

Cabral Realty Investors

v.

City of Nashua

Docket Nos.: 6277-89 and 8148-90

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "City's" 1989 and 1990 assessments of \$11,101,500 (land, \$969,500; buildings, \$10,132,000) on the Canterbury Apartments, a 480-unit apartment complex comprised of 16 buildings located on Congress Street (the Property). For the reasons stated below, the appeal for abatement is granted.

The Taxpayer has the burden of showing the assessments were disproportionately high or unlawful, resulting in the Taxpayer paying an unfair and disproportionate share of taxes. See RSA 76:16-a; Tax 201.04(e); Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985). We find the Taxpayer carried this burden and proved disproportionality.

The Taxpayer argued the assessments were excessive because:

- (1) the 1989 assessment when equalized at the 1989 rate of 43 percent indicates a value of \$25,817,441, and the 1990 assessment equalized at 47 percent indicates a value of \$23,620,212;
- (2) the Property is located in an industrial zone behind a number of manufacturing buildings which is not a competitive location;

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(3) an analysis by the income approach to value indicates a 1989 value of \$18,700,000 and a 1990 value of \$17,200,000, and a depreciated replacement cost approach indicated a value of \$21,091,400;

(4) several of the City's comparable sales have been foreclosed on by the lender or were revalued at approximately one-half the original purchase price;

(5) assessments of comparable properties analyzed indicate the subject is overassessed;

(6) the revised assessment of \$13,647,800 for the 1992 tax year verifies that the property valuations were on a downward trend;

(7) an Appraisal Report prepared by Byrne McKinney & Associates, Inc.

estimated a fair market value of the Property as of March 25, 1992 at \$10,100,000 which confirms the Property was on a downward trend in value; and

(8) an assessment of \$7,300,000 representing a market value of \$17,000,000 would be fair and equitable.

The City argued the assessments were proper because:

(1) ten sales of comparable property in 1985 to 1989 indicate an estimate of market value for the Property by both the direct sales comparison approach and the income approach of \$25,400,000 for 1989 and \$24,000,000 for 1990; and

(2) the Taxpayer failed to show that its Property was assessed at a higher percentage of market value than the percentage at which property is generally assessed in Nashua.

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Board's Findings & Rulings

The board is faced with two general issues as argued by the parties:

(I) what were the proper estimates of market value for the Property for the two years under appeal; and

(II) what ratio(s) should be applied to the estimates of market value to arrive at the proper assessments.

(I) Estimate of Market Value

The board finds, based upon the evidence submitted by both parties and the income producing nature of the Property, the income approach to value provides the best estimate of value for the two years before the board. Analysis of the party's evidence on the income approach can be broken down into three general areas: a) effective gross income (EGI), b) typical and proper operating expenses, and c) capitalization rate.

a) Effective Gross Income

The Taxpayer relied upon actual income for the Property (which by its very nature includes rental income, any miscellaneous income and reflects actual vacancy and collection losses). The Taxpayer's EGIs for 1989 and 1990 were \$3,355,763 and \$3,378,258.

The City estimated the Property's EGI by reviewing market rents and vacancy rates for comparable property in the city. For 1989 the City

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determined an EGI of \$3,243,456 from an estimated potential gross income of \$3,603,840 and a vacancy rate of ten percent. For 1990 the City determined an EGI of \$3,062,414 from an estimated potential gross income of \$3,602,840 and a vacancy rate of fifteen percent.

While in these cases the actual effective income is slightly higher than the City's estimated EGI (indicating either the property and/or management was superior than the City's comparables thereby resulting in a lower vacancy rate), the board relies on the City's EGI as the best evidence since it is based upon market data broader than just the subject itself.

b) Operating Expenses

The Taxpayer again relied upon actual expenses in its analysis. For 1989 the expenses were \$1,197,969 or 36 percent of the EGI and in 1990 the expenses were \$1,341,704 or 39.7 percent of the EGI. The Taxpayer testified that the expenses were exclusive of property taxes.

