method to value income-producing properties, but it is driven by numerous variables and, therefore, should be used in conjunction with another valuation method. The *Seaford* Court concluded that market value may be determined by using any of the three recognized methods, or any combination thereof. *Delaware Racing Ass'n v. McMahon*, 340 A.2d 837, 842 (Del. 1995).

²³*Tatten Partners, L.P. v. New Castle County Board of Assessment Review*, 642 A.2d 1251, 1257 (Del. Super. Ct. 1993).

for not accounting for depreciation in determining market value is that it has never been done at any time other than at a general reassessment. Although the County argues that only County Council can set the rate of depreciation, the County has not presented any law, statutory or otherwise, that confirms this assertion. The Board did not act beyond its authority in accepting expert evidence of depreciation, and, in fact, the Board may not ignore competent evidence of over-valuation.²⁴ The Court finds that the face of the record indicates that depreciation is a factual matter cannot be addressed by the Court on certiorari.

The County makes a number of arguments to show that depreciation is not a factual question. The County asserts that if the General Assembly meant for property tax assessments to include depreciation and/or appreciation it could have done so, as it has done for mobile homes. Mobile homes are addressed in a subchapter separate from the subchapter that governs the valuation and assessment of every other type of real estate.²⁵ The General Assembly has dictated that mobile homes are to be reassessed every 5 years,²⁶ which includes depreciation and appreciation. Because of this provision, the County argues that the Board is prohibited from addressing

²⁴*Id.* at 1262.

²⁵Mobile homes are addressed in Del. Code Ann. tit. 9, subchapter II. All other properties are addressed in subchapter I.

²⁶Del. Code Ann. tit. 9, § 8351 (1989).

depreciation. However, there are so many differences between the two subchapters that the Court is unwilling to draw any conclusions about the Board's powers from the legislature's provisions for mobile homes.

The County argues that the Board's reference to correcting the inequities by allowing depreciation (see page 3 above) shows that the Board knew that it was acting beyond its jurisdiction in granting the appeal. The fact that the County typically addresses depreciation in a general assessment does not mean that depreciation is a jurisdictional matter of that the Board is prohibited from addressing it. As far as can be determined from the face of the record, the County's 5 percent deduction for depreciation is the Board's habit, not a legislative mandate. The Board's duty is to determine whether the assessment is correct in light of the facts produced at hearing.²⁷ In this case, the Board heard the evidence and determined that Verizon's assessment was too high based in part on the fact that Verizon's outside equipment had depreciated. The County concedes this fact. The Board did not act beyond its jurisdiction or make an error of law in granting the appeal.

The County also argues that the Board's decision discriminated in favor of Verizon and created a class of taxpayers that included only Verizon. To sustain this

²⁷Del. Code Ann. tit. 9, § 1318 (2006 Supp.).

position, the County relies on the following language from the Delaware Supreme Court:

Deliberate discrimination between taxpayers in the valuation of similar property is a violation of the constitutional requirement [of uniformity]. . . . If the **taxpayer** can show that he has been discriminated against in such a manner, he has his **remedy**.²⁸

On the face of the record, there is no showing of “deliberate discrimination” on the part of the Board, despite the Board’s obvious frustration that a general assessment has not conducted since 1983. More importantly, in the excerpt, the Supreme Court refers to a taxpayer’s remedy but is silent as to whether the County can take this position on behalf of taxpayers. This is an argument that cannot be resolved on the face of the record, and is therefore not valid subject matter for certiorari review.

The function of the Board is to determine whether the assessment on review is correct based on accepted methods of assessing properties,²⁹ and, in so doing, to take into account all elements entering into the value of a property.³⁰ The Board heard evidence from both parties and decided that Verizon’s methodology resulted in a more accurate assessment, and the County does not disagree. Verizon’s values were

²⁸*Bd. of Assessment Review v. Stewart*, 378 A.2d 113 (Del. 1977) (quoting *Brennan v. Black*, 104 A.2d 777 (Del. 1954)).

²⁹*Bailey v. Bd. of Assessment Review*, 2004 WL 1965867 (Del. Super.).

³⁰*Brennan v. Black*, 104 A.2d 777 (Del. 1954).

factored back to the base year of 1983, in satisfaction of the constitutional uniformity requirement. The question of a taking a deduction for depreciation of outdoor equipment is a factual matter that appears to be part of the determination of the property's true value in money, a statutory requirement which involved facts and therefore not subject to certiorari review.

For these reasons, the County's petition for a writ of certiorari is ***Dismissed***.

It Is So ORDERED.

Judge John E. Babiarz, Jr.

JEB,jr/ram/bjw
Original to Prothonotary

