THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2020-0475

Appeal of Town of Chester & Town of Hudson

Rule 10 Discretionary Appeal from
Administrative Decision of the Board of Tax and Land Appeals

REPLY BRIEF FOR THE TOWNS OF CHESTER AND HUDSON

TOWNS OF CHESTER AND HUDSON, NH
By Their Attorneys:

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II. STATEMENT OF THE FACTS

The Towns hereby incorporate by reference the Statement of Facts set forth in the April 2, 2021 Brief for the Towns of Chester and Hudson.

III. ARGUMENT

The decision of the New Hampshire Board of Tax and Land Appeals ("BTLA") was unjust and unreasonable. The BTLA overlooked or misapprehended the fact that Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH") never challenged the assessments on fee land and buildings ("PSNH's Land Interests") in each of the Towns of Chester and Hudson (the "Towns"). As a result, the BTLA unlawfully applied the New Hampshire Department of Revenue Administration's ("DRA") median equalization ratios to grant abatements on PSNH's Land Interests notwithstanding the fact that PSNH never challenged the assessments on its Land Interests. Likewise, the BTLA's decision denying the Towns' Motion for Partial Reconsideration (the "Towns' Motion") was unjust and unreasonable because it was timely filed, because the Towns never stipulated as to how the BTLA would apply the DRA's equalization ratios, and the resultant harm was far from de minimis.

A. The BTLA erred as a matter of law when it granted abatements on parcels and assessments PSNH never challenged.

This Court should reverse the BTLA's denial of the Towns' Motion because the BTLA erroneously applied the DRA's median equalization ratios to grant abatements on PSNH's Land Interests even though PSNH never challenged the assessed values of those Land Interests. The Court's

decision in Appeal of Sunapee, 126 N.H. 214 (1985), is dispositive. As the Court noted there, the sole justification for considering parcels the taxpayer did not challenge is that "a taxpayer is not entitled to an abatement on any given parcel unless the aggregate valuation placed on all of his property is unfavorably disproportionate to the assessment of property generally in the town." Id. at 217. While a taxpayer's request for abatement on one parcel thus requires consideration of assessments on other parcels, such consideration does not, and cannot, result in an abatement of taxes on parcels for which the taxpayer never requested an abatement. Id. at 216. Nevertheless, that is what the BTLA did in this case. In so doing, the BTLA committed an error of law, namely, applying the DRA's median equalization ratios to grant an abatement on Land Interests that PSNH never argued were disproportionately assessed. The BTLA's decision was thus unlawful and unreasonable, and it must be reversed.

In its Brief, PSNH argues that the Towns' reliance on Appeal of Sunapee is misplaced because it was necessary for the BTLA to consider PSNH's entire taxable estate when determining whether an abatement was due. See Brief of Public Service Company of New Hampshire D/B/A Eversource Energy – Appellee (hereafter "PSNH Brief") at 27–28. PSNH's argument, however, is flawed in two significant respects. First, PSNH overlooks the central holding from Appeal of Sunapee that neither a town nor the BTLA may grant an abatement on a parcel for which a taxpayer did not request an abatement. As the Court noted in Appeal of Sunapee, this is a question of jurisdiction; where the taxpayer does not request an abatement on a given lot, the BTLA cannot order an abatement on that lot. 126 N.H. at 216. Second, PSNH conflates the distinction

between (a) "considering" the assessment on a parcel for which no abatement was requested, and (b) granting an abatement on said parcel. Whereas the former is required of the BTLA under Appeal of Sunapee, 126 N.H. at 217, the latter is forbidden, id. at 216, and the BTLA committed the latter.