The City derived its 35 percent of EGI estimate for expenses (i.e. expense ratio) from the analysis of ten sales of comparable properties in the state. The differences between each sale's EGI and net operating incomes were compared to their respective EGIs and then correlated to the 35 percent estimate. The City testified that the ten sales income data included property taxes as an expense and thus the 35 percent estimate for the subject property was inclusive of taxes.

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The board rejects a strict adoption of either party's figures as it finds some shortcomings in both.

The greatest shortcomings lie with the City's analysis. The board finds the City's estimate of expenses and determination of an overall capitalization rate (OAR) are inextricably tied to the City's ten comparable sales. Thus the following findings apply to both calculations by the City.

While in theory it is possible to derive an estimate of expenses (and an OAR) from sales data, in practice the City's methodology is flawed for several reasons:

- A) the sales data was received mostly from third parties and not verified;
- B) the City made no adjustments to the sale for their differing locations and differing tax rates; and
- C) the City did not stratify or adjust the sales for differing factors such as risk, land to improvement ratios, remaining economic life, and date and terms of sales (See Property Appraisal and Assessment Administration, International Association of Assessing Officers, 270 (1990), and more specifically at page 272,

"Capitalization rates change over time, especially with changing interest rates and changing supply and demand conditions. An overall rate of return can quickly become obsolete. Consequently, appraisers monitor

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capitalization rates in times of changing market conditions so that as of the date of appraisal the correct rate will be used. This can be done by adjusting available sales for sale date and terms of sale if sales close to the appraisal date are not available."

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The City did none of this. The sales used by the City occurred mostly in 1986 and 1987 and yet the City made no adjustment for time and market changes between then and the tax years under consideration. The market perceptions and decisions being made by investors of multi-unit rental property in 1986 and 1987 were quite different than those in 1989 and 1990. In the earlier time frame, the purchasers were looking largely at speculative short term resale potential of such property either as a whole or as separate condominium units. In 1989-90, however, the roller coaster ride of the market for this property was just past its apex and dropping with increasing vacancy rates, financing uncertainties and an oversupply of rental units. Thus, the two time periods are not comparable without significant adjustments.

The City did not adjust for the terms of the sales; eight of the ten sales had prices that were either influenced by highly leveraged resales of the property with seller second mortgages with deferred interest for several years or by the anticipation of condominium conversion which did not materialize. These type of terms had all but evaporated by 1989 and 1990.

Some of the Taxpayers' expenses are suspect. Their allowance for "Debt/Vacancy" as an expense in 1990 appears to be a double dipping. Further, the combination of administrative and management expenses totalling nearly ten percent appears to be excessive compared to industry norm.

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Therefore, in reviewing all the evidence before it and relying on its collective knowledge and experience with properties such as this, the board finds that an estimate of expenses of 35 percent of the EGI, exclusive of taxes, is reasonable. (The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence. See RSA 541-A:18, V(b).)

C) Capitalization Rate

The Taxpayer estimated the overall capitalization rate to be 11.52 % for 1989 and 11.82 % for 1990. These rates included considerations for mortgage rates, equity requirements, holding period any appreciation during the period and an effective tax rate.

The City determined an overall rate of 8.3 % for both years from an analysis of the ten sales previously mentioned.

The board rejects the City's overall rate for the same reasons its expense estimates were rejected.

The board finds the Taxpayer's assumptions made in calculating the rate reasonable and in keeping with the board's knowledge of rates for this type of property during this time period.

Summary of Market Value

Based upon the findings above the market value of the Property is estimated as follows:

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1989

Effective Gross Income	\$3,243,456
Expenses (-35 %)	\$1,135,210
Net Operating Income	\$2,108,246
Overall Capitalization Rate	11.52 %
Estimated Value	\$18,300,750

1990

Effective Gross Income	\$3,062,840
Expenses (-35 %)	\$1,071,994
Net Operating Income	\$1,990,846
Overall Capitalization Rate	11.82 %
Estimated Value	\$16,843,000

(II) Proper Ratio(s)

The City argued the board could not use the department of revenue administration's (DRA) equalization ratios because: 1) the ratios are statistically invalid; and 2) the Taxpayer did not provide evidence to support the ratios. Concurrent with this argument, the City argued the Taxpayer did not provide any evidence concerning the general level of assessments, and therefore, the board should deny the Taxpayer's appeals.

