IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

LAURENCE P. MOYNIHAN and HARRY M. FREEDMAN, M.D.,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 1352-S**
THE CITY OF SEAFORD, a municipal corporation of the State of Delaware,	:	
Defendant.	:	

MEMORANDUM OPINION AND ORDER

Date Submitted: April 10, 2006
Date Decided: August 7, 2006

Stephen P. Ellis, Esquire of Sergovic & Ellis, P.A., Georgetown, Delaware, Attorney for Plaintiffs.

Timothy G. Willard, Esquire and Tasha Marie Stevens, Esquire of Fuqua & Yori, P.A., Georgetown, Delaware, Attorneys for Defendant.

NOBLE, Vice Chancellor

Defendant The City of Seaford (the "City") entered into a contract with Randolph A. Westergren ("Westergren"), who does business as the "Delaware Assessor," to perform a "reassessment audit" of properties in the City. Plaintiffs Laurence P. Moynihan and Harry M. Freedman, property owners in the City, challenge the integrity, fairness, accuracy, and reliability of Westergren's undertaking. They ask the Court to enjoin permanently the City from using the results of Westergren's work and to refund to property owners any additional taxes that were collected because of Westergren's work.[1] This Memorandum Opinion contains the Court's post-trial findings of fact and conclusions of law.

The Property Assessment Audit Agreement (the "Agreement")[2] between the City and Westergren was executed as of September 1, 2004. Westergren agreed to "provide a complete and comprehensive assessment audit of the entire assessment roll of the [City] in an effort to discover those real properties assessed incorrectly or that are escaping taxation." Although the Agreement does not explain how Westergren would uncover "properties assessed incorrectly or that are escaping taxation," once the discovery is made, he agreed to "appraise the subject property, including a property inspection and digital photography, consistent with the most

[1] The Plaintiffs did not bring this action under Court of Chancery Rule 23.
[2] DX E.

recent reassessment conducted by the City, which was January 1, 1989."[3] The Agreement also established the means by which Westergren's compensation would be determined: "[Westergren] shall be entitled to a services rendered fee of a one-time percentage of tax revenue generated on behalf of the [City]. The percentage shall be 50% of the net tax bill due." Although the Agreement may not be entirely clear, the City and Westergren concur that the City committed to pay him one-half of the first year's additional taxes that are billed because of his efforts. The contractual incentive is clear: the higher the assessment, the more Westergren will be paid. Westergren testified candidly at trial that, if he found a property that was assessed unfairly on the high side, he would do nothing about it in his audit. His mission, as the Agreement incentivized him, was to find parcels for which the assessment could be increased.

For purposes of this dispute, one may reasonably assume that many properties in the City are not fairly assessed. A significant portion of the properties are assessed at too low a valuation, thereby depriving the City of needed revenue and unfairly shifting the relative taxation burden to those property owners whose properties are fairly assessed or, in some instances, assessed at too high a valuation. The Plaintiffs do not question the City's objectives; they do object to the City's (or, more accurately) Westergren's methodology.

[3] Westergren is not licensed under the real estate appraisers' statute, 24 *Del.C.* Ch. 40 (or its prior codification).

Sussex County's last reassessment was in 1974. The City, by § 25(D) of its Charter, may rely upon the County's assessment.[4] That assessment is now more than three decades old and, thus, its continued reliability may fairly be questioned. In 1989, the City conducted an assessment of the properties within its limits. Many view that effort as flawed.

Westergren approached his assignment by comparing the 1974 Sussex County assessment with the 1989 City assessment. Through various statistical methods, with emphasis on regression analysis, he concluded that the fair value of property in the City as of 1989 could be ascertained by multiplying the 1974 Sussex County assessment valuation by three. He then identified those properties in the City with an assessed valuation (based on the City's 1989 assessment) less than three times their 1974 Sussex County assessment. Those properties—numbering approximately 899 out of approximately 2700 parcels in the City—were then reassessed. Instead of the 1989 City assessment, the assessment rolls were revised to reflect an assessment equal to three times the 1974 Sussex County assessment. Westergren may have viewed some properties as part of the process, but his reassessed valuations were determined arithmetically by reference to the 1974 Sussex County assessment. In substance, although some properties eluded his net, Westergren adjusted properties with a lower assessment based on the 1989

[4] *See also* 22 *Del.C.* § 1101.

City assessment to be in line with the 1974 Sussex County assessment as multiplied by three. Properties with a 1989 City assessment above the adjusted 1974 Sussex County assessment were not otherwise reviewed. Thus, as a general matter, after Westergren's input, properties in the City would be assessed at the higher of the 1989 City assessment or the 1974 Sussex County assessment, as multiplied by three.