Applying the analysis set forth in Appeal of Sunapee to the facts of this case clearly demonstrates that the BTLA erred as a matter of law in applying the DRA's median equalization ratios to PSNH's Land Interests to grant an abatement. The taxpayers in Appeal of Sunapee owned two parcels within a single municipality and requested an abatement on only one of their parcels (the "vacant lot"); they did not challenge the town's assessment on their second parcel (the "house lot"). 126 N.H. at 216. The Town denied the taxpayers' abatement application, and the taxpayers appealed the town's decision to the BTLA. Id. After conducting a final hearing on the matter, the BTLA granted an abatement on the taxpayers' parcels, finding that both the vacant lot and the house lot had been over-assessed. Id. The town appealed the BTLA's decision to this Court, arguing that the BTLA erred in ordering an abatement on the house lot. Id. This Court agreed with the town, ruling that although the BTLA was required to consider the town's assessment on the house lot, id. at 217, the BTLA did not have jurisdiction to grant an abatement on that lot. Id. at 216. Accordingly, this Court reversed the BTLA's decision as it pertained to the house lot. Id. at 219.

The Court affirmed the BTLA's abatement on the vacant lot only, notwithstanding its finding that the record supported the BTLA's conclusion that both the house lot and the vacant lot were assessed

disproportionately to other properties in the Town. Id. Specifically, with respect to the vacant lot, the BTLA: (1) found that the fair market value of the vacant lot was $25,110.00; (2) applied the 58% general level of assessment to the fair market value of the vacant lot; (3) found that the fair market value adjusted by the general level of assessment was approximately $15,000.00; and (4) reduced the assessment on the vacant lot by $2,900.00, representing the difference between the town's assessed value and the fair market value adjusted by the general level of assessment. Id. Thus, although the Town assessed both of the lots disproportionately, this Court held that the taxpayers were entitled to an abatement on only the challenged vacant lot. Id.

In this case, the BTLA committed the same error of law it committed in Town of Sunapee. PSNH, concededly, "did not challenge the assessments of its fee land and conventional buildings located in the Town." See PSNH Brief at 27. Under the plain terms of Appeal of Sunapee, the BTLA was nevertheless required to consider the Towns' assessments on these Land Interests because PSNH was entitled to an abatement only if "the aggregate valuation placed on all of [its] property [was] unfavorably disproportionate to the assessment of property generally in the town." 126 N.H. at 217. As a matter of law, however, the BTLA erred when it granted abatements that were based, in part, on the fair market value of PSNH's Land Interests adjusted by the DRA's median equalization ratios.

As this Court made clear in Appeal of Sunapee, the BTLA may not grant an abatement on a property for which the taxpayer never requested an abatement. PSNH never challenged the Towns' assessments on its Land

Interests. The BTLA, therefore, was foreclosed from granting an abatement on PSNH's Land Interests. The BTLA should have thus limited its analysis to: (1) determining the fair market value of PSNH's T&D Assets; (2) applying the correct equalization ratio to the fair market value of PSNH's T&D Assets; (3) determining the fair market value of PSNH's T&D Assets when adjusted by the general level of assessment in the Towns; and (4) reducing the Towns' assessments, if at all, by the difference between the assessed value of PSNH's T&D Assets and the fair market value of the T&D Assets adjusted by the general level of assessment. This is the same process the Court affirmed in Appeal of Sunapee, 126 N.H. at 219, and it is the same process the Towns advocated in the Towns' Motion.

Instead, the BTLA: (1) consolidated the fair market value of PSNH's T&D Assets with the fair market value of PSNH's Land Interests, resulting in a combined fair market value of all of PSNH's property interests; (2) applied the DRA's equalization ratios to the combined fair market value of all of PSNH's property interests; and (3) granted abatements, if any, based on the difference between assessed property values and the *combined* values of PSNH's T&D Assets and Land Interests adjusted by the applicable equalization ratios. By combining the fair market values of PSNH's T&D Assets with the fair market values of its Land Interests in this manner, the BTLA erroneously granted abatements on property interests that PSNH never challenged, i.e., PSNH's Land Interests. Said another way, the BTLA essentially skipped a step, applying the exact same analysis to PSNH's T&D Assets, the assessments on which PSNH challenged, and PSNH's Land Interests, the assessments on which PSNH *never* challenged.

In so doing, the BTLA overlooked this Court's central holding in Appeal of Sunapee and unlawfully granted abatements on PSNH's Land Interests.

The Towns' reliance on Appeal of Sunapee does not miss the mark. While the BTLA was required to "consider" the Towns' assessments of PSNH's Land Interests, the BTLA clearly erred in applying equalization ratios to ultimately grant abatements on those Land Interests. The decision of the BTLA denying the Towns' Motion was unreasonable and unlawful, and it must be reversed.

