

Cheney East Corporation

v.

Town of Newmarket

Docket No.: 10016-90

Cheney Enterprises, Inc.

v.

Town of Newmarket

Docket No.: 10017-90

DECISION

The "Taxpayers" appeal, pursuant to RSA 76:16-a, the "Town's" assessments on 14 properties consisting of 518 apartments. The assessments on the apartment buildings totaled \$12,851,400. The department of revenue calculated the Town's equalization ratio at 62% for 1990, and the parties agreed the ratio represented the general level of assessment in the Town. Thus, the equalized values totaled \$20,728,064. Attached Appendix A is a list of the appealed properties. The Taxpayers also own two vacant lots that have been approved for a total of 158 additional apartment units, and the Taxpayers' Lot U4-4-11, while partially developed, has approval for 60 more units. These assessments are listed on attached Appendix B.

The Taxpayers have the burden of showing the assessments were disproportionately high or unlawful, resulting in the Taxpayers 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 Taxpayers carried this burden and proved disproportionality.

For the reasons stated below, the appeals are granted. The ordered assessments are based upon the Town's analysis of the Taxpayers' income analysis. No adjustment has been made for the asserted but unproven underassessment of the Taxpayers' nonappealed properties.

Taxpayers' Position

The Taxpayers based their arguments on several appraisals that relied solely on the income approach. The value estimates of those appraisals are listed on attached Appendix C. The Taxpayers asserted the total assessments on the apartment buildings should be \$7,993,040.

Town's Position

The appealed assessments were based on the Town's 1984 revaluation, and the assessments were arrived at using the cost approach. The Town, in municipality Exhibit A, recalculated the assessments using the cost-approach analysis (50%) and the Town's adjustments to the Taxpayers' income-approach analysis (50%). The Town's correlation of values is shown on attached Appendix E (with some math corrections).

The Town also argued the Taxpayers' nonappealed properties were underassessed, and therefore, the overassessments of the apartment buildings should be offset by the underassessment of the nonappealed properties. The Town's analysis on this issue is presented in municipality Exhibit A, page 14-A, and the Town's conclusions are summarized on attached Appendix B. Again, the Town used a weighted analysis, applying 50% weight to the land as

originally assessed and 50% to the land as assessed based on the analysis presented on page 14-A.

Issues

The following issues must be addressed to decide this appeal:

- (1) what is the appropriate approach to value?;
- (2) what values are yielded using the chosen approach?; and
- (3) should the overassessment of the apartment buildings be reduced based on the asserted underassessment of the Taxpayers' nonappealed properties?.

In summary, we decide:

- (1) the income approach is the most appropriate valuation approach;
- (2) the Town's analysis of the Taxpayers' income analysis was the best evidence concerning the proper assessments; and
- (3) the Town did not show the Taxpayers' nonappealed properties were underassessed, and thus no set off is due against the overassessment of the apartment buildings.

Selecting the Approach to Value

There are three basic approaches to valuing property;

- 1) the cost approach;
- 2) the comparative-sales approach; and
- 3) the income approach.

Appraisal Institute, The Appraisal of Real Estate 71 (10th ed. 1991); International Association of Assessing Officers, Property Assessment Valuation 38 (1977).

While there are three approaches to value, not all three approaches are of equal import in every situation. The Appraisal of Real Estate 72; Property Assessment Value 38. In New Hampshire, the supreme court has recognized that

no single method is controlling in all cases, Demoulas v. Town of Salem, 116 N.H. 775, 780 (1976), and the tribunal that is reviewing valuation evidence is authorized to select any one of the valuation approaches based on the evidence. Brickman v. City of Manchester, 119 N.H. 919, 920 (1979).

Given the consistent evidence and factors in this appeal, we find the income approach is the most appropriate approach to value because:

- 1) all of the Taxpayers' appraisals were based on the income approach, and those appraisals indicated the cost approach could not be employed due to lack of vacant-land sales and the sales approach could not be used due to lack of comparable sales;
- 2) one of the Taxpayers' appraisers, Mr. Rogers, testified that given the changing market and the lack of other market data, the income approach was the most appropriate approach;
- 3) the Taxpayers' president, Mr. Cheney, testified he was very experienced in the development of and the purchase and sales of apartment buildings and that the income approach was the method of valuation that a prospective purchaser would use;

- 4) the Taxpayers' evidence concerning the construction costs of 11 and 13 Bennett Way were not reflective of those properties' values given the income produced and the changes in economy;
- 5) the real estate market was experiencing dramatic changes, which were best reflected by the income approach; and
- 6) the Town's own assessor indicated the income approach would be the most appropriate approach in a distressed market as there was in 1990. See generally Property Assessment Valuation 203-04.

Furthermore, the Town's assessments were based on 1984 cost figures, and the real estate market had undergone dramatic changes from 1984 to 1990. The 1984 cost approach would not adequately reflect these market changes. In support of this conclusion, Mr. Rogers testified that the cost approach includes an analysis of market data of income and expenses of the general economy to arrive at appropriate economic depreciation factors. The Town's 1984 cost estimates did not include any factors for the 1990 real estate market or overall economy.

Having concluded the income approach is the most appropriate approach, the board now turns to the analysis of the parties' positions.