An example may be helpful. A property on Front Street[5] was assessed in 1989 by the City for $43,100. Its corresponding 1974 Sussex County assessment was $21,300. Westergren multiplied $21,300 by three to obtain $63,900—a difference of $20,800 from the 1989 City assessment. The tax bill for the parcel for 2004 on $43,100 of assessed value was $224.12; with the $20,800 increase, the tax bill became $332.28, an adjustment of $108.16. Presumably, for his efforts, Westergren, with respect to that one parcel, would be paid $54.08. The other adjusted assessments followed the same pattern.

Plaintiff Moynihan, himself a licensed real estate appraiser, contacted the City and complained about Westergren's lack of an appraiser's license and his methodology. The City Manager sent Westergren an e-mail and, after reciting that the assessment audit was being challenged, posed a question to Westergren:

> "We would like to know the way you arrived at the new values in simple language so us [non-]assessors understand. The challenge is

[5] The Tax Parcel Number is 4-31 5.00 80.00.

> that you took the 1974 Sussex County real estate tax listings and multiplied those numbers times three to arrive at the 1989 values for the adjustments. Is this correct?"[6]

In a subsequent response,[7] acknowledging uneasiness on the part of City officials, Westergren wrote:

> You appear nervous about the appeal process. It will only hurt for a little while! That's what I'm here for. I am here to defend my values until proven otherwise.
>
> . . .
>
> As far as appeals, I expect about 1% to file and about half of them to even show up and adjust probably only a hand full [sic]. Most folks will just forward the tax bill to their lender anyway to pay out of their escrow account.[8]

Both of the Plaintiffs appealed their new assessments in accordance with § 25(D) of the City Charter. After the filing of this action, the City decided to await the outcome before moving forward with the administrative review process. Thus, the Plaintiffs' administrative appeals remain pending.

II. CONTENTIONS

The Plaintiffs present numerous grounds for rejection of Westergren's efforts: First, according to the Plaintiffs, he was required to have and, as conceded by the City, did not have a real estate appraiser's license. This failure is said not only to invalidate the results of the reassessment, but also to bring into question the

[6] PX L. The City Manager continued, "This whole process is not pleasant . . . ."
[7] It is not clear if all of the e-mails exchanged between Westergren and the City were made part of the record. Some of the responses to the City's inquiries may have been verbal. Indeed, in his February 24, 2005 e-mail, Westergren, perhaps wisely, advised the City: "At this point, I would like to refrain from e-mail communications."
[8] PX M.

lawfulness of Westergren's contract with the City. Second, they argue that Westergren's "assessment audit" fails to satisfy the City Charter's requirement of a "fair and impartial assessment."[9] The mixing and matching of various assessment efforts is said not to have been fair or accurate. Third, the Plaintiffs argue that an assessor, whose compensation is tied directly and exclusively to increases in assessed valuations, cannot be considered impartial. Finally, they question the validity of Westergren's efforts to correlate the 1974 Sussex County assessment to the 1989 City assessment.

The City raises the threshold question of whether the Court may consider the Plaintiffs' claims. It notes that disgruntled property owners could appeal Westergren's reassessment to the City's assessment board and, if necessary, to the Superior Court. Thus, it, in substance, argues that the Plaintiffs have failed to exhaust their available administrative remedies.[10] Similarly, appeal to the Superior Court would provide, according to the City, an adequate remedy at law, thereby defeating this Court's equitable jurisdiction—the only jurisdictional basis relied upon by the Plaintiffs.

[9] By § 25(C) of the City Charter, the assessment must be "true and impartial." The "fair and impartial" language appears in § 25(D) of the Charter. The City Charter may be viewed at http://www.state.de.us/research/Charters/seaford.shtml.

[10] The City characterizes its argument, in part, as based on notions of ripeness.

