

**Pagata Association**

**v.**

**City of Dover**

**Docket Nos.: 12063-91PT and 13214-92PT**

**DECISION**

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "City's" 1991 assessment of \$1,127,900 (land \$153,300; buildings \$974,600) and 1992 assessment of \$1,959,000 (land \$535,900; buildings \$1,423,100) on a 19.64-acre lot with a building known as the Friendship Inn (the Property). For the reasons stated below, the appeal for abatement is granted for the 1991 tax year and denied for the 1992 tax year.

The Taxpayer has the burden of showing the assessment was 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).

The Taxpayer argued the assessment was excessive because:

- (1) the Property is an 81-unit motel in fair to poor condition;
- (2) the building was assessed using a replacement cost approach, which does not reflect market value for motels;
- (3) a September 1993 appraisal estimated the market value to be \$800,000;

Page 2  
Pagata Association v. City of Dover  
Docket Nos.: 12063-91PT & 13214-92PT

- (4) the fair market value as of April 1, 1991 was \$1,200,000 and \$750,000 as of April 1, 1992; and
- (5) the Property sold in August 1994 for \$810,000 including furniture, fixtures and business value.

The City argued the assessment was proper because:

- (1) the Property has transferred numerous times over the last several years and the most recent sale was not an arm's-length transaction;
- (2) the sale price that was established in 1982 from the Ramada to N.E. Lodging was analyzed and the sale had an adjusted sale price of \$1,098,000 - the adjusted sale price as of 1991 was \$2,000,000 giving an assessed value of \$1,127,900 (or 56% assessment to sale price); the City recommended reducing the 1991 assessment to \$1,000,000 to give a 50% assessment ratio;
- (3) in 1992, a general reassessment of all property in the City was performed and the value determined for 1992 was through a market-driven cost approach and in addition an income approach was performed;
- (4) a comparison of another hotel/motel facility in the City shows that the City has applied the same levels of consistency in determining income and expenses;
- (5) the Taxpayer's appraisal has not been trended backwards and there is no evidence of the information being correlated to either of the assessment dates; and
- (6) the income approach supports the assessed value as of April 1, 1992 based on the information collected during the revaluation.

Page 3

Pagata Association v. City of Dover  
Docket Nos.: 12063-91PT & 13214-92PT

#### **Board's Rulings**

Based on the evidence, the board finds the proper 1991 assessment to be \$1,015,110 and finds the Taxpayer failed to prove the 1992 assessment was disproportionate.

There are three approaches to value: 1) the cost approach; 2) the comparable-sales approach; and 3) the income approach. Appraisal Institute, The Appraisal of Real Estate at 71 (10th Ed. 1991); International Association of Assessing Officers, Property Assessment Valuation at 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 at 72;

Property Assessment Valuation at 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 is authorized to select any one of the valuation approaches based on the evidence.

The board did not find the comparable-sales approach to be a valid indicator of the Property's value because while general comparisons can be made, there were too many variables that were not addressed such as adjustments for: 1) location; 2) condition; 3) size (number of rooms); 4) an unexplained category labeled "deductions;" and 5) existence of restaurant, etc. Further, specific information relative to the arm's-length nature or extent of the sales was lacking. For instance, the City stated that Taxpayer's comparable #5 was a land purchase and the building was subsequently raised. Therefore, an adjusted sale price per room is irrelevant in this sale. Other sales utilized were not valid market indicators because they were

Page 4  
Pagata Association v. City of Dover  
Docket Nos.: 12063-91PT & 13214-92PT

bank foreclosures or distressed liquidations, which do not pass the test of arm's-length transactions. The Taxpayer's comparables were located in Nashua, Concord, Keene, Lawrence, Massachusetts and Lowell, Massachusetts and no evidence was submitted to compare the markets in these areas.

The board finds that the location and type of the lodging and restaurant operations of the Property are factors that would affect its market value and should be recognized by the City (Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1975) all factors affecting market value should be considered by the municipality in arriving at a proper assessment).