Analysis of Income Approaches

The Taxpayers' appraisals were all based on the income approach. The Town reviewed these income analyses and made adjustments. The Town's analysis was presented in municipality Exhibit A. The major differences between the Taxpayers' and the Town's analyses was in the following areas. First, the Town adjusted the vacancy rates, management fees, utilities, maintenance and repair costs to estimates based on market data rather than on the actual figures for the specific property. Second, the Taxpayers' appraisers treated the property taxes as an expense while the Town did not include the taxes as an expense but

rather added the effective tax rate to the capitalization rate. Third, the Taxpayers' appraisals were not estimates as of the assessment date, and the Town used a time-adjustment factor to calculate all values as of April 1, 1990.

We find the Town's methodology to be appropriate. First, in valuing property, appraisers and assessors should use market income and expense data. Property Assessment Valuation 42, 204-05 (use market\economic rents), 212 (use market vacancy rates), 215 (use reasonable and typical expenses); see also Demoulas, 116 N.H. at 781. Second, property taxes should not be expensed but rather the tax rate should be added to the capitalization rate. This is the appropriate methodology for valuing property in tax appeals because property taxes are a large expense item, and the taxes are the matter under dispute. Thus, expensing the taxes, which is the basis of the appeal, discredits the entire approach. Property Assessment Valuation 218, 240-243 (discusses why property taxes should not be expensed but rather why the effective tax rate should be added to the capitalization rate). Third, and this issue was not disputed by the Taxpayers, pursuant to RSA 75:8 and RSA 74:1, all valuations must be as of April 1 of the year appealed. The Taxpayers' appraisals were not, and had to be time adjusted to April 1, 1990.

Having agreed with the Town's adjustments to the Taxpayers' income analysis, we find the proper assessments on the apartments should be the Town's income estimates as shown on Appendix E. (Note: the Town presented a weighted or blended analysis, using both the cost approach of the assessment and the revised Taxpayers' income approach. However, since the board concludes the income approach is the more appropriate approach, the blended approach cannot be used because it included the cost approach, which the board has not accepted as reliable.)

Town's Asserted Undervaluation of Land

On page 14-A of municipality Exhibit A, the Town presented an analysis that it claimed showed the Taxpayers' nonappealed land was underassessed. The Town then argued this underassessment should offset any overassessment of the apartment buildings. The Town is correct that the board is required to review the Taxpayers' entire estate. Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985). However, based on the evidence, the board finds the Taxpayers' nonappealed land was not underassessed.

The Town argued the Taxpayers' land had been assessed as raw land when in fact the land had been approved for multi-unit development. The Town, therefore, argued the land was underassessed. The Town's position was based on the following calculations:

- 1) a \$20,000, per-unit total assessed value (land and building components);
- 2) a 4-to-1 building-to-land ratio; and
- 3) the average between the original, per-unit assessment and the revised, per-unit assessment.

Based on this analysis, the Town arrived at a \$4,000 land factor per-unit, but this land factor was reduced on the specific parcels based on the Town's blended assessment calculation. The Town's calculations are shown on page 14-A of municipality Exhibit A, and the summary is presented on attached Appendix B.

Unfortunately, there were no comparable land sales in the Town during the time under review. Thus, the Town used another methodology in trying to make its point. We find, however, the Town did not make its point for the following reasons.

1) The Taxpayers' president, Mr. Cheney, testified he did not think, in his professional opinion, the land could be sold during this particular market time for the per-unit value asserted by the Town.

He also indicated he had tried to sell certain lots to abutters at \$350 per-unit but he could not find any takers.

2) As shown by the lack of any land sales, there was no activity of land for the development of multi-unit properties.

3) Because no one was building new, multi-unit buildings, it was inappropriate to use a developed, per-unit value to arrive at a raw land value when the market information and general condition of the economy did not support that use of the land. In other words, the Town's methodology might be appropriate if the evidence had shown there was a market for this land for present or future development.

The evidence proved the contrary. Therefore, adjustments would be required to reflect the holding time and costs and the possibility of extending the approvals.

Given all of the uncertainties with the Town's approach, we find the Town did not show that the Taxpayers' nonappealed land was underassessed.

Conclusion

Based on the above, the assessments are reduced to those set forth on Appendix D, resulting in a total assessment of \$10,548,100 for the assessments on the apartment buildings. If taxes have been paid, the Town shall refund any taxes paid on assessments in excess of the ordered assessments here, plus the addition of any other assessments for the nonappealed land and other properties not analyzed but also owned by the Taxpayers, e.g. the laundromat on North Main Street.

The amount paid on the value in excess of the taxes shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Pursuant to RSA 76:16-a (Supp. 1991), RSA 76:17-c II, board rule TAX 203.05, and the board's November 3, 1993 order, the Town shall also refund any overpayment for 1991, 1992 and 1993. Until the Town undergoes a general reassessment, the Town shall use the ordered assessment for subsequent years with good-faith adjustments under RSA 75:8. RSA 76:17-c I.

Motions for reconsideration of this decision must be filed within twenty (20) days of the clerk's date below, not the date received. RSA 541:3. The motion must state with specificity the reasons supporting the request, but generally new evidence will not be accepted. Filing this motion is a prerequisite for appealing to the supreme court. RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Ignatius MacLellan, Esq., Member

CERTIFICATION

I hereby certify that the foregoing order has been sent postage prepaid to Michael Cornelius, George R. Moore, Esq., Ralph R. Woodman, Jr., Esq., Edwinna C. Vanderzanden, Esq., and the Chairman, Board of Selectmen, Town of Newmarket.

Dated: January 4, 1994

0008

Valerie B. Lanigan, Clerk

Cheney East Corporation, Docket No.: 10016-90

and

Cheney Enterprises, Inc., Docket No.: 10017-90

v.

