

**Spiros Flomp**

**v.**

**City of Nashua**

**Docket Nos.: 7118-89 and 8585-90**

**DECISION**

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "City's" 1989 and 1990 assessments of \$1,165,800 on 419 and 421 Amherst Street (the Property). For the reasons stated below, the appeals for abatement are 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 Property had a high vacancy rate and less than reliable tenants;
- (2) the Property has ingress and egress problems;
- (3) the buildings are at right angles to the highway, resulting in poor exposure for commercial use;
- (4) topography problems in the rear of the lot limit the Property's utility;
- (5) the lots share the same gas line and use a common parking area that would be inadequate if the lots were sold separately;

- (6) the Property was purchased in 1987 for \$1,500,000; and
- (7) a market analysis by the income and cost approaches indicated value estimates of \$1,150,000 and \$1,165,000 respectively.

The City's appraisal report was not admitted because the board sustained the Taxpayer's objection to the report due to the City's failure to properly notify the Taxpayer about the City's comparables ten days before the hearing.

The City argued the assessments were proper because:

- (1) the Taxpayer relied upon the Property's actual rents, vacancies, etc. rather than on market data;
- (2) the Taxpayer did not submit any evidence of the general level of assessment; and
- (3) the Taxpayer did not analyze any of the land sales that occurred in the area in the years under question.

**Board's Rulings**

Based on the evidence, we find the correct assessment for both years should be \$932,640.

The board rejects the Taxpayer's value opinions because the data was unreliable and very questionable. The Taxpayer did, however, point out certain problems with the Property that require adjustment, namely:

- (1) the Property has problems with its access and visibility;
- (2) the City assessed one of the buildings for a second floor but a second floor did not exist in 1989; and

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(3) the City erred in assessing this Property as having a highest and best use as two separate lots.

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Items number (1) and (2) above do not require elaboration. Concerning number (3), the board reviewed the site plan and the information provided by the Taxpayer concerning the use of the two lots. The City assessed the Property as two lots, but the Property could not be subdivided without obtaining subdivision approval and site-plan review. Based on the evidence, the Property's highest and best use is as one integrated property, not as two separate lots.

The board has decided to adjust the assessments by -20% to reflect these problems. The -20% adjustment may be inadequate, but the Taxpayer's evidence was insufficient to provide the board with any justification to reduce the assessments any further.

Since the board only adjusted the City's failure to make certain adjustments to the assessment, there is no reason to discuss the City's other challenges to the Taxpayer's arguments.

Bias

The board asked the consultant how he was being paid by the Taxpayer. The consultant objected to the board's question, but the board overruled the objection. The consultant testified he had a contingency-fee arrangement with the Taxpayer whereby the consultant would earn 50 % of any abated taxes. At the hearing, the board explained the basis for overruling the consultant's objection, but it is appropriate to reiterate those reasons.

The board overruled the objection because the consultant's fee

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arrangement is relevant to the consultant's testimony concerning value. The inquiry was made to determine whether the consultant had any bias. "The term 'bias' denotes a variety of mental attitudes that may cause a witness to give false or misleading

testimony. In general, it signifies a witness's interest in the outcome of the case. \*\*\* The [questioner] can expose any potential bias by showing the witness [has a] financial interest in the outcome \*\*\*." Lilly, Introduction to the Law of Evidence 297 (1978). Under the New Hampshire Rules of Evidence, witnesses may be impeached for bias. See New Hampshire Rules of Evidence Rules 104(e), 401, 404, 607, 608, 611(b). Allowing inquiry into a witness's potential bias has also been recognized in case law. E.g., Cheshire Toyota/Volvo, Inc. v. O'Sullivan, 129 N.H. 698, 701 (1987) ("The proper way to expose a witness's bias is through rigorous cross-examination."); Bedford School District v. Caron Construction Co., Inc., 116 N.H. 800, 805 (1976) (a witness may be questioned concerning any financial gain they may receive from their testimony to indicate bias). Clearly, given the above, witnesses that express opinions concerning value may be examined to determine if they have any financial interest in the outcome of the appeal. Therefore, the board's overrule of the consultant's objection was appropriate. The consultant also argued he should not be required to disclose his fee arrangement because attorneys are not required to do so. There is a difference between an attorney and a property-tax consultant. An attorney is an advocate for his client's position, but the attorney does not provide any evidence or valuation opinion. On the other hand, property-tax consultants act as both advocates and expert witnesses. Thus, to the extent the consultant offers evidence, he/she is subject to questions concerning bias.