The board placed no significant weight on the Taxpayer's September 1993 appraisal because it was done 1½ - 2½ years subsequent to the tax years appealed and the appraiser submitted no evidence to time adjust the values to the dates of assessments. Further, the appraiser deducted real estate taxes as a fixed expense. Property taxes are sometimes considered proper expenses for the income approach. To avoid circularity, however, property taxes are accounted for in valuations for assessment purposes by adjusting the capitalization rate. Otherwise, the amount of tax affects the estimate of value used to calculate the tax. The International Association of Assessing Officers, Property Appraisal and Assessment Administration at 258 (1990).

The board finds the Taxpayer's request for abatements based on findings of \$1,200,000 as of April 1991 is not warranted because the Taxpayer's agent

submitted conflicting 1990 income and expense information in Exhibits 1 and 3.

For example, in Taxpayer's #1, Mr. Lutter presents gross income based on the 1990 IRS Partnership Return of Income to be \$736,843 and \$728,701 in Taxpayer's #3 (note: the income items listed total \$696,436, not \$728,701);

Page 5

Pagata Association v. City of Dover  
Docket Nos.: 12063-91PT & 13214-92PT

utilities of \$83,381 was recorded on the IRS form and \$103,342 in Taxpayer's #3; insurance was reported as \$61,220 on the IRS form and \$54,497 on Taxpayer's #3. Further, upon review of the Taxpayer's 1993 appraisal, it was noted that the appraiser determined that in his review of the 1987 through 1991 income and expense data, he found large unexplained expenses and income and a number of expenses that had not been paid. For instance, no room sales tax had been paid since 1988. Mr. Lutter's income and expense statement shows rooms and meals taxes of \$37,835. Also, an amount of \$50,163 was included as an expense in Taxpayer's #3 without explanation. There were also indications of additional income not reported in Taxpayer's #3 (income from Merchants Leasing). The board finds the information provided to be inconclusive, unclear and insufficient to sustain the Taxpayer's burden to prove disproportionality.

The City performed a market-driven cost approach to determine the proper assessment for the Property. Further, as part of the 1992 revaluation, the City collected all market information available relative to income values and capitalization rates and correlated the data relative to the types of capitalization rates that would be applied. An income approach was performed based on the market information derived. The same levels of expense were applied consistently throughout the City. The board finds this evidence to be the best evidence presented as of April 1992.

Upon review of the evidence, however, the board did find the 1991 assessment did not appropriately account for the subject's poor visibility from the turnpike or the condition of the building. Although the board gave little weight to the Taxpayer's 1993 appraisal, the board did note that the

Page 6

Pagata Association v. City of Dover  
Docket Nos.: 12063-91PT & 13214-92PT

buildings suffer from a lack of routine maintenance and capital expenditures for items ranging from heating systems to carpeting and that the pool was in need of major repair. Therefore, the board has determined a 10% adjustment to the assessment is warranted.

The board did not conclude a reduction to the 1991 assessment was warranted based on the change in the equalization ratios from 1982 to 1991. In previous decisions, the board has looked at the percentage change as indicated by City-wide equalization ratios when:

- (1) it is the only substantiated evidence of the decline in market value;
- (2) the purchase of the property was one or two years prior to the assessment date;
- (3) other than the purchase price, no credible evidence of market value is presented; and
- (4) there was no evidence submitted to support a claim that other types of property declined at a faster rate than all other properties generally in the City.

The board finds no value in using the equalization ratios to trend a property which sold 10 years prior to the date of assessment because there are too many factors which could affect value. Specifically, certain types of property may have declined or appreciated at a faster rate than all other properties in the City and without market evidence of similar properties, this exercise would be fruitless.

Page 7

Pagata Association v. City of Dover  
Docket Nos.: 12063-91PT & 13214-92PT

Lastly, the Taxpayer stated that the Property sold in August 1994 for \$710,000. The board does not consider the sale to be evidence of the Property's market value because:

(1) the sale was from a bank. The sales made by an owner to satisfy delinquent loans are not arm's length due to the pressure of the owner to sell; consequently, while these accelerated sales will affect the market value of those who choose not to sell, they alone do not define the market;

(2) in lieu of default, the owners had worked out an arrangement with the bank of \$1,200,000; and

(3) there was no evidence submitted regarding the conditions of the sale, how long the Property had been on the market, whether it was an auction sale, etc.