The board has already addressed this specific issue in Birch Pond Office

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Park Association v. City of Nashua, Docket Nos. 4246-88 and 5894-89 and in New England Life Insurance Company v. City of Nashua, Docket No. 8471-90. The board incorporates in this decision pages 8-13 of those decisions, excluding the specific calculations found on page 13. (Copy of decisions attached.) Some of the discussion below reiterates and reinforces the board's earlier conclusions.

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EQUALIZATION RATIO STATISTICALLY UNACCEPTABLE

The City argued the equalization ratios were statistically unacceptable because:

- 1) the DRA's ratio studies were based on unrepresentative samples because the percentage of sales, by property class, used in the studies did not mirror the actual percentage of properties in each class existing in the City;
- 2) the sample sizes were inadequate;
- 3) the sales used in the studies were not time adjusted to April 1 of the subject years; and
- 4) the DRA did not verify all of the sales used in the studies.

The board reviewed the City's analyses and its testimony. The board rejects the City's conclusion that the ratio studies are so flawed that the ratios must be rejected. First, despite its criticism of the ratio studies, the City has acknowledged the DRA ratios were not far from the ratios that would have been calculated if the DRA had completed a statistically acceptable analysis.

Second, the board reviewed the City's analyses of the studies, using the International Association of Assessing Officers, Standard on Ratio Studies (1990). While the DRA's studies may not have complied precisely with the IAAO's standards, the studies were not so flawed as to be rejected.

In response to the City's specific arguments, we make the following observations. See also the Birch Pond decision.

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1) Representativeness.

The IAAO standards do not require absolute identity between the sample, i.e., properties used in a study, and the population, i.e., the properties existing in a municipality. As stated in section 5.5 of the IAAO standards: In general, a ratio study is valid to the extent the sample is **representative** of the population. Ideally, the sample would mirror the population exactly. Operationally, representativeness is achieved when (1) appraisal procedures used to value the sample parcels are similar to procedures used to value the rest of the population, (2) sample properties are not unduly concentrated in certain areas or types of property that have been appraised differently from other properties in the population, and (3) sales or independent appraisals provide good surrogates for market values.

Therefore, we reject the City's argument that the ratio studies were flawed because the samples were unrepresentative.

2. Sample size.

The City critiqued the DRA's sample sizes, but the City's conclusions did not show the sample sizes were inadequate.

3. Time adjustment.

The City criticized the DRA's failure to time adjust the sales used in the study to April 1 of the subject years. While the IAAO does suggest time adjusting to a particular date, it is not a critical flaw in this case.

4. All sales not verified.

The City criticized the DRA's ratio studies because all of the sales used in the studies were not verified. Again, while the IAAO suggests that

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all sales be verified, we do not think the DRA's failure to verify all sales was a critical flaw. In the 1989 study, 70% of the sales were verified, and in the 1990 study, 71% of the sales were verified.

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GENERAL LEVEL OF ASSESSMENT

The City also argued the equalization ratios could not be used by the board because the City did not stipulate to the ratios and the Taxpayer failed to provide evidence to support the equalization ratios or to demonstrate the City's general level of assessment. We reject the City's position.

Initially, we direct the parties to the Birch Pond decision for the board's response to this argument. Furthermore, we direct the parties to Dickerman v. Nashua, Docket No. 7273-89 and 8584-90. The board took official notice of that hearing. See RSA 541-A:18 V.

During the Dickerman hearing, the City testified the last general revaluation occurred for the 1981 tax year. From 1981 to 1989 and 1990, the City made only two adjustments to property assessments in the City: 1) adjusted the assessments on commercial properties along the Daniel Webster Highway; and 2) adjusted the assessments on condominiums (1989). With the exception of these two adjustments, the City made no studies or adjustments to assessments based on relative changes in the market. In other words, the assessments now under appeal were derived from 1981 market data with one adjustment even though the market changed dramatically from 1981 to 1989 and 1990.