B. Application of the DRA's median equalization ratios is not a factual determination.

PSNH attempts to avail itself of a deferential standard of review, stating that this Court should defer to the BTLA "[g]iven the extraordinary difficulties in placing a fair market value on the property of a regulated utility." See PSNH's Brief at 27. Beyond the fact that the valuation of PSNH's Land Interest is not at issue – PSNH did not challenge the assessments – it is clear that application of the DRA's median equalization ratios is not a question of fact that warrants deference. Rather, as was the case in Appeal of Sunapee, it is a question of law inhering in the BTLA's subject matter jurisdiction granted by the Legislature. See Appeal of Sunapee, 126 N.H. at 216 ("The powers of the board and the rights of taxpayers appearing before the board are entirely statutory and are limited by the terms of the statute. . . . Under RSA 76:16-a . . . a taxpayer is authorized to seek relief from the board only if the selectmen neglect or refuse to abate. . . . It is a truly appellate jurisdiction.") (quotations, citations, brackets and ellipses omitted). Once the applicable equalization ratio has been identified, its application requires no discretion, experience,

competence, or specialized knowledge. It requires knowledge and adherence to the decisional law of this Court.

Applying that same equalization ratio for the purpose of granting an abatement on a separate parcel for which the taxpayer did not seek an abatement is *not* a factual determination; it is an error of law that this Court has squarely addressed. See Appeal of Sunapee, 126 N.H. at 216; see also RSA 76:16-a. By applying the DRA's median equalization ratios to PSNH's Land Interests, the BTLA unreasonably and unlawfully awarded abatements on parcels and assessments PSNH did not challenge. The BTLA erred as a matter of law, and its decision must therefore be reversed.

C. The Towns are not stepping back from, or otherwise disavowing, their stipulations.

In seeking judicial review of the BTLA's decision in this Appeal, the Towns challenge neither their stipulations nor the BTLA's findings of fact. Indeed, the Towns of Chester and Hudson stand by their expert appraiser's, and thus the BTLA's, determinations of fair market value as reflected in the stipulation submitted as Taxpayer's Exhibit 43. As they did when the BTLA ordered those stipulations, however, the Towns continue to challenge the BTLA's application of equalization ratios to PSNH's Land Interests as PSNH never challenged the Towns' assessments on those interests. The BTLA made an error of law in applying equalization ratios to PSNH's Land Interests and inadvertently granting abatements on Land Interests that—even PSNH does not dispute—were proportionately assessed. In this manner, the BTLA effected what the Towns have described as a "double equalization" on PSNH's Land Interests and

consequently granted abatements on parcels that were not subjects of PSNH's appeals.

D. PSNH's procedural arguments are without merit, and the questions presented in the Towns' Appeal are properly before this Court.

New Hampshire Code of Administrative Rules Tax 201.37, governing motions for rehearing, reconsideration, or clarification (referred to therein as "rehearing motions"), is irrelevant to this Court's jurisdiction to hear and decide the Towns' appeal. It should go without saying that "an administrative rule cannot contravene a statute," Fischer v. N.H. State Bldg. Code Review Bd., 154 N.H. 585, 592 (2006), yet PSNH appears to suggest that the Court should disregard this widely accepted rule of preemption without providing any authority for such a radical departure from this Court's well-established rules of construction. See PSNH Brief at 16–20. Notwithstanding the fact that the BTLA declined to consider the questions presented in the Towns' Motion on timeliness grounds, the questions presented in the Towns' Brief are properly before this Court.

As PSNH observes in its Brief, see PSNH Brief at 17, Administrative Rule Tax 201.37(g) provides, in part, that "rehearing motions shall not be granted to consider evidence previously available to the moving party but not presented at the hearing or to consider new arguments that could have been raised at the hearing." PSNH argues that, under the plain terms of this rule, the arguments raised in the Towns' Motion were not properly before the BTLA on a Motion for Reconsideration, thus rendering this Appeal untimely. Tax 201.37(g) has

no bearing on this Court's jurisdiction under RSA chapter 541 as the quoted language directly conflicts with the plain language of RSA 541:3.