If the taxes have been paid, the amount paid on the value in excess of \$1,015,110 for tax year 1991 only shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

A motion for rehearing, reconsideration or clarification (collectively "rehearing motion") of this decision must be filed within thirty (30) days of the clerk's date below, not the date this decision is received. RSA 541:3; TAX 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 law. Thus, new evidence and new arguments are only allowed in very limited circumstances as stated in

Page 8  
Pagata Association v. City of Dover  
Docket Nos.: 12063-91PT & 13214-92PT

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 a copy of the foregoing decision has been mailed this date, postage prepaid, to Mark Lutter of Northeast Property Tax Consultants, Agent for Pagata Association, Taxpayer; and Chairman, Board of Assessors, City of Dover.

Dated: August 7, 1995

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Valerie B. Lanigan, Clerk

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**Docket Nos.: 12063-91PT and 13214-92PT**

**ORDER**

This order responds to the "Taxpayer's" rehearing motion, which is granted in part and denied in part. Upon review of the evidence, the board has determined that a furniture deduction should have been applied. The board denies the request for rehearing with respect to all other issues raised. The Taxpayer's "Agent" argued that the board made several errors of fact and law.

Specifically, the Agent stated that the board erred in analyzing the market approach and ignored all arguments relating to disproportionality.

The Taxpayer stated 12 "errors and omissions" with the board's decision. The board disagrees with the Agent's characterizations. The board did consider both the market data submitted and the evidence received relating to disproportionality and will attempt to clarify its decision by addressing each item listed in the rehearing motion.

**1) The 25% economic obsolescence applied to apartments should have applied to motels.**

The Taxpayer argued that the board should apply a 25% economic obsolescence factor to motels because the "City" had applied this factor to

Page 2  
Pagata Assoc. v. City of Dover  
Docket Nos.: 12063-91PT and 13214-92PT

apartments. In a determination of value, one must look at the highest and best use of a given property and determine its value based on its highest and best use. For the Taxpayer's Agent to make a blanket statement that one class of property should receive a discount similar to another class of property

because they both have "a large increase in the water and sewer bills and a large number of foreclosure sales" without any market evidence lacks the support necessary to justify a reduction to the subject. No evidence was submitted by the Agent to show the relevance of such a conclusion, such as a valid comparison of how the market views apartment complexes and hotels/motels. Further, the Agent did not indicate whether a two or four-unit house receives the same reduction as a two-hundred unit apartment complex.

**2) The subject did not meet ADA requirements on 4/1/92.**

The Taxpayer's evidence was again lacking in this area. The Agent needs to support this fact with such relevant information as what effect the failure to meet ADA requirements had on the "Property's" market value or the costs to bring the Property up to standard. The Agent offered no evidence to show that the City adjusted similar properties that did not meet the requirements.

Therefore, there was no evidence to support a reduction for this fact. It is the Taxpayer's burden to prove that the Property was disproportionately assessed and what adjustments should be made to the Property's assessment to determine a fair market value, and the board found that the Taxpayer did not carry this burden.

Page 3  
Pagata Assoc. v. City of Dover  
Docket Nos.: 12063-91PT and 13214-92PT

**3) The City used an inappropriate cap for the subject based on their manual.**

The Agent states that the board should have found disproportionality because the MMC manual stated that "larger and higher risk properties will be classified as average to poor." The Agent interprets this statement to mean that for large properties, average is the best classification. MMC used cap rates of average, minimum and maximum. The board understands the statement to mean exactly what it says. For larger properties and properties with higher risks, the maximum cap rate was not utilized. Rather, the properties were classified as average or poor (minimum). Based on the evidence, the board did

not find that this Property should be classified as poor. The Agent failed to submit any information of comparable properties in the City where the City assessed the comparables by a different standard than that used on the subject.