Obviously the City's failure to annually review assessments raises

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several questions concerning proportionality, which the City cannot answer.

The specific question now being whether the appealed properties were equitably assessed. At the Dickerman hearing, the City admitted it did not know whether the appealed assessments were proportional or not. Mr. Fedele, the City's assessor, admitted that using the 1981 market and cost data may not result in proportional assessments in 1989 and 1990. Mr. Fedele said:

Whether that's [the method used by the City] proportional or not, the City really has no idea at any point whether an assessment is proportional in that regards. We really don't. It becomes a matter of whether a taxpayer brings in information relative to the proportionality of an assessment that the City then goes back and reviews that information in that regards.

Additionally, Mr. Rousseau, the City's assessment manager, agreed the City is required to have an understanding of the general level of assessment within the City. Unfortunately, the City did not and does not have an understanding of the general level of assessment in the City for 1989 and 1990.

Based on the evidence presented, including the City's admissions, the board concludes the City has not complied with its obligations to ensure proportional assessments. Birch Pond discussed the law concerning these obligations. Having failed to fulfill its obligations, the City cannot now stonewall the Taxpayer's who have shown overassessment by equalizing the assessments with the applicable equalization ratios and then comparing those equalized values with the fair market value evidence.

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One factor underlying this decision is the reality that ratio studies require a significant effort and expense. The same is true for reviewing and supporting the DRA's study. At the Dickerman hearing, the City acknowledged that performing ratio studies was an onerous task - - too onerous for municipalities and too onerous for taxpayers. Specifically, the city stated an annual study would have been too burdensome to do because the City's assessment system from 1981-1992 was not computerized. If the task is burdensome for municipality, then certainly it would be prohibitive for all but the wealthiest taxpayers.

Conclusion

Therefore, the board's findings of market value in the first section should be equalized by the DRA ratios to arrive at the proper assessments of:

1989 \$18,300,750 x .43 = \$7,869,300

1990 \$16,843,000 x .47 = \$7,916,200

If the taxes have been paid, the amount paid on the value in excess of the above stated assessments shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

SO ORDERED.

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Paul B. Franklin, Member

Michele E. LeBrun, Member

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CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Gary M Stern, Taxpayer's representative; and Mark J. Bennett, Esq., Nashua.

Dated: January 20, 1993

0008

Valerie B. Lanigan, Clerk

Cabral Realty Investors

v.

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Order

On December 30, 1992 the board received a letter from the Taxpayer noting some typographical errors and omissions in the board's earlier decision in this case. Further, in reviewing the decision, it was noted the decision was not dated on page 13.

Therefore, the board amends its earlier decision with the corrected decision enclosed with this order.

The City has filed a motion for rehearing on January 12, 1993. The board will consider the motion timely under RSA 541:3.

SO ORDERED

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Member

Michele E. Lebrun, Member

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CERTIFICATION

I hereby certify a copy of the foregoing order has been mailed this date, postage prepaid, Gary M. Stern, Taxpayer's representative; and Mark J. Bennett, Esq., representing the City of Nashua.

Dated: January 20, 1993

008

Valerie B. Lanigan, Clerk

Cabral Realty Investors

v.

City of Nashua

Docket Nos.: 6277-89 and 8148-90

and

Allen F. Dickerman, Trustee of Mountain View Realty Trust

v.

City of Nashua

Docket Nos.: 7273-89 and 8584-90

ORDER RE MOTION FOR REHEARING AND RECONSIDERATION

The board of tax and land appeals (board) received timely motions for rehearings in the above-captioned cases from the City of Nashua (City). The City stated four reasons for the requests for rehearing:

- 1) the board relied on evidence obtained outside the scope of the hearing;
- 2) the board's reliance on the taxpayers' capitalization rate, because it included an effective tax rate, was without adequate evidentiary foundation to support it;
- 3) the board improperly shifted the burden of establishing the general level of assessment from the taxpayers to the City; and

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4) the board refused to permit the City to cross-examine the taxpayers' witnesses.