III. ANALYSIS

A. *Availability and Scope of Administrative Review*

A property owner, unhappy with an assessed valuation, may take his complaint to the board of assessment. In the City, the City Council serves as the Board of Revision and Appeal (the "Board").[11] Before the Board, the property owner must confront the presumption that the municipality's assessment is accurate.[12] Typically, the property owner must rebut the presumption by "evidence of substantial overvaluation."[13] That presumption, however, is premised upon the regularity—the "fair and impartial" process mandated by the City Charter—of the assessment effort. The Board must consider all relevant evidence,[14] and evidence tending to demonstrate that the process was not "fair and impartial" must be considered by the Board. Unlike the typical assessment appeal in which property owners claim that a process which may have been otherwise "fair and impartial" was simply wrong, the Plaintiffs have asserted here that something more fundamental provides a basis for relief—that the process, itself, was not, in fact,

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[11] City Charter § 25(D). The Board has the exclusive administrative jurisdiction or authority to review challenged assessments. By § 25(F) of the City Charter:

> [The Board] shall sit and determine any appeals from the assessment as determined by the Tax Assessor and shall make any corrections, alterations or additions in and to any assessment so made. [The Board] shall have full authority to alter, revise, reduce, or increase the assessment or property of any person or persons, partnership or corporation whose property has been assessed by the Tax Assessor.

[12] *Seaford Assocs., L.P. v. Bd. of Assessment Review*, 539 A.2d 1045, 1047 (Del. 1988).

[13] *Id*.

[14] *Compare* 9 *Del.C.* § 8312(b).

"fair and impartial." An assessment effort that was not "fair and impartial" (a claim posing a not insignificant evidentiary burden for the property owner) is not entitled to the same respect—even though it may, for any particular property, have established a fair assessed value—as one generated through proper procedures.[15] Accordingly, the Court concludes that the Board may—and, if presented with appropriate evidence, must—consider whether Westergren's approach, incentives, and attitudes preclude or undermine the presumption of accuracy normally given to the assessor's conclusions.[16] Moreover, the Board is fully capable of assessing the integrity and the reliability of the procedures employed during the course of the "assessment audit."[17]

[15] The assessment process seeks out fair property valuation in a relativistic context. Although fair value is the touchstone, the goal ultimately is an equitable apportioning of the tax burden. For many reasons—difficulty in ascertaining fair value, cost of assessment, the sheer number of parcels to be assessed—some flexibility must be accorded to the municipality. The difficulties inherent in a reassessment effort may explain why Sussex County's assessment is now more than three decades old.

[16] In *Seaford Associates*, the Supreme Court recited that "a presumption [of accuracy] . . . is rebutted only through evidence of substantial overvaluation." 539 A.2d at 1047. One could read such language as limiting a property owner's challenge—he could not challenge whether an assessment effort was "fair and impartial." That case, however, did not involve questions of whether the assessor had acted fairly and impartially. Thus, there was no reason for the Court to address the appropriate standard for challenges to the integrity of the assessment process.

[17] The Assessment Change Notice (DX G) arguably could be read as limiting the scope of administrative review: "In the event you elect to appeal your assessment, you will be required to provide and/or submit satisfactory and convincing evidence that the property assessment deserves adjustment. This evidence is typically in the form of a real estate appraisal prepared by a real estate appraiser certified by the State of Delaware . . . ." The guidance to obtain a licensed appraiser is "typically" good advice. The challenges arising out of Westergren's conduct cannot fairly be classified as "typical."

B. *Exhaustion of Administrative Remedies*

The next question is whether the Court should defer to the Board. The doctrine of exhaustion of administrative remedies is a "judicially created rule . . . requir[ing] that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will either review any action by the agency or provide an independent remedy."[18] It is premised upon the need to maintain the proper balance between the courts and the administrative bodies of the various levels of government. Three reasons sustaining the policy are routinely cited:

> It accomplishes this [acknowledging and preserving the autonomy among the various branches of government] by: (1) favoring a preliminary administrative sifting process, especially when matters at issue are largely within the expertise of the involved agency; (2) avoiding interference with the administrative agency by withholding judicial action until the administrative process has run its course; and (3) preventing attempts to burden the courts by resort to them in the first instance.[19]

Each of these objectives is present in this case.[20] A preliminary development of the record before the Board would have facilitated judicial review, perhaps by the Superior Court; and questions regarding the fairness of the process are clearly within the Board's expertise, discretion, and capacity to resolve. In addition, there

[18] *Levinson v. Del. Comp. Rating Bureau, Inc.*, 616 A.2d 1182, 1187 (Del. 1992). *See generally* II RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, Ch. 15 (4th ed. 2002).
[19] *Levinson*, 616 A.2d at 1187.
[20] These arguments may carry somewhat less weight here because trial has been held. That the question of whether the Court should defer to the administrative process was not raised during pretrial motion practice does not allow the Court to avoid it now.

is no reason why the Court needs to intercede on behalf of the Plaintiffs and thereby disrupt the normal assessment review process; nor is there any reason to encourage disgruntled property owners to bring claims to court without first resorting to the orderly process established by the City Charter.