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**Conclusion**

If the taxes have been paid, the amount paid on the value in excess of \$932,640 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Member

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Ignatius MacLellan, Esq., Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Robert Banks, Agent for Spiros Flomp, Taxpayer; and Chairman, Board of Assessors of Nashua.

Dated: January 11, 1993

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Valerie B. Lanigan, Clerk

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**Spiros Flomp**

**v.**

**City of Nashua**

**Docket Nos.: 7118-89 and 8585-90**

**ORDER**

This order responds to the "City's" rehearing motion, which is denied. The City's motion raised five issues:

- 1) the board erred by excluding the City's comparable-sales data;
- 2) the board erred in concluding the building at 420 Amherst St. did not have a second floor;
- 3) the board erred in concluding the "Properties" could not be subdivided and separately conveyed without first obtaining City approvals;
- 4) the board erred by not requiring the "Taxpayer" to prove the Properties' market values; and
- 5) the board erred by not requiring the Taxpayer to prove the general level of assessment.

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The board will address each issue, and the numbered paragraphs below correspond to above-numbered paragraphs.

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**1) Exclusion of City's Comparables**

The City claimed the board erred in excluding the City's comparable-sales data. We find no error.

At the hearing, the board excluded the City's comparables because the City failed to comply with board rule Tax 201.03(e) and with the board's hearing notice. The rule and the notice required both parties to submit to the other party a list of all comparable properties that the offering party intended to rely upon at the hearing. The board requires this notification to ensure each party has an opportunity to review the other party's comparables. This notification avoids surprise and assists the board in making its decision.

The City failed to comply with these requirements because it gave notice to the Properties' owner and not the owner's agent. The City challenged the board's exclusion, claiming notice to the owner was sufficient even though the owner was represented by an agent.

The City's argument is without merit. Service of the notice to the owner is insufficient where the owner is represented by an agent and where the City knew the agent was representing the owner. The City knew the owner was represented by an agent because the agent had filed the abatement application with the City and the appeal document with the board. The agent had also provided the City written authorization from the owner. Additionally, on October 7, 1992 -- two weeks before the scheduled hearing -- the board denied

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the agent's continuance motion, and a copy of that order was sent to the City.

Given

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these facts, it is clear that the City knew the owner was represented by an agent, and thus, the City should have provided notification of its comparables to the agent not the owner.

**2) The Second Floor at 421 Amherst Street**

The City claimed the board erred in concluding the building at 421 Amherst Street did not have a second floor. We find no error in the board's conclusion. Whether there is a second floor at 421 Amherst Street is a factual question, and the evidence clearly proved the building lacked a second floor. The photographs submitted by both parties showed the building no longer has a second floor. These photographs showed the interior of 421 Amherst Street (TP. Ex. 2) and showed the exterior of the building where the old window openings were (CY. Ex. B).

**3) City Approval to Subdivide and Convey**

The City claimed the board erred in concluding that City approvals would be required to separately sell the lots and that cross easements would have to be created. We find no error in these conclusions. The evidence was clear that the Taxpayer would need City approvals to separately convey these lots. First, the approved site plan was for an integrated use between the lots. Therefore, any change to separately existing lots would require City approval and amendment to the site plan. Specifically, we note that the lots share a gas lines, and more importantly, 421 Amherst Street provides required (zoning)

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parking spaces for 419 Amherst Street. Thus, the Properties' present use complies with the City

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planning ordinances, but if the lots were separately subdivided, the uses could not be continued without easements between the two lots and without the City's approval.

The board reviewed the hearing tape, and even the City Assessor, Michael Fedele, admitted City approval would be required to convey the lots separately.