Town of Newmarket

ORDER

Due to a typographical error, the board's January 4, 1994 decision is amended to read as follows (revisions underlined):

Page 9, paragraph Conclusion: "resulting in a total assessment of \$10,614,600 for the assessments on the apartment buildings."

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Ignatius MacLellan, Esq., Member

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Cheney East Corporation v. Town of Newmarket

Docket No.: 10016-90

Cheney Enterprises, Inc. v. Town of Newmarket

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CERTIFICATION

I hereby certify a copy of the foregoing order has been mailed this date, postage prepaid, to Michael Cornelius, George R. Moore, Esq., Ralph R. Woodman, Jr., Esq., Edwinna C. Vanderzanden, Esq., and the Chairman, Board of Selectment, Town of Newmarket.

Dated: January 11, 1994

Valerie B. Lanigan Clerk

0001

Cheney East Corporation, Docket No. 10016-90
Cheney Enterprises, Docket No. 10017-90
Moody Point Company, Docket No. 10019-90
Cheney East Corporation and R.E.A., Inc., Docket No. 10021-90

v.

Town of Newmarket

ORDER

This order responds to the "Taxpayers'" motion in limine, requesting the board to decide what tax years are under appeal. The board held a telephone conference on this motion and asked the parties to submit memoranda. A hearing was then held, and the board asked the parties to file supplemental memoranda on issues the board raised that had not yet been briefed.

Succinctly stated, the Taxpayers claim, under RSA 76:16-a I (Supp. 1991, enacted Laws 1991, 386:4; repealed Laws 1992, 175:2) and RSA 76:17-c (Supp. 1992, as amended by Laws 1993, 141:3), the board has jurisdiction over tax years 1990, 1991, 1992, and 1993.¹ The Town disagrees, asserting the Taxpayers only filed for 1990, and the cited statutes do not apply to the Taxpayers' 1990 appeals.

This is the first time the board has addressed this issue in any appeal.

¹ The Taxpayers argued the board had jurisdiction over tax years 1990 - 1992. The 1993 tax bills were mailed October 22, 1993, and thus, we assume the Taxpayers want the board to have jurisdiction over 1993.

The board's decision will have significant impact on all pending board appeals.

Thus, the board has done extensive research and analysis and writes at length here.

This order has two basic parts: 1) explanation of the board's analytical approach; and 2) application of the approach. This format is used because it is consistent with how the board prepared for and reviewed this motion. Here is an outline of this order.

- I. Introduction
 - II. Statutory History
 - III. Legislative History
 - VI. Rules of Statutory Interpretation and Construction
- V. Analysis and Discussion
 - VI. Conclusion

Finally, to assist the reader, an appendix has been included, which includes the statutes and other documents at issue here.

I. INTRODUCTION

On May 6, 1991, the Taxpayers appealed to the board pursuant to RSA 76:16-a (Supp. 1990) attached as Appendix A. The Taxpayers did not appeal any tax year after 1990. As shown below, the statutes governing tax appeals have changed several times while the Taxpayers' appeals were pending, and the Taxpayers seek the benefits of the new statutes. Specifically, the Taxpayers have asserted they are entitled to the benefit of the so-called "Rollover Provision" in RSA 76:16-a I (Supp. 1991, enacted Laws 1991, 386:4; repealed Laws 1992, 175:2 attached as Appendix B and C) and the so-called "Subsequent-Years Statute" in RSA 76:17-c (Supp. 1992, as amended by Laws 1993, 141:3). The Taxpayers argued the board has jurisdiction over tax years 1990, 1991, 1992 and 1993. The sole issue to now be decided is whether the Taxpayers are correct.

II. STATUTORY HISTORY

The following is the statutory history on this issue.

A. Prior to July 2, 1991 - Taxpayers were required to file an appeal each year.

Expired Tax 201.01 ("Decisions of the board apply only to the year appealed. Separate appeals shall be filed for successive years."); see RSA 75:8 (annual inventory and assessment); Appeal of Town of Sunapee, 126 N.H. 214, 216 (1986) (board limited by statute and taxpayer's original request to municipality); Appeal of Net Realty Holding Trust, 128 N.H. 795, 799-800 (1986) (discusses assessments as a yearly matter); Appeal of Public Service Company of New Hampshire, 120 N.H. 830 (1980) (discusses effect of prior year appeals).

B. Effective July 2, 1991 - March 31, 1992 - The Rollover Provision was added and then repealed. Enacted Laws 1991, 386:4; repealed Laws 1992, 175:2.

The RSA 76:16-a I Rollover Provision provided:

Property owners who have appealed a tax assessment to the board of tax and land appeals and who receive a tax bill for a subsequent year prior to the time the board of tax and land appeals has acted on the original appeal shall be automatically considered as having appealed the subsequent bill and no further filing fee shall be required.

C. Effective April 1, 1992 - The Subsequent-Years Statute was added and made applicable to tax bills mailed after April 1, 1992. Laws 1992, 175:4.

Basically, RSA 76:17-c, did the following:

- 1) municipalities must, until a revaluation occurs, use the board's ordered assessment for future years but with good faith adjustments (RSA 76:17-c I);
- 2) for tax years that lapsed while the appeal was pending, municipalities must use the ordered assessment with good faith adjustments and make abatements for subsequent years even if no abatement application or appeal was filed for the subsequent years (RSA 76:17-c II); and
- 3) until a revaluation occurs, the superior court and the board retain jurisdiction over abatements granted under RSA 76:16-a and RSA 76:17 (RSA 76:17-c III).

