

**Dining and Kitchen Administration, Inc.**

**v.**

**City of Keene**

**Docket Nos.: 7702-89PT, 9308-90PT and 11987-91PT**

**DECISION**

The "Taxpayer appeals", pursuant to RSA 76:16-a, the "City's" 1989 and 1990 assessments of \$5,995,400 (land \$565,500; buildings \$5,429,900) and 1991 assessment of \$5,456,100 on Map 166, Lot 01-002, a 132-unit Ramada Inn on a 5-acre lot (the Property). For the reasons stated below, the appeal for abatement is denied.

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 203.09(a); Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985). We find the Taxpayer failed to carry this burden and prove disproportionality.

The Taxpayer argued the assessments were excessive because:

- 1) the Property was built by C & K Associates in 1973 as a full facility 100-room motel on leased land (99 years, from January 1, 1973) from Richard and Shirley Conway;
- 2) on May 14, 1992, the Property was deeded and the land lease was assigned to Dining and Kitchen Administration (d/b/a DAKA, Inc.);

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- 3) in August of 1989, an additional 32 rooms were built, bringing the total rentable rooms to 131 (one was for "house" use);
- 4) the occupancy was declining due to economic conditions and local competition; and
- 5) an appraisal report dated September 10, 1991 and a February, 1993 update (not including furniture, fixtures, equipment or leased land) was submitted to show value.

The City argued the assessments were proper because:

- 1) the City conducts an annual index system that allows for adjustments of assessments and all properties are included in the system;
- 2) all commercial properties increased in value by 13% from 1987 to 1988, 10% from 1988 to 1989 -- the market showed no change from 1989 to 1990 and indicated a 12% decline from 1990 to 1991;
- 3) the subject sits on one of the best sites in the City, has the best visibility, and is the premiere hotel facility in the greater Cheshire County area;
- 4) access to the Property is by Kit Street off Winchester Street and is ideally positioned for the industrial activity in the area;
- 5) the land is zoned industrial, is leased to the Taxpayer, and has a site value of \$600,000; and
- 6) the capitalization rate used by the Taxpayer's appraiser is not valid.

Board's Rulings

In arriving at its decision, the board reviewed all of the evidence submitted by the parties, and to confirm the board's recollection of the testimony, listened to the entire tape recording of the hearing. Based on the evidence, the board finds the Taxpayer failed to prove the Property was disproportionately assessed for the following reasons.

- 1) The board gave little weight to the Taxpayer's September, 1991 appraisal report and February, 1993 update for the following reasons.
  - a) The Taxpayer relied solely on actual occupancy, rates and expenses without much evidence that the actuals were similar to those in the market.
  - b) The value assigned for furniture, fixtures and equipment (FFE) was based on certain assumptions and the appraiser provided no evidence to support the value.
  - c) The September, 1991 appraisal of \$4,410,000 attributed over half of the value to FFE and the value of the business, yet the gap in value between the September, 1991 appraisal and February, 1993 update was not detailed.
  - d) The appraiser stated on page 27 of the September, 1991 appraisal that the gross revenue was understated due to non-inclusion of income from a hotel contract. The report states, "The Ramada Inn should be generating a higher operating profit than 11.6% to 12.0%. DAKA does not use Uniform System of Accounts common to hotels and motels. It is not possible to make detailed departmental examinations to ascertain the reasons for the low level of profits." If this is true, actual income should not be

used. Assessments are based on a fee simple appraisal and do not adjust for bad management.

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e) On page 37 of the September, 1991 report, the appraiser developed a composite capitalization rate of .1109. However, the final value estimate was not based on a straight capitalization of the first year's income. Instead, a discounted cash flow analysis was used to arrive at a value of \$4,410,000 ( $\$365,700 \div \$4,410,000 = .0829$ ). To arrive at the indicated value using straight capitalization of the first year's income, you would have to use a capitalization rate of .0829, not .1109 as indicated in the appraisal report. On page 2 of the February, 1993 update, the appraiser used a capitalization rate of .1109.