He stated, "I imagine that if [the lots] were transferred that the City would require some sort of encumbrance over onto the other property for the purposes of using parking on that site." Finally, and only as an observation, while the City now argues these are two separate properties, the review of the assessment-record cards shows that at one time the City viewed these Properties as integrated by assessing all of the buildings -- even though located on two lots -- to one of the lots.

The board denies the rehearing on this issue because obtaining City approvals and creating cross easements are important factors that would be considered by any prudent buyer, and therefore, they must be considered in the assessment. See Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1975).

#### **4) Market Value**

The board granted the abatements because we found the City's assessments were flawed because those assessments did not factor in the adverse impact of certain factors. The City claimed the board erred in considering these adverse factors because the Taxpayer did not prove the Properties' market values. The

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City requested the board to take a very narrow and limited view of the evidence rather than a broad and comprehensive view as is more appropriate. We conclude the board did not err. Following the board's receipt of the rehearing motion, the board ordered the City to brief this novel issue. The board read the cases cited in the City's memorandum on this issue. We find that none of those cases address the issue now before the board.

The main thrust of our conclusion is that to adopt the City's position would require an abandonment of sound assessing practices and would be contrary to New Hampshire law.

The issue to be decided is whether the board has authority to grant abatements where the following factors exist:

- a) the City failed to comply with its assessing responsibilities -- specifically where the City failed to comply with RSA 75:8, which mandates the yearly review of assessments and market data, where the City failed to comply with RSA 75:1, which mandates that assessments be related to market value and where the City failed to comply with N.H. Const. pt. 1, art. 12, pt. 1, art. 5 and pt. 2, art. 6, which require proportional taxes and periodic review of assessments;
- b) the City's methodology used in arriving at the assessments was consistently used throughout the City when the 1981 revaluation was performed and for new properties that were improved after 1981;

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- c) the assessments did not consider three important factors that affected the Properties' values and thus should have been factored into the assessments;
- d) the Taxpayer submitted sufficient evidence to raise questions about the assessments even though the Taxpayer failed to provide a supportable opinion of market value; and
- e) the full-value assessments following a later revaluation were substantially less than the equalized assessments for the appealed years.

Each factor warrants brief discussion here, and we also incorporate pages five through nine of the board's decision in Numerica Savings Bank v. City of Nashua, Docket Nos.: 5976-89 and 8149-90 (attached).

**a) City failed to comply with its assessing duties**

Based on the City's arguments at the hearing and now in the rehearing motion, the City argued its actions in setting the assessments and its failure to comply with the constitution and the statutes is irrelevant. All that matters, according to the City, is the burden of proof. The City asserted it is the Taxpayer's burden to show the error, and the burden is totally independent of the City's responsibilities. The board rejects this approach and this attitude.

The City's contempt for the importance of complying with the constitution and the assessing statutes is unfathomable. Because the City has

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not complied with its duties, the board will not and has not given the City's assessments the presumption of correctness that assessments that are arrived at consistent with the constitution and the statutes are entitled to.

Under RSA 75:8, the City was required to annually review all real estate in the City and to make adjustments based on changes to the Properties and changes in the market. Additionally, the City was mandated by RSA 75:1 to base assessments on market value. See Public Service Company of New Hampshire v. Town of Seabrook, 126 N.H. 740, 742 (1985); Brock v. Farmington, 98 N.H. 275, 277 (1953) (Statute consistently construed to mean market value based assessments). The City did not comply with RSA 75:8 or RSA 75:1. In Dickerman v. Nashua, Docket Nos.: 7273-89 and 8589-90, the City testified, with the exception of two situations not applicable here, it did not conduct annual reviews of the assessments or the market. The City even stated it had no idea whether properties in the City were proportionally assessed. These admissions demonstrated the City failed to fulfill its RSA 75:8 and RSA 75:1 duties.