D. Effective May 17, 1993 - The Subsequent-Years Statute's applicability date was changed from tax bills mailed after April 1, 1992 to tax bills mailed after April 1, 1993. Laws 1993, 141:3.

III. LEGISLATIVE HISTORY

The board conducted an extensive search of legislative documents to determine what, if any, guidance the legislative history could provide.

A. The Rollover Provision

The Rollover Provision was added in the conference committee. Thus, with the exception of the committee's report and the bill's amended analysis, there was no documented legislative history. The committee report and amended analysis, attached Appendix D and E, stated: "The bill also specifies that a person must pay only one filing fee for each appeal to the board of tax and land appeals." The Rollover Provision as passed, however, did more than indicated by the analysis because the enacted provision also stated the taxpayer was considered as having automatically appealed. Thus, the statute as passed prevails over the committee's notes and the amended analysis.

B. The Subsequent-Years Statute

The Subsequent-Years Statute was introduced specifically to clarify and to replace the Rollover Provision. The bill's sponsor, Representative Richard Grodin, stated the bill "attempts to clear up unexpected consequences of committee of conference last year." Attached Appendix F. The Subsequent-Years Statute was enacted and the Rollover Provision was simultaneously repealed.

The original Subsequent-Years Statute was applicable to all appeals based on tax bills mailed after April 1, 1992. Before enactment, the board of tax and land appeals' Chairman, George Twigg, III, wrote Representative Grodin to seek a change of the applicability date to tax bills mailed after April 1, 1991, but that change was not made. The following legislative session, the applicability provision of the Subsequent-Years Statute was changed to April 1, 1991. Laws 1993, 141:3, effective May 17, 1993 attached as Appendix G.

IV. RULES OF STATUTORY INTERPRETATION AND CONSTRUCTION

A. General Rules

The board will apply the following general rules of statutory

interpretation

and construction.

The board must first look to the statute's language and consider the statute's plain meaning. Rix v. Kinderworks Corp., 136 N.H. 548, 550 (1992); Town of Gilsum v. Monadnock Regional School District, 136 N.H. 32, 36 (1992).

If the language is clear and unambiguous, the board must apply such interpretation and not modify it by construction. State v. Dushame, 136 N.H. 309, 313 (1992); Penrich, Inc. v. Sullivan, 136 N.H. 621, 623 (1993).

The board must read the language at issue in the context of the entire statute and the statutory scheme. Barksdale v. Town of Epsom, 136 N.H. 511, 514 (1992); Great Lakes Aircraft Co., Inc. v. City of Claremont, 135 N.H. 270, 277 (1992).

The statute's words are the touchstone of the legislature's intention. Thus, the legislative intent is based not on what the legislature might have intended, but rather, on what was stated in the statute. Dushame, 136 N.H. at 314.

In determining legislative intent and in construing a statute, the basic purpose -- the problem the statute was intended to remedy -- should be considered. Inquiry must be made into the statute's declared purpose and essential characteristics. Rix, 136 N.H. at 550; American Automobile Association v. State, 136 N.H. 579, 585 (1992).

If a statute is unambiguous, the legislative history should not be examined or considered. State v. Gagnon, 135 N.H. 217, 221 (1991).

If, and only if, a statute is ambiguous, the board may resort to the statute's legislative history. Appeal of Public Service Company of New Hampshire, 125 N.H. 46, 52 (1984).

If a statute is ambiguous, legislative history can be a valuable aid in ascertaining the intended meaning of a statute. King v. Sununu, 126 N.H. 302, 307 (1985).

B. Rules Concerning Applicability and Remedial Statutes

"[The] presumption of prospectivity [of statutes] is reversed *** when the statute is remedial in nature or affects only procedural rights. In that case, retrospective application is not unjust." Eldridge v. Eldridge, 136 N.H. 611, 613 (1993) (citations omitted).

The abatement statutes are remedial statutes and are to be liberally construed. Dewey v. Stratford, 40 N.H. 203, 207 (1860).

V. ANALYSIS AND DISCUSSION

This section presents the board's analysis of the issues presented by the motion, using the above-stated principles.

A. Inapplicability of pt. I, art. 23 of the N.H. Constitution

Determining whether the Rollover Provision and the Subsequent-Years Statute apply retrospectively or prospectively does not involve any consideration of pt. I, art. 23 of the New Hampshire Constitution, which generally prohibits the retrospective application of statutes. As the board indicated at the hearing, the Town is not protected by pt. I, art. 23 because the article guarantees the individual rights and does not provide protection to a municipality. E.g., Nottingham v. Harvey, 120 N.H. 889, 898 (1980); Hodge v. Manchester, 79 N.H. 437, 438 (1920). Therefore, this order will not further address pt. I, art. 23. There will, however, be a discussion concerning whether the retrospective application of the Rollover Provision and the Subsequent-Years Statute results in a violation of pt. I, art. 28-a of the New Hampshire Constitution, which prohibits unfunded state mandates.

B. The Retrospective Application of the Rollover Provision

1. Presumption in Favor of Retrospective Application

The board concludes the Rollover Provision retrospectively applies to the Taxpayers' 1990 appeals even though they were pending when the Rollover Provision was enacted.