2) The board gave no weight to the June 2, 1992 letter from Terry Vince, President of Sovereign Hotels (TP Exhibit #4). Mr. Vince suggested combining the value of three Ramada Inns owned by Sovereign located in Mystic, Connecticut (150 rooms); Bedford, Massachusetts (100 rooms); and Keene, New Hampshire (130 rooms); all doing a similar sales volume with a total, combined worth of \$10,332,000. Mr. Vince adds, "to obtain a value for the Keene Ramada, assuming the properties are of equal value ... doing similar annual sales volumes, and dividing this by three would put a value of \$3,413,000 per building." The board finds this approach to value simplistic, flawed and not probative of market value.

3) The City testified the Property's assessment was arrived at using the same methodology used in assessing other properties in the City. This testimony is evidence of proportionality. See Bedford Development Company v Town of Bedford, 122 N.H. 187, 189-90 (1982).

A motion for rehearing, reconsideration or clarification (collectively "rehearing motion") of this decision must be filed within twenty (20) days of the clerk's date below, not the date this decision is received. RSA 541:3; TAX Page 5  
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201.37. The rehearing motion must state with specificity all of the reasons supporting the request. RSA 541:4; TAX 201.37(b). A rehearing motion is granted only if the moving party establishes: 1) the decision needs clarification; or 2) based on the evidence and arguments submitted to the board, the board's decision was erroneous in fact or in law. Thus, new evidence and new arguments are only allowed in very limited circumstances as stated in board rule TAX 201.37(e). Filing a rehearing motion is a prerequisite for appealing to the supreme court, and the grounds on appeal are limited to those stated in the rehearing motion. RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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George Twigg, III, Chairman

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Michele E. LeBrun, Member

CERTIFICATION

I hereby certify that copies of the foregoing decision were mailed this date, postage prepaid, to Property Tax Research Company and Joseph M. Kerrigan, Esq., Counsel for Dining and Kitchen Administration, Inc., Taxpayer; and Chairman, Board of Assessors, City of Keene.

Dated: November 28, 1994

Valerie B. Lanigan, Clerk



**Dining and Kitchen Administration, Inc.**

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**ORDER**

This order responds to the Taxpayer's December 19, 1994 motion for rehearing. The Taxpayer stated four reasons for the request for rehearing:

I) the decision of the board was against the law, the evidence and the weight of the evidence;

II) the passage of time between the date of the hearing and the date of the decision has caused a corrosive effect on the memory process;

III) the reasons cited in the decision for the finding that the Taxpayer failed to prove disproportionality are not legally sufficient to support the finding; and

IV) the board erred in giving no weight to the June 1, 1992 letter from the President of Sovereign Hotels.

The board denies the motion for rehearing. Many of the Taxpayer's arguments were ruled on by the board in its decision. However, for the purpose of clarification, the board responds further to the issues raised by the Taxpayer.

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**I) Decision was against the law, the evidence and the weight of the evidence.**

The Taxpayer has the burden of proving that the assessments were disproportionately high or unlawful, resulting in the Taxpayer paying an unfair and disproportionate share of the tax burden. See RSA 76:16-a; TAX 203.09(a); Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985). Based on all of the evidence and testimony presented to the board, the board found that the Taxpayer did not sustain its burden of proof. The reasons were detailed in the board's decision and will be further clarified in this order.

**II) Passage of time.**

The Board acknowledges the passage of an inordinate and unreasonable amount of time from the date of hearing to the date the decision was released to the parties. The Chairman assumes full responsibility for the inexcusable delay.

However, the actual deliberation by the Board and conclusion that the Taxpayer had failed to meet the burden of proof to show disproportionate, unequal, unfair, or illegal assessment was made shortly after the hearing.

The original tapes were reviewed after the decision was processed to insure that the board's conclusions were consistent with the record. The original tapes were clear and coherent. If the copied tapes supplied to the Taxpayer were "frequently confusing" we will make the original tapes available for the Taxpayers' review.