The City's failure also violated its constitutional duties as provided in N.H. Const. pt. 1, art. 12 and pt. 1, art. 5 (each member of the community is only bound to contribute his/her reasonable and proportional share towards the community). Furthermore, the City violated N.H. Constitution pt 2, art. 6, which states, "There shall be a valuation of the estates within the state taken anew once in every five years, at least, and as much oftener as the general

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court shall order." This provision requires full revaluation on a periodic basis to ensure proportionality. Opinion of the Justices, 76 N.H. 588, 595 (1911). Periodic review of assessments is so important, it is embodied in our constitution! Yet, the City ignored this duty.

These constitutional and statutory mandates are clear, and the City did not comply with them. Incredulously, the City asked for certain presumptions about the correctness of assessments even though the City was seriously derelict in fulfilling its constitutional and statutory mandates. Because the City did not comply with its statutory and constitutional duties, the assessments are not entitled to the normal presumption of correctness that is normally accorded assessments. This conclusion is described in detail in the two attached decisions.

We also note that the City's assessment practices do not comply with the assessing function as that function is described by the International Association of Assessing Officials (IAAO). The IAAO, in defining the role of the assessor, states:

It is hard to overstate the importance of assessors to the administration of the property tax and, indirectly, the vitality of local governments. Appraised values determine the distribution of property tax levies among taxpayers. Only if these values are correct will tax limits, debt limits, and the distribution of state aid to localities be as the legislature intended. Boards of review and boards of equalization can never fully correct poor initial assessments.

A cornerstone of the IAAO and actions of its members is stated in standard one

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of the IAAO Code of Ethics and Standards of Professional Conduct, which states:

Perform their duties in accordance with applicable laws and regulations and apply them uniformly and fairly. Perform all appraisal and assessment-related assignments to the best of their ability in accordance with the Uniform Standards of Professional Appraisal Practice adopted by IAAO.

We only mention the IAAO because its requirements parallel the requirements of New Hampshire law. We have not based our decision on these IAAO statements, but refer to them as additional material, supporting our conclusion that the City's failure to do its job should not be ignored.

**b) City's Use of Consistent Methodology**

We find the consistent methodology, used in the City, which included considering all relevant factors, was not followed in assessing these Properties. The City used the same methodology on these Properties as it used on all other commercial properties. We assume this general methodology included consideration of all factors affecting value. The Taxpayer, however, showed the City failed to consider factors that affect value. The City, however, would have us ignore this failure. We find this to be contrary to any acceptable assessing practice and specifically to the assessment practice in the City in setting its assessments in 1981.

Consistent methodology throughout a municipality in setting assessments is some evidence of proportionality. See Bedford Development Co. v. Town of Bedford, 122 N.H. 187, 189-90 (1982). Thus, if a taxpayer shows the

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methodology used throughout the municipality was not consistent or that the methodology throughout the City was not used on the particular property, this is some evidence of disproportionality.

**c) Failure to Consider Important Factors**

The City is required by law to consider all factors that affect value. See Paras, 115 N.H. at 67-68. This statement is consistent with RSA 75:1, which requires that assessments be based on market value. See Brock, 98 N.H. at 277. Determining the market value of a particular property requires consideration of all factors that would be relevant to prospective purchasers.

The factors raised by the Taxpayer and accepted by the board certainly affected market value, and therefore, the assessments should have been adjusted to reflect this point.

**d) Taxpayer's Evidence**

While the board did not accept the Taxpayer's value opinion, the Taxpayer presented credible evidence of matters that affected the Properties' value, and those factors should have been considered in the assessments. These factors were listed on page two of the decision. Additionally, the Taxpayer introduced credible evidence about the Properties' vacancy and rental rates and the efforts taken to lease the Properties. Our rejection of the Taxpayer's value opinion did not mean the Taxpayer failed to present any relevant evidence concerning the Properties' value.

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**e) The 1992 Full-Value Assessment**

For tax year 1992, the City was revalued and thus had new full-value assessments (97% according to the department of revenue administrative). The information concerning the Properties' new assessments was cumulative and confirmatory evidence of overassessment. The equalized assessments for 1989 and 1990 as compared to the 1992 assessments were as follows.