The Rollover Provision is a remedial statute, i.e., it provides a procedure for tax abatements. See Dewey v. Stratford, 40 N.H. at 207. Therefore, we must presume the Rollover Provision applies retrospectively to appeals pending on the effective date but for which no decision had been issued. See, e.g., Eldridge, 136 N.H. at 613. The board was unable to find any statutory wording, legislative history, or caselaw to overcome this presumption. Moreover, the Rollover Provision's wording and the problem the Rollover Provision was to remedy clearly support retrospective application. The Town's argument -- that the Rollover Provision should only be applied prospectively to appeals filed after the effective date -- while an interesting argument, cannot succeed

because of the presumption of retrospective application, the wording of the provision, and the legislative intent.

2. Words of Rollover Provision

The Rollover Provision states:
Property owners who have appealed a tax assessment to the board of tax and land appeals and who receive a tax bill for a subsequent year prior to the time the board of tax and land appeals has acted on the original appeal shall be automatically considered as having appealed the subsequent bill and no further filing fee shall be required. (Emphasis added.)

Looking at the underlined language within the context of the abatement process shows the legislature intended the Rollover Provision to apply to pending appeals. The Rollover Provision assumes a taxpayer has already taken an action

-- appealed -- and after appealing, receives another tax bill before the board has decided the taxpayer's original appeal. In such circumstance, the legislature decided the taxpayer should not be required to appeal again. Thus, the plain meaning of the provision supports retrospective application.

Grammatically, the clause "who have appealed" is the perfect tense, meaning "[a]n action begun earlier and still relevant at a later time." Millward, Handbook for Writers 17 (1980); see also Jaderstrom, Professional Secretaries Complete Office Handbook 504 (1992); Barrons, A Pocket Guide to Grammar 22 (1990) attached as Appendix H. Thus, the Taxpayers' earlier action -- appealing -- still has significance because the board had not yet decided the appeal. This interpretation is consistent with the verb tense concerning receipt of a tax bill ("receive"). The Rollover Provision was enacted to apply to taxpayers who had already appealed, had not yet received a decision, and who, subsequent to a decision, received another tax bill. Therefore, grammatically, the Rollover Provision's wording supports retrospective application to pending appeals.

3. Retrospective Application Addresses the Problem Sought to be Solved

The Rollover Provision was enacted to address the delay created by the board's backlog. Specifically, the dramatic increase in appeals caused a three-year delay before the board could hear and decide an appeal.² The legislature was concerned with this delay, especially since taxpayers had to annually appeal and pay another filing fee even though the taxpayer was not responsible for the delay. The Rollover Provision was the legislature's attempt to address the problem and only retrospective application of the Rollover Provision can solve the problem. To apply the Rollover Provision prospectively would not address the mischief intended to be addressed. We note the legislature's intention to address a delay problem was consistent with part 1, article 14 of the New Hampshire Constitution, which requires that legal remedies be prompt.

4. Retrospective Application is Just Result

As stated in Eldridge, 136 N.H. at 613, "In the final instance, the question of retrospective application rests on a determination of fundamental fairness, because the underlying purpose of all legislation is to promote justice." Using the statute's language, the legislative intent, the constitutional mandate, and the justice standard, retrospective application is appropriate.

5. Retrospective Application Given the Taxpayers' Circumstances

² The following demonstrates the dramatic change in the board's caseload.

Calendar Year	Tax Cases Disposed	Tax Cases Filed	Tax Cases Pending
1986	251	241	N/Available
1987	248	433	N/Available
1988	450	512	674
1989	572	1708	1771
1990	1093	2575	2842
1991	1574	2488	4844
1992	2688	1826	3117

Retrospective application is reinforced when these Taxpayers' specific situations are examined. The Taxpayers' 1990 appeals were filed on May 6, 1991, before the Rollover Provision was effective. However, for the 1991 tax year, the Rollover Provision was in effect until it was repealed on April 1, 1992. Thus, when the Taxpayers received their 1991 tax bill on October 30, 1991, and examined the abatement statutes, the Rollover Provision would: a) have been in the statute book; and b) would have been effective when the Taxpayers would have been required to file their RSA 76:16 abatement application with the Town. (The RSA 76:16 filing deadline for 1991 tax year was December 30, 1991. The filing deadline with the board was June 29, 1992, and the Rollover Provision was repealed on April 1, 1992.) The Taxpayers, however, would not have been entitled to appeal to the board because filing an RSA 76:16 abatement application with the Town was and is a prerequisite for appealing to the board or the superior court. In summary, taxpayers who had appealed in 1990 and had reviewed the statutes after receiving their 1991 tax bill could have reasonably concluded they were not required to file an application with their municipality or to appeal with the board. Therefore, retrospective application of the Rollover Provision is fair to the taxpayers while prospective application would be unfair.

6. Conclusion on Retrospectivity of Rollover Provision

It is interesting to read the first full paragraph on page 615 in Eldridge and compare that analysis and discussion with the situation presented here. In Eldridge, the question was the retrospective application of a child-support statute. The court's discussion can be used here by analogy. In Eldridge, the court stated the defendant's child-support obligations preexisted the new child-support statute, and thus, the new statute only affected the procedure whereby the preexisting duty would be addressed. In other words, the child-support statute did not create a new obligation but rather created a new procedure whereby that obligation could be addressed in court. The same situation exists here. The municipalities have always had an obligation to

fairly and proportionately assess properties and tax property owners. N.H. CONST. pt. I, art. 12; pt. II, art. 5; pt. II, art. 6; RSA 75:1, 8; RSA 76:16, 16-a, 76:17; Appeal of Andrews, 136 N.H. 61, 64-65 (1992); Amoskeag Manufacturing Co. v. Manchester, 70 N.H. 200, 202-03, (1899). The Rollover Provision, therefore, did not place any new obligation on the Town. Rather, the Rollover Provision simply created a new procedural remedy for taxpayers who claimed they had been overassessed.