**III) The reasons cited in the decision for the finding that the Taxpayer failed**

**to prove disproportionality are not legally sufficient to support the finding.**

The board will attempt to be more specific in its findings by addressing each letter cited:

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A) On page 31 of the appraisal, the appraiser stated that the net operating income was \$365,700. The February 3, 1993 updated two page assessment analysis report showed a figure of \$275,187 for essentially the same time frame. In the appraisal report, the appraiser has confirmed that market income is greater than actual income. The difference between actual and market income is even greater than it appears since there is a subtraction error on page 31, (net operating income should be \$392,200).

B) The board found the rate of return of 12% and depreciation of 10% used to determine the income attributable to furniture, fixtures and equipment (FFE) appeared to be high and there was no solid explanation.

C) For fiscal year 1991, if you subtract the value for FFE in the assessment report and the proposed assessment from the indicated value as of September 5, 1991 in the appraisal, the indicated value attributed to the business is \$2,130,000. The same calculations using fiscal year 1990 and the August 6, 1990 appraisal indicates a value to the business of \$835,000.

This raises the unanswered question, how can there be such a substantial difference, unaccounted for in the business value, from one year to the next.

Fiscal Year 1991

Appraised value as of September 5, 1991	\$4,410,000
Value assigned to FF & E	- 300,000

Estimated assessment, April 1, 1991	<u>-1,980,000</u>
Remaining Value	\$2,130,000

Fiscal Year 1990

Appraised value as of August 6, 1990	\$4,460,000
Value assigned to FF & E	- 330,000
Estimated assessment	<u>-3,295,000</u>
Remaining Value	\$ 835,000

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D) As stated in "A" the appraiser used market income in his appraisal. It is not consistent to then use actual income in his updated assessment report for similar time periods.

E) In the appraisal report, the appraiser did not use the direct capitalization approach to determine his final value. Instead, he used a discounted cash flow which examined future earnings to arrive at his final value.

In his reconciliation of value on page 42, he stated, "The motivation for the purchase is invariably for the production of income."

It is inconsistent to use the direct capitalization approach in the updated assessment report, when in his original appraisal the direct capitalization approach produced a value of \$3,300,000. He discarded this approach in favor of the value indicated (\$4,410,000) by the discounted cash flow.

If the appraiser wanted to use the direct capitalization approach for assessment purposes using the assumptions in the appraisal as a basis, he would first have to recalculate the capitalization rate using his final estimate of

value and his final estimate of net operating income.

**IV) The board erred in giving no weight to the June 1, 1992 letter from the President of Sovereign Hotels.**

The letter from Terry Vince of Sovereign Hotels stated a value of \$3,413,000 per building assuming the three properties are of equal value...and they are all doing similar annual sales volumes. The board did not interpret Mr. Vince's letter as a statement that this was the case with the three properties, merely the board interpreted this letter as an assumption of how to arrive at a value if you assume certain facts relative to the three properties.

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Further, only a copy of the letter from Mr. Vince was submitted to the board. Mr. Vince was not present at the hearing, therefore the board could not question him as to the arms-length nature of the combined sale of the three properties and how the properties' difference in size (Bedford 100 rooms, Keene 130 rooms, Mystic 150 rooms) and location (in N.H., Massachusetts, Connecticut) affects the value of the properties and what adjustments were made, if any, etc. Further, the Taxpayer argued that the board ignored the fact that the City lowered the assessment of the Property on April 1, 1992. The board found the City's evidence of the reasons for the reduction (Winding Brook Motel closed; Valley Green went into bankruptcy; and the entire motel industry was hurt by the downturn in the economy as well as the competitive impact of the newly added Days Inn and Super 8 motel) to be sufficient justification for reducing the assessment for 1992.

Motion for rehearing denied.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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George Twigg, III, Chairman

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Michele E. LeBrun, Member

CERTIFICATION

I hereby certify that copies of the foregoing decision were mailed this date, postage prepaid, to Property Tax Research Company and Joseph M. Kerrigan, Esq., Counsel for Dining and Kitchen Administration, Inc., Taxpayer; and Chairman, Board of Assessors, City of Keene.

Dated: January 25, 1995

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Valerie B. Lanigan, Clerk