<u>1989</u>	<u>1990</u>	<u>1992</u>	(without equalization)
419 Amherst \$1,996,745	\$1,826,810	\$540,200	
421 Amherst \$ <u>714,420</u>	<u>\$ 653,620</u>	<u>\$489,200</u>	
Total <u>\$2,711,165</u>	<u>\$2,480,430</u>	<u>\$1,029,400</u>	

Again, the 1992 assessments were so significantly less than the 1989 and 1990 equalized assessments that the new assessments gave some indication that the Properties were overassessed in 1989 and 1990.

**5) General Level of Assessment**

The City claimed the board erred by not requiring the Taxpayer to prove the general level of assessment. We find no error in the board's conclusion on this issue. First, the abatements granted were not based on relative market value, but were based on errors in the assessment methodology itself. Therefore, the board simply made adjustments that should have been made to the assessments itself. To the extent the general level of assessment was at

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issue, we have answered that issue in the two attached decisions.

It is interesting, and somewhat disturbing, that the City has vehemently raised and stuck to this argument in all commercial appeals, except in Hi-Tension Corp. v. Nashua, Docket Nos. 9241-89, 9587-90. For some unexplained reason, the City settled Hi-Tension after an extensive hearing even though the City in that case argued for a denial because the Taxpayer, Hi-Tension did not address the general level of assessment. The board reviewed the Hi-Tension settlement agreement, and substantial abatements were made even though similar issues existed in that case and this case. Is this fairness to the City's taxpayers, who like this Taxpayer, had similarly valid tax appeals but whose valid appeals have been stonewalled by the City?

### **Conclusion**

For the reasons stated above and in the referenced sections of the decision attached, we find the City failed to present any good cause to grant a rehearing. See RSA 541:3. Further because of the City's failure to comply with the constitution and statutes and its failure to grant these abatements, we find the City's actions in defending this appeal to have been frivolous and in bad faith. **Final note**

The issues discussed on this order have been recurring and warrant a final observation to express the board's displeasure with the City and to dispel any doubt the City or other municipalities may have about whether the

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board will require municipalities to follow the law. The board is confounded and frustrated by the City's position, as discusses above and as taken in several appeals. We have found the City's actions to be in violation of the constitution and the statutes and to have been in bad faith. We have, therefore, used strong language in this order to express our dissatisfaction with the City. The board has invested considerable time and research into these cases because of the landmark importance of the issues addressed herein.

If the City's actions were deemed lawful and acceptable, the taxpayers in this state would be subjected to unfair taxation from which they could not obtain adequate relief. A result contrary to the board's decisions in these appeals would have required the board to ignore all due regard for fair taxation and for fair treatment of taxpayers. Think of the implication in the assessing community and on taxpayers if the board had accepted the City's position. We will not give our imprimatur to the City's unlawful actions and vexatious arguments, and we want to send a strong message to the City and other municipalities, that municipalities must follow the law and must be fair to taxpayers.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Member

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Ignatius MacLellan, Esq., Member

Certification

I hereby certify a copy of the foregoing order has been mailed this date, postage prepaid to Spiros Flomp, Taxpayer; and Chairman, Board of Assessors of Nashua.

Date:  
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Valerie B. Lanigan, Clerk

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**ORDER**

This order relates to the "City's" rehearing motion, which is denied. The City raised five issues in its motion:

- (1) the board erred by excluding the City's comparable sales data;
- (2) the board erred in concluding the building at 421 Amherst Street did not have a second floor;
- (3) the board erred in concluding that the property could not be subdivided without first obtaining City approvals;
- (4) the board erred in not requiring Flomp to prove the Property's market value; and
- (5) the board erred by failing to require Flomp to prove the general

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level of assessment.

The board will address each issue, and the following numbered paragraphs correspond to the above numbered paragraphs.