All of the above analysis establishes the Rollover Provision applies retrospectively to appeals pending on the statute's effective date. To conclude otherwise: a) would be contrary to the presumption of retrospective application of remedial statutes; b) would be contrary to the plain language; c) would not solve the problem sought to be solved; and d) would not be the most just and fair result.

C. The Subsequent-Years Statute

The board has concluded that the Taxpayers' 1991 taxes were governed by the Rollover Provision and thus are before the board. However, the Rollover Provision was repealed on April 1, 1992, and the Subsequent-Years Statute was enacted. Therefore, does the Subsequent-Years Statute apply to the Taxpayers' appeal? Based on the clear legislative intent, we conclude the Subsequent-Years Statute applies to the 1992 and 1993 tax years.

The statutory and legislative history demonstrate the Subsequent-Years Statute was enacted to replace the Rollover Provision. The Subsequent-Years Statute was enacted as part of the bill that also repealed the Rollover Provision. See page 4. The sponsor of the Subsequent-Years Statute stated it was intended to "clear up unexpected consequences of committee of conference last year." This was a reference to the Rollover Provision, which was added in the previous year's committee of conference without any input from the board and without any thoughtful consideration of the various issues raised by such a provision.

The legislature's change in the Subsequent-Years Statute's applicability

confirms the retrospective application. Originally, the Subsequent-Years Statute applied only to tax bills mailed after April 1, 1992. This was changed to April 1, 1991, after the legislature discovered a gap existed between the repeal date of the Rollover Provision and the applicability date of the Subsequent-Years Statute. Specifically, some 1991 appeals that were filed after April 1, 1992, (the date of the Rollover Provision's repeal) were not governed by any statute concerning subsequent years. Thus, in 1993, the legislature amended the applicability date of the Subsequent-Years Statute so it would apply to appeals based on tax bills mailed after April 1, 1991. This action, along with the sponsor's comments and the simultaneous enactment of the Subsequent-Years Statute and the repeal of the Rollover Provision, shows the legislature intended the Subsequent-Years Statute to, in essence, replace the Rollover Provision and apply to all pending 1991 and 1992 appeals.

This conclusion is supported by a look at the deadlines for 1991 appeals.

The new applicability date was effective May 17, 1993, and the last date for filing a 1991 appeal with the board from any municipality was September 1992. Thus, only pending appeals would be affected by the Subsequent-Years Statute. This demonstrates the legislature's clear intent to have the Subsequent-Years Statute apply to all pending 1991 appeals.

The Rollover Provision stated that taxpayers with a pending appeal "shall be automatically considered as having appealed ***." Therefore, the Taxpayers, pursuant to the Rollover Provision, were considered as having appealed their 1991 taxes, which triggered the Subsequent-Years Statutes for tax years 1991, 1992 and 1993.

D. Discussion on Pt. 1, Art. 28-a of the New Hampshire Constitution

The final issue to be addressed is whether retrospectively applying the Rollover Provision and the Subsequent-Years Statute violates pt. I, art. 28-a of the New Hampshire Constitution, which prohibits the state from mandating "any new, expanded or modified programs or responsibilities ***," except in

limited circumstances not applicable here.³ The board concludes retrospective application does not violate pt. I, art. 28-a because neither statute created "any new, expanded or modified programs or responsibilities ***." Before the statutes were enacted, the Town had a preexisting duty to proportionally assess taxes. N.H. CONST. pt. I, art. 12; pt. II, art. 5; pt. II, art. 6; RSA 75:1, 9; RSA 76:16, 16-a, 17; Appeal of Andrews, 136 at 64-65; Amoskeag, 70 N.H. at 202-03. The statutes have only changed the procedure whereby the taxpayers can challenge the municipalities fulfillment of this duty. Thus, we find the retrospective application does not violate the pt. I, art. 28-a prohibition.

VI. CONCLUSION

Based on the above analysis, the board concludes it has jurisdiction over tax years 1990 through 1993. Such jurisdiction, however, must be exercised in accordance with the Rollover Provision, the Subsequent-Years Statute and the board's rule Tax 203.05. Thus, if a hearing is required on this matter, the board will conduct its hearing in accordance with the cited statutes and rules.

³ The issue raised in this discussion does not concern whether the statutes are constitutional in their entirety but rather whether part 1, article 28-a requires interpreting these statutes in a particular manner. The board concludes performing such an analysis is within the board's jurisdiction.

The parties shall inform the board as soon as practicable as to whether the scheduled November 18th and 19th hearing will be required given the decision reached here.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Paul B. Franklin, Member

Ignatius MacLellan, Esq., Member

Michele E. LeBrun, Member

CERTIFICATION

I hereby certify that a copy of the foregoing order has been mailed this date, postage prepaid, to Michael Cornelius of The Cheney Companies, Ralph Woodman, Jr., Esq., Attorney for Taxpayers; and Edwinna C. Vanderzanden, Esq. and George R. Moore, Esq., Attorneys for Town of Newmarket.