The board denies the City's motions for rehearing. Much of the City's arguments were ruled on by the board in its decision in each case. However, for the purpose of clarification, the board responds further to the issues raised by the City.

1) Extraneous Evidence

The City argues it was not given notice of the board's intention to use evidence obtained outside the scope of the hearing. No notice was given the City because the board did not rely upon any outside evidence but relied only on evidence received during the respective hearings.

The City apparently is arguing the board does not have any latitude in reviewing and analyzing evidence submitted to it during a specific hearing and then arriving at its own conclusions. Simply put, the City asserts the board must accept either the City's or the taxpayers' evidence, and thus, the board cannot review and analyze evidence to arrive at the board's own conclusions on issues. The City cited Appeal of Lambrou, 136 N.H. 18 (1992) to support this position.

To answer this argument, a review must be made of the various statutes dealing with the board's jurisdiction. See Appeal of Town of Hampton Falls,

126 N.H. 805, 809 (1985) ("[A]ll statutes upon the same subject matter are to be considered in interpreting any one of them.") Three statutes will be reviewed

-- RSA 71:B-a, RSA 76:16-a and RSA 541-A:18, V (b). First, under RSA 71-B:1
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members must be "learned and experienced in questions of taxation or of real estate valuation and appraisal or of both." These qualifications are required to ensure the board can review and make qualified judgments on technical issues. These specific qualifications are in contrast to the lack of any specific qualifications as to technical knowledge or experience in the composition of the workers' compensation appeals board, which was the agency from which an appeal was taken in Appeal Lambrou. Id. Second, RSA 76:16-a I requires the board to "make such order thereon as justice requires." The phrase "as justice requires" confers upon the board certain equitable powers as enjoyed by the superior court and clearly requires the board to review evidence and arrive at the "right" decision, using the board's knowledge and experience. Lastly, as cited in the decisions, RSA 541-A:18, V (b) authorizes the board to rely upon its experience, technical competence and specialized knowledge in analyzing and weighing the evidence submitted to it and in reaching a conclusion on various issues.

The above establishes the board's general review authority and grants the board latitude -- the authority to rely on its experience and knowledge -- in deciding an appeal. For the board to be blind of its experience and

knowledge gained through the board members' previous employment and through knowledge and experience gained in courses, seminars and sitting as finders of fact in thousands of similar tax cases throughout the years would relegate the board to the status of a lay-person board. It is obvious from the review of the statutes that was not the legislature's intent.

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In arriving at the capitalization rate and the estimate of expenses used in the decisions, the board based its conclusions solely on the board's evaluation of the evidence in the respective cases. This was appropriate.

2) Lack of evidentiary foundation in taxpayers' capitalization rate

The City argues that the board's reliance on the taxpayers' capitalization rate is not proper because a component of the taxpayers' capitalization rate is the effective tax rate of the municipality. The City argues since the effective tax rate was derived by multiplying the current or nominal tax rate by the department of revenue administration's (DRA) equalization ratio, the board cannot rely on that effective tax rate because one of its components is the state's equalization ratio which the City did not either stipulate to or use, nor did the taxpayers present any independent evidence as to its validity.

The board finds the City is really stretching in this argument in an attempt to shackle the board from arriving at a proper assessment through the

evaluation of all the evidence supplied to it. Again the City attempts to retrospectively throw up legal stonewalls after gross assessment inequities have been allowed to creep in that could have been kept out by periodic assessment fence mending. See RSA 75:8. Such stonewalls only serve to retain assessment inequities when the City should have taken steps to ensure assessment equity.

In addition to the above, a brief discussion of the effective tax rate is appropriate to show another reason why the City's argument fails.

Effective tax rates are normally in the one to three percent range and, therefore, make up a relatively small portion of an overall capitalization

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performed each year for all municipalities are intended to arrive at an equalized grand list for the distribution of state funds to localities and for the intra-county distribution of municipal taxes. The ratio which they arrive at provides a general relationship between the present level of assessment in a community versus its full value assessment level. This ratio, therefore, is very appropriately applied to the municipality's current or nominal tax rate to arrive at an estimated effective tax rate to be used in the construction of an overall capitalization rate. Further, as the board discussed in its decision and will touch upon in the next section, the DRA's equalization ratios were found to be the best evidence admitted in these appeals as to the general level of assessment within the City.