Another important purpose served by the exhaustion doctrine is affording the agency the opportunity to correct its own errors.[21] That consideration may be particularly applicable in this instance because of the obvious discomfort exhibited by the City Manager in her e-mail to Westergren regarding his approach to the reassessment effort.[22]

Although exhaustion of administrative remedies is not jurisdictional but, instead, is a matter committed to the Court's discretion,[23] that discretion is not without its limitations. "In order to allow administrative bodies to perform their statutory functions in an orderly manner without preliminary interference from the courts, a strong presumption exists favoring the exhaustion of administrative remedies."[24] Because the public policies supporting the exhaustion doctrine would be well served by allowing the City, through the Board, to deal initially with the

[21] *McKart v. United States*, 395 U.S. 185, 195 (1969) ("And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors.").
[22] *See supra* note 6 and accompanying text.
[23] *Cf. Liborio, L.P. v. Sussex County Planning & Zoning Comm'n*, 850 A.2d 302 (Del. 2004) (TABLE) (text appearing at 2004 WL 1207510); *Toll Bros., Inc. v. Wicks*, 2006 WL 1829875, at *8 (Del. Ch. June 21, 2006) ("Application of the doctrine of exhaustion of administrative remedies is a matter of judicial discretion.").
[24] *Levinson*, 616 A.2d at 1190.

problems created by Westergren's actions, the Court, in the exercise of its discretion, concludes that deference to the City's process is appropriate.

Not all of Plaintiffs' claims are amenable to resolution before the Board. Those that challenge the fairness, impartiality, and accuracy of the assessment process may be properly considered by the Board and will benefit from the exercise of its expertise.[25] The Plaintiffs, however, also challenge the validity of Westergren's product because he did not have the legal authority to perform that work for the City. The Board (at least as constituted for purposes of reviewing assessments on appeal) has no special expertise to bring to this question.[26] The Court, therefore, turns to that question.[27]

[25] This would include the effort to establish an arithmetic relationship between the 1974 Sussex County assessment and the 1989 City assessment.

[26] The Court may conclude that a plaintiff need not exhaust available administrative remedies where, *inter alia*, "the issues do not involve administrative expertise . . . ." *Toll Bros., Inc.*, 2006 WL 1829875, at *8 (citing *Levinson*, 616 A.2d at 1190 (explaining that "discretionary courts" have recognized exceptions to exhaustion of remedies doctrine which include, *inter alia*, "where the issues do not involve administrative expertise or discretion and only a question of law is involved" (citation omitted))).

[27] The Plaintiffs also challenge the validity of Westergren's contract because of the unreasonableness of the fees that he charged. Whether the City paid too much (or whether it bought the proverbial "pig-in-a-poke") is not a question for the Court to answer.

C. *Westergren's Lack of a Real Estate Appraiser's License and its Consequences for his Reassessment*[28]

When Westergren and the City entered into the Agreement as of September 1, 2004, the following provisions of the real estate appraisers' statute were applicable:

> (e) This Subchapter [*i.e.*, the real estate appraisers' statute] shall not invalidate appraisals done for municipal or county governments for real estate tax assessments or reassessments for tax years commencing prior to August 1, 2004.
>
> (f) This Subchapter shall apply to appraisals done after August 1, 2004 for municipal or county governments for real estate tax assessments or reassessments.[29]

The City's tax year runs from July 1. The notices of reassessment that reflected Westergren's efforts were sent for the tax year commencing July 1, 2004. Indeed, the City sent interim tax bills, based on the reassessments. Thus, the City gave effect to the new valuations established by Westergren during that tax year.

[28] The real estate appraiser statute draws a distinction between a license holder and a certificate holder. The Court, for convenience, refers to a license under the statute. Whatever the distinctions between a license holder and a certificate holder, they are immaterial to the disposition of this matter.

[29] At the time, these provisions were codified as 24 *Del.C.* § 2932. The real estate appraisers' statute was revised in 2005 and is now found at 24 *Del.C.* Ch. 40. The quoted provisions in the text above were repealed, *see* 75 Del. Laws c. 105, § 2 (effective July 7, 2005), but they remain the proper standard for assessing and, if appropriate, remedying Westergren's conduct. *See General Motors Corp. v. Wolhar*, 686 A.2d 170, 172 (Del. 1996); *Hubbard v. Hibbard Brown & Co.*, 633 A.2d 345, 354 (Del. 1993); *cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). The current relationship between real estate appraisal licenses and reassessments is prescribed at 24 *Del.C.* § 4019(d) ("This chapter shall not invalidate nor shall it apply to real estate tax assessments or reassessments done for municipal or county governments where such appraisals are done by full-time municipal or county government employees acting in the regular course of business."). Westergren was not a full-time employee of the City. The City has not argued that the current exception applies to Westergren because he was a full-time employee of another municipality.