Dated: November 3, 1993

Valerie B. Lanigan, Clerk

APPENDIX

- A. RSA 76:16-a (Supp. 1990)
- B. RSA 76:16-a I (Supp. 1991)
- C. Laws 1991, 386:4 (SB 180-FN)
Laws 1992, 175:2 (HB 1405)
- D. Rollover Provision Committee Report dated April 24, 1991 on Laws 1991,
ch. 386 (SB 180-FN)
- E. Rollover Provision Amended Analysis on Laws 1991, ch. 386 (SB 180-FN)
- F. Representative Grodin's statement on Subsequent-Years Statute dated
January 9, 1992 (Laws 1992, ch. 175) (HB 1405)
- G. Laws 1993, 141:3 (HB 645-FN)
- H. Excerpts from:
Millward, Handbook for Writers 17 (1980)
Jaderstrom, Professional Secretaries Complete Office Handbook 504 (1992)
Barrons, A Pocket Guide to Grammar 22 (1990)

Cheney East Corporation, Docket No.: 10016-90

and

Cheney Enterprises, Docket No.: 10017-90

v.

Town of Newmarket

ORDER

This order responds to the "Town's" rehearing motion, which is denied.

The motion raised three issues:

- (1) the board erred in its November 3, 1993 order by concluding the board had jurisdiction over tax years subsequent to 1990;
- (2) the board erred by excluding the Town's evidence concerning mortgages on the appealed properties and by limiting cross-examination concerning the mortgages; and
- (3) the board erred in finding the nonappealed properties were not underassessed.

Years Under Appeal

The board finds the rehearing motion failed to specify any error in law or in fact, and thus the board denies the motion on this issue. The board directs the parties to the board's original order, which presented a detailed analysis on this issue.

Exclusion of Mortgages and Limitation on Cross-Examination

At the hearing on the merits, the board did not permit the Town to introduce certain mortgages that were recorded against the properties. The board also precluded the Town from cross-examining the Taxpayers' witnesses about the mortgages. The Town claimed the board erred in these evidentiary rulings. The board finds the rehearing motion failed to specify any error in law, and thus the board denies the motion on these issues.

The board is not "bound by the strict rules of evidence adhered to in the superior courts ***." RSA 71-B:7; see also RSA 541-A:18 II; Tax 201.30(a). The board may "exclude irrelevant, immaterial or unduly repetitious evidence."

RSA 541-A:18; Tax 201.30(c). The board's administrative rules state the board may look to the rules of evidence for guidance in ruling on objections. Tax 201.30(b). Based on the statutes, rules, and the issues before the board, the board excluded the mortgages as irrelevant. See Rule 401 and Rule 402 of the NH Rules of Evidence (hereinafter "Rules of Evidence"). Even if the evidence was relevant, it was properly excluded because admitting such evidence would have been a waste of time requiring a trial within a trial.

The mortgages were irrelevant because under RSA 75:1, the assessment standard is market value not mortgage value. See Public Service Company of N.H. v. Town of Seabrook, 126 N.H. 740, 742 (1985). Market value is determined by using the three approaches to value: (1) comparative sales; (2) cost; and/or (3) income. See Town of Croydon v. Current Use Advisory Board, 121 N.H. 442, 446 (1981). The board, in its decision, concluded the income approach was the best approach in this case. Mortgages are not evidence of market value, but rather are evidence of financing arrangements with numerous variables. To the extent

these mortgages were financing arrangements or refinancing arrangements, they would have no relation to market value but would go more to the borrower's financial condition and the economy's general decline. In this case, the Taxpayers' president, Mr. Cheney, stated the mortgages were irrelevant because they were not purchase-money mortgages but rather were mortgages for refinancing. Additionally, some mortgages were blanket mortgages, i.e., they covered several properties rather than a single property.

Concerning the issue of a trial within a trial, Mr. Cheney testified that if the mortgages had been introduced as evidence, he would have been required to explain in detail all of the circumstances involved in each mortgage such as the company's financial condition at the time the mortgage was entered into, the bank's requirement for the mortgage, and such other factors as would be relevant to explain the amount of the mortgage. Mr. Cheney also testified some of the mortgages were entered into under duress when banks threatened to put the company into bankruptcy if the mortgages were not executed.

Given these factors, the mortgages were not relevant to the determination of the properties' values, and if relevant, the mortgages were properly excluded because of the requirement for a trial within a trial for each mortgage that the Town wanted to rely upon.

Concerning the board's limitation on cross-examination, "[c]ross-examination must be allowed only to the extent necessary for a full and fair disclosure of the facts." Petition of Sprague, 132 N.H. 250, 258 (1989); RSA 541-A:18 IV. The Town was given ample opportunity to cross-examine the Taxpayers' witnesses on all relevant issues, but the board did not permit cross-

examination on the excluded mortgages or the circumstances surrounding those mortgages. This restriction was placed on the cross-examination because such examination was not relevant or necessary for the "full and fair disclosure of the facts." Id. The board has discretion to control cross-examination, see Petition of Sprague, 132 N.H. at 260, and the board properly exercised that discretion.

To the extent the Town claims the cross-examination would have shown the Taxpayers' witnesses' prior inconsistent statement, we fail to see how those prior statements would have affected the board's decision. Quite frankly, the board is not always concerned about what a taxpayer says a property is worth; we are concerned, however, with what the market demonstrates a property is worth. Even if we assume the Taxpayers had previously stated the properties were worth more, we fail to see how such statements would have been factored into the valuation analysis, especially when we based our analysis on the Town's analysis.