3) Shift of burden in determining the level of assessment

The board's decisions do not run counter to the New Hampshire Supreme Court's (Court) opinions on this issue. Rather, as we stated in the decision, we do not think the Court has yet been presented with this issue of whose burden it is to determine the level of assessment when there is competent evidence that the equalized assessment exceeds market value and where the municipality has clearly failed to first fulfill its RSA 75:1, 8 duties. We ruled this appeal is different than earlier court cases in four ways.

A) The City did not fulfill its original burden/duty of annually reviewing and determining proper the proper assessment pursuant to RSA 75:1 and 75:8. As we stated, one leg of the three legged stool of assessing (physical description of the property, relevant market data and the general level of assessment) had

not

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been determined by the City. The board in its decision is not shifting the burden of determining the level of assessment from the taxpayers to the City because the burden had never been placed upon the taxpayers due to the lack of the City complying with its statutory requirements.

B) The board, having been the appealed tribunal in Appeal of Andrews, 136 N.H.

61 (1992), is aware in that case the town did not use the equalization ratio in

determining the assessments. Yet, the Court stated in part, "[o]nce [a] town decided to use the median ratio as the basis of its equalization process, it should... [grant] all abatements to that median ratio." Id. at 65.

C) The board in its decisions concluded that the DRA's ratio reasonably represented the general level of assessment and that the issues raised by the City as to the representativeness of the sample, the sample size, lack of time adjustment and the verification of sales did not detract significantly from the overall validity of the DRA's ratio.

D) The board's responsibility to "make such orders as justice requires ***, " RSA 76:16-a, engages the principles of equity. In this case, where there was clear evidence that the equalized assessment exceeded fair market value, equity requires a remedy.

4) Cross examination of taxpayers' witnesses

The board received from the City on March 8, 1993, a withdrawal of this issue from their motions for rehearing. Therefore, the board does not respond to this issue raised in the original motion.

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Member

Ignatius MacLellan, Esq., Member

Michele E. LeBrun, Member

CERTIFICATION

I hereby certify a copy of the foregoing order has been mailed this date, postage prepaid, to Marvin E. Poer & Co., Agent for Allen F. Dickerman, Taxpayer; Gary M. Stern, Agent for Cabral Realty Investors, Taxpayer; Lucien G. Rousseau, Jr., Assessing Manager, City of Nashua; Michael Fedele, Assessor, City of Nashua; and Mark J. Bennett, Esq., Corporation Counsel, City of Nashua.

Date: March 31, 1993

Valerie B. Lanigan, Clerk

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v.

City of Nashua

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Numerica Savings Bank, F.S.B.

v.

City of Nashua

Docket Nos.: 5976-89 and 8149-90

ORDER

The board received a motion for rehearing from the City on January 12, 1993, in which was raised, among several issues, that "the board refused to permit the City to cross-examine the taxpayers' witnesses."

Before ruling on these motions, the board orders the City to file a response on two issues:

1) with reference to the hearing tape, state when the board refused to permit the City to conduct cross examination; and

2) file written offer of proof as to what needs to be covered on cross examination to satisfy RSA 541-A:18 IV, stating what witnesses and issues the City needs to cover through cross examination. See Petition of Betty Sprague,

132 N.H. 250, 259 (1989).
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The City shall file its response with the board within 20 days from the clerk's date below.

Note: The City may listen to the tape at the board's office by calling the clerk and scheduling a time to use the tape machine. Alternatively, the City may obtain a copy of the hearing tapes.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Paul B. Franklin, Member

Ignatius MacLellan, Esq., Member

I hereby certify a copy of the foregoing order has been mailed this date, postage prepaid, to Gary M. Stern, Taxpayers' representative; Mark J. Bennett, Esq., representing City of Nashua.

Dated:

Valerie B. Lanigan, Clerk