Westergren's work, because it was performed after August 1, 2004, was in violation of Subparagraph (f).[30] The appraisal statute, however, expressly insulates from challenge on these grounds "reassessments for tax years commencing prior to August 1, 2004." Accordingly, because the tax year in which Westergren's reassessments were implemented began before August 1, 2004, the statute may not serve as the basis for invalidating his reassessment efforts.[31] In short, the statute

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[30] The licensure requirement is imposed upon those who perform "appraisals." By 24 *Del.C.* § 2942(c), in effect when Westergren performed his work, "'[a]ppraisal and real estate appraisal' means an analysis, opinion or conclusion as to the value of identified real estate or specified interests therein." The definition was revised in 2005:

> 'Appraisal' shall mean an analysis, opinion, or conclusion prepared by a real estate appraiser relating to the nature, quality, value, or utility of specified interests in, or aspects of, identified real estate as of a specific date. An appraisal may be classified by subject matter into either a valuation or an analysis. A valuation is an estimate of the value of real estate or real property. An analysis is a study of real estate or real property other than estimating value. A competitive market analysis is not an appraisal.

24 *Del.C.* § 4002(1). Westergren—regardless of the label applied to his work and regardless of which statutory definition one uses—produced "appraisals." He certainly reported a "conclusion as to the value of identified real estate or specified interests therein." Any effort to avoid the reach of the real estate appraisers' statute fares no better under the revised version because he provided to the City a "conclusion . . . relating to the . . . value . . . of specific interests in, or aspects of, identified real estate as of a specific date." Moreover, he supplied "an estimate of the value of real estate." Although the new statutory definition may be viewed as somewhat circular (an "appraisal" is "prepared by a real estate appraiser"), the acts which the General Assembly intended to regulate include Westergren's efforts in this matter. Also, if assessment and reassessment efforts did not require licensure, the provisions of the Delaware Code quoted in the text accompanying note 29 *supra* would not have served any purpose. In addition, the provisions in 24 *Del.C.* § 4019(d), adopted after Westergren's actions, would not have been necessary either. Finally, the Agreement, under which Westergren provided his services to the City, obligated him, after uncovering "incorrectly" assessed properties, to "appraise the subject property." *See* text accompanying note 3 *supra*. Thus, to the extent that the City may suggest that Westergren did not perform "appraisals" (*see* DX A & B (letters authored by Westergren's attorney)), that argument is rejected.

[31] The Plaintiffs also urge a multi-step analysis: (1) that the reassessment was inconsistent with the statute; (2) that the contract between Westergren and the City authorized a reassessment that would violate the statute; (3) that a contract that authorizes conduct in violation of statute must

deprives the Court of the authority to enjoin the City from using Westergren's work based on his lack of a license, at least to the extent that any reassessment was implemented during the City's tax year beginning July 1, 2004.[32]

IV. CONCLUSION

One cannot confront Westergren's methodology—taking the higher of two assessments (one of which has been adjusted by a factor)—and not come away wondering if any semblance of fairness—hopefully not a totally naive aspiration—was buried in an attempt to increase the City's tax base, all premised on the cynical—but, perhaps, accurate—assumption that property owners would be unable or unlikely to bring effective challenges. The Plaintiffs' efforts, however commendable they are, fail in this venue because questions regarding the fairness, impartiality, and accuracy of the reassessment process should first be evaluated by the Board on which the primary responsibility for decisions of this nature has been conferred. In addition, the real estate appraisers' statute deprives this Court of the power to set aside the challenged reassessments because of Westergren's failure to have proper licensure.

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be set aside; and (4) if the contract is invalid, then the reassessment conducted under that contract must be invalid. That analysis, however cogent, would defeat the clear statutory language that as long as the work was for a tax year beginning before August 1, 2004, the reassessment could not be set aside simply because of the statute.

[32] The statute does not support a reading that would call into question assessments done earlier by individuals without proper credentials. In short, the statute, as a practical matter, "grandfathers" prior assessments as to challenges based on licensure.

Accordingly, judgment is entered in favor of the City and against the Plaintiffs on the Plaintiffs' claim that the reassessment must be enjoined because of Westergren's licensure status. Otherwise, the Plaintiffs' action is dismissed, without prejudice, because of their failure to exhaust administrative remedies. The parties shall bear their own costs.

IT IS SO ORDERED.