(1) Board rule TAX 201.03 (e) requires that any party intending to submit comparable properties as part of its case to supply in writing a list of those

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properties to the opposing party. This requirement was stated in the board's hearing notice. The City claims it complied by sending the notice to the property owner rather than the property owner's agent. The board ruled that the City failed to comply since the appeal was filed by and has been prosecuted by the owner's agent. The City had notice that the owner was represented by an agent because both the abatement application filed with the City and the appeal filed with the board were filed by the agent with a written authorization from the owner. Additionally, the hearing notice indicated that it was sent to the agent and not the owner. Finally, on October 7, 1992, the board issued an order denying the agent's request for a continuance, and the City was sent a copy of that order. Therefore, the board denies the rehearing motion on this

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ground because the City had notice that the owner was represented by an agent and yet the City failed to comply with the board's notification requirement.

(2) The board denies the rehearing motion concerning the existence of a second floor at 421 Amherst Street. This is a factual question that the taxpayer proved. Specifically, the taxpayer introduced photographs that proved that the building no longer had a second floor. These photographs showed the interior shot with no second floor and an exterior shot where the old window openings were covered with newer shingles.

(3) The board denies the rehearing motion on this matter because the board finds the requirement of obtaining City approval to be an important factor that would be considered by any prudent buyer and therefore, it must be considered in part of the assessment. See Paras v. Portsmouth, 115 N.H. 67-68 (1975). The board reviewed the tape of the hearing and the City's assessor did indicate that some type of City approval would be required. This testimony is

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consistent with the evidence, which established that the site plan submitted to the City was for an integrated use. Again, this is a factor that should have been considered by the City.

(4) The board denies the rehearing motion on this matter, concluding

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that the board simply took the assessment and made adjustments for factors that should have been considered by the City. If the taxpayer proves that the assessment, which is presumed to be correct, did not include adjustments for factors that certainly affect the property's value, making adjustments to the assessment is not only appropriate, it is required by the law. See RSA 75:1; see Paras, 115 N.H. 67-68.

(5) The board denies the rehearing motion on this issue because the board only adjusted the assessment and did not grant an abatement based on specific market data. Basically, the board decided that it was required to make adjustments to the assessment for factors that affected value. The board has found no authority, nor has the City cited any authority, that supports the proposition that the City's assessment can be erroneous but the board cannot adjust the assessment absent evidence concerning the general level of assessment in the community. Again, there is an assumption that the assessments are correct, and all the board did was make adjustments to those assessments because the City admitted it did not adjust for those factors. Surely, if the error were in the lot size or construction quality of the buildings, the City would not argue that the board was without authority to correct the errors, and we see the adjustments made by the board in a similar vein.

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CONCLUSION

For the reasons stated above, we find that the City failed to present any "good cause" to grant a rehearing. See RSA 541:3.  
SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Member

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Ignatius MacLellan, Esq., Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Robert Banks, Agent for Spiros Flomp, Taxpayer; and Chairman, Board of Assessors of Nashua.

Valerie B. Lanigan, Clerk

Date:

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**ORDER**

This order relates the "City's" rehearing motion. The board has reviewed the motion and the memorandum, and the board is uncertain about the City's fourth issue, i.e., that the board erred by failing to require the "Taxpayer" to prove market value. The City has apparently argued the board is prohibited from correcting errors in the assessment itself absent a showing of market value by the Taxpayer. Therefore, the board wants clarification on this issue with any authority to support the argument. The board orders the City to file, within 10 days of the clerk's date below, a memorandum on this issue. In its memorandum, the City shall provide the board with authority to support its position that errors in the City's assessment, e.g., the City's failure to consider factors that affect value, cannot be the basis for granting an abatement absent proof of the Property's market value. The board directs the City's attention to Paras v. Portsmouth, 115 N.H. 63, 67-68 (1975), which states that assessments must consider all factors affecting value.

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If the City fails to timely file the memorandum, the board will rule on the rehearing motion without the memorandum. The City shall send a copy of its memorandum to the Taxpayer's agent and the Taxpayer's agent, shall have 10 days from the filing of that memorandum to file any responsive memorandum.

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Member

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Ignatius MacLellan, Esq., Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Robert Banks, Agent for Spiros Flomp, Taxpayer; and the Chairman, Board of Assessors of Nashua.

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Valerie B. Lanigan, Clerk

Date: March 29, 1993

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