In addition to the above analysis, the board finds the exclusion of the mortgages and the limitation on cross-examination do not warrant a rehearing or revision of the decision because the Town did not, in its rehearing motion, contest the board's valuation analysis. In other words, even if the board erred, it was a harmless error. If the board granted a rehearing to allow the introduction of the mortgages and to allow further cross-examination, the decision would not change because the decision was based on the best market data and analysis available to the board.

Underassessment of Nonappealed Properties

The Town claims the board erred in finding the Taxpayers' nonappealed properties were not underassessed. The board finds the rehearing motion failed to specify any error in law or in fact, and thus the board denies the motion on this issue.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Ignatius MacLellan, Esq., Member

CERTIFICATION

I hereby certify that a copy of the foregoing order has been mailed this date, postage prepaid, to Michael Cornelius of Cheney East Corporation and Cheney Enterprises, Taxpayers; Ralph Woodman, Jr., Esq., Attorney for Taxpayer; George R. Moore, Esq. and Edwinna C. Vanderzanden, Esq., Attorneys for the Town of Newmarket.

Date: February 2, 1994

Valerie B. Lanigan, Clerk

Cheney East Corporation, Docket No.: 10016-90

and

Cheney Enterprises, Docket No.: 10017-90

v.

Town of Newmarket

ORDER

This order responds to the "Taxpayers'" rehearing motion, which is denied. The Taxpayers asserted the board erred by adopting the "Town's" income analysis instead of accepting the Taxpayers' income analysis. The board finds no error in its decision.

Arriving at a proper assessment is not a science but is a matter of informed judgment and experienced opinion. See Brickman v. City of Manchester, 119 N.H. 919, 921 (1979). This board, as a quasi-judicial body, must weigh the evidence and apply its judgment in deciding upon a proper assessment. Paras v. City of Portsmouth, 115 N.H. 63, 68 (1975); see also Petition of Guimm, ___ N.H. ___ (Dec. 17, 1993) (administrative board may use expertise and experience to evaluate evidence).

While the board's decision recited three factors that supported the board's selection of the Town's income analysis over the Taxpayers' income analysis, the board must stress that its decision was not based solely on the enumerated

factors but was based on the board's review of the evidence, including the

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witnesses' testimony. Mr. Blais, the Town's expert, was a very credible witness, and the board found his analysis to be the most persuasive and reliable. Additionally, while the Taxpayers presented the testimony of one appraiser, they did not present the other appraiser who had performed some of the appraisals. Therefore, while the decision recited specific reasons for adopting the Town's income analysis, the board did not base that conclusion solely on the three factors stated in the decision.

Concerning the three factors listed in the decision and the Taxpayers' motion on those factors, the board has a comment on the first factor - - whether actual income and expense figures should have been used as compared to market income and expense figures. First, the board is aware that Demoulas v. Town of Salem, 116 N.H. 775, 781 (1976), does not hold that actual income figures are not relevant and cannot be relied upon. However, the board found in these appeals that market income and expense figures were more reliable for several reasons. First, under RSA 75:1, the assessment standard is market value. Thus, market income and expense information are generally more helpful in finding market value because such data is based on the market and not just on a particular property's income and expenses. See also International Association of Assessing Officers, Property Assessment Valuation 42, 204-05 (use market/economic rents), 212 (use market vacancy rents), 215 (use reasonable and typical expenses) (1977). Secondly, the Taxpayers indicated that the years under appeal were difficult

economic times for their respective companies, and thus, the board was concerned about whether the Taxpayers' actual income and expense figures were reflective of market income and expenses given the Taxpayers' economic distress.

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Specifically, the Taxpayers were threatened with foreclosure on some of the properties, and it was appropriate for the board to rely on market income and expense data to ensure the Taxpayers' financial difficulties were not affecting the estimation of values.

For the reasons stated above, the board finds the Taxpayers' rehearing motion fails to state any error in law or in fact, thus, the motion is denied.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Ignatius MacLellan, Esq., Member

CERTIFICATION

I hereby certify that a copy of the foregoing order has been mailed this date, postage prepaid, to Michael Cornelius of Cheney East Corporation and Cheney Enterprises, Taxpayers; Ralph Woodman, Jr., Esq., Attorney for the Taxpayers; George R. Moore, Esq. and Edwinna C. Vanderzanden, Esq., Attorneys for the Town of Newmarket.

Valerie B. Lanigan, Clerk

Date: February 2, 1994
0009

Docket No.: 10019-90, Moody Point Company
Docket No.: 10021-90, Cheney East Corporation and Real Estate Advisors, Inc.
Docket No.: 10016-90, Cheney East Corporation
Docket No.: 10017-90, Cheney Enterprises, Inc.

v.

Town of Newmarket

ORDER

This order relates to the "Town's" November 22, 1993, rehearing motion. The board grants the Town's request concerning reserving an order on the rehearing motion. The board will respond to the rehearing motion in the board's response to any other rehearing motion(s) that may be filed after the board issues the valuation decision. This will allow the Town to file only one appeal if an appeal is sought.
SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Ignatius MacLellan, Esq., Member

I hereby certify that copies of the within Order have this date been mailed, postage prepaid, to Michael Cornelius, George R. Moore, Esq., Ralph R. Woodman, Jr., Esq., Edwinna C. Vanderzanden, Esq. and the Chairman, Selectmen of Newmarket.

Date:

Valerie B. Lanigan, Clerk

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