Pursuant to RSA 71-B:12, decisions of the BTLA "may be appealed . . . only in accordance with the provisions of RSA 541 as from time to time amended." RSA 541:3 governs motions for rehearing, such as the Towns' Motion, and provides that motions for rehearing may address "any matter determined in the action or proceeding, or covered or included in the order." This Court has held that RSA chapter 541 allows a party to raise any arguments "on appeal if they relate to 'any matter determined in the action or proceeding,' were included in an application for rehearing within thirty days of 'any order or decision,' and the agency's ruling on the application was timely appealed to this court." Appeal of N. New Eng. Tel. Operations, LLC ("Appeal of FairPoint"), 165 N.H. 267, 271-72 (2013) (ruling that Court had jurisdiction to consider determinations in initial order of PUC when motion for reconsideration was filed beyond thirty days of that order, but within thirty days of subsequent order). Here, the Towns' Motion specifically addressed matters that were covered in the BTLA's Decision on the Merits (the "Order"), namely, the BTLA's erroneous application of equalization ratios within that very Order. See Towns' Appd'x Vol I at 20–21, 34, 46–47. Thus, pursuant to RSA 541:3, the matters were properly before the BTLA. To the extent Tax 201.37(g), or any other administrative rule, contradicts this result, it is preempted by RSA 541:3. Accordingly, the questions raised in the Towns' Appeal were properly and timely raised before the BTLA and are properly before this Court.

On a related note, PSNH also argues that the Towns failed to comply with Superior Court Rule 16(3)(b) by failing to make specific reference after each question presented to the transcript page, or pleading, where the issue was preserved for appeal. PSNH Brief at 20. PSNH admits, however, that after each of the questions presented in the Towns' Brief, the Towns cited to the Towns' Motion. As is manifest based on the foregoing, the questions presented on appeal were preserved in the Towns' Motion. PSNH's argument is spurious, pointlessly argumentative, and completely lacking in merit. The Towns have fully complied with this Court's rules of procedure.

IV. CONCLUSION

The decision of the BTLA was unjust and unreasonable. The BTLA improperly applied the DRA's median equalization ratios and unlawfully granted abatements on parcels and assessments PSNH never challenged. The BTLA's decision must, therefore, be reversed. Likewise, the BTLA's decision denying the Towns' Motion was unjust and unreasonable as the arguments set for therein were timely raised, the Towns never stipulated to how the BTLA would apply the DRA's median equalization ratios, and the resultant harm was not de minimis. The Towns of Chester and Hudson, therefore, respectfully request that this Honorable Court reverse the decision of the BTLA.

While PSNH's Land Interests might make up a tiny percentage of its combined holdings, $42,537.90 in added tax liability is not de minimis to the Town of Chester, just as $51,455.50 is not de minimis to the Town of Hudson. $42,000.00, and indeed $51,000.00, is a municipal employee's

salary for a year; while it might be insignificant to PSNH, the employee receiving that salary would undoubtedly disagree. If left uncorrected, the BTLA's errors will result in a windfall to PSNH, inequitably shifting PSNH's tax burden to the Towns, their employees, and all other taxpayers. The BTLA's error far from "harmless" and must be reversed on this narrow issue.

Dated this 24th day of May, 2021.

Respectfully Submitted:

TOWNS OF CHESTER AND HUDSON, NH

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COMPLIANCE WITH SUPREME COURT RULE 16(11)

I hereby certify that the foregoing Brief For the Towns of Chester and Hudson complies with Supreme Court Rule 16(11) and contains a total of 2,972 words exclusive of the Table of Contents, the Table of Authorities, and the certifications on this page.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been transmitted via the Court's electronic filing system this ___ day of May, 2021, to Margaret Nelson and Derek Lick, counsel for Public Service Company of New Hampshire d/b/a Eversource Energy, and has been hand delivered or transmitted via U.S. first-class mail, postage prepaid to the Board of Tax and Land Appeals, 107 Pleasant Street, Concord, NH 03301, and to the New Hampshire Attorney General's Office, 33 Capitol Street, Concord, NH 03301.

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