The Agent and Mr. Sterling had significantly differing views as to how to determine the cap rate. The Agent assumed an 11% interest rate with 25-year amortization and a loan-to-value ratio of 75%. Mr. Sterling assumed a 10% mortgage rate with a 10-year loan term and a loan-to-value ratio of 65%. The board finds a 10-year amortization to be a very short-term loan and little support was provided to defend this assumption.

The board calculated the annual constant based on the Agent's assumptions (11% and 25-year term) and arrived at a different conclusion than the Agent (.1176 versus Agent's .1143). The Agent also had conflicting information in the abatement request filed with the board and exhibit #3. In

Page 4  
Pagata Assoc. v. City of Dover  
Docket Nos.: 12063-91PT and 13214-92PT

that request, the Agent had calculated the mortgage constant (based on the same assumptions) to be .1239. The Agent indicated that the prime rate as of April 1991 was 9.0%, yet in exhibit #3 gave a range of 9.5% to 11.0%. The Agent states that due to the risk involved, the average investor would demand an equity return of 12.45% in the abatement request and 12.00% in exhibit #3.

Further, the abatement request deducts a credit for equity buildup and adds .0050 for "extra risk" (if a factor for extra risk were appropriate, it should have been added in the mortgage and equity rate).

The board found there were too many inconsistencies in the Taxpayer's presentation to give it much weight.

**4) The City did not subtract a furniture or business value from their income approach.**

The Agent argued that the board should reduce the assessment by the value of the furniture and for a business value. The justification used was that an article by Stephen Rushmore entitled Property Tax Assessments for Hotels and Motels describes the method for subtracting the personal property

and the business operation from the market value. The board has thoroughly read the Rushmore article. In his article, Mr. Rushmore states: "The return of personal property is based on the fact that furniture and equipment have a relatively short useful life and must be replaced on an average of every six to ten years. To reflect this cash flow deduction, most hotel companies utilize a reserve for replacement that normally ranges from 3 percent to 5 percent of total revenue."

Page 5  
Pagata Assoc. v. City of Dover  
Docket Nos.: 12063-91PT and 13214-92PT

The Agent did not submit any photos of the Property's interior for the board to review or give the board any descriptive information of the contents of the rooms. The City testified that no deduction was made for the furniture value. However, upon revisiting this issue, the board finds that some value should be deducted from the assessment for the personal property. The board did review Marshall and Swift and has determined that the amount testified to by the Agent is reasonable for an 81-unit motel in average condition. Therefore, the board amends its decision to deduct the equalized value of the furniture from the assessments as follows:

1991 - reduction of \$43,500 ( $\$87,000 \times .50$  equalization ratio)

1992 - reduction of \$84,390 ( $\$87,000 \times .97$  equalization ratio)

**5) The City did not provide any supporting documentation for its income approach.**

The City testified that its 1992 value was determined through a market-driven cost approach along with the collection of all market information available relative to income values and capitalization rates. An income approach was performed at that time based on the market information obtained.

Further, the City testified that the same levels of expense were utilized throughout the City. For the 1991 tax year, the City recommended reducing the assessment to \$1,000,000 based on the change in the equalization ratios from 1982 to 1991. The board found no value in trending a 1982 sale to 1991 because there are too many unknown factors which could affect the Property's

value over the course of 10 years and without market evidence of similar properties, this exercise was pointless. The board did feel that the

Page 6

Pagata Assoc. v. City of Dover

Docket Nos.: 12063-91PT and 13214-92PT

information submitted by the City at the hearing was limited; however, the burden to show disproportionality is on the Taxpayer, not the City. The Taxpayer's evidence was insufficient to sustain the burden of proof.

**6) A total of 15 sales show a market range from \$7,900 to \$15,200 per room.**

As stated in its decision, the board did not find the comparable-sales approach to be a valid indicator of the Property's value. For the Agent to suggest that a clarification of the "deductions" line item would then convince the board to accept the approach is incorrect. The board assumed that the item entitled "deductions" was for furniture values being subtracted; however, the Agent produced no evidence as to how the values were determined.

The board did not find the testimony relative to the 15 sales to be of any significant value because:

1) Mr. Sterling's 4 sales were all forced sales and were sold at auction. In his report, Mr. Sterling stated that market derived adjustments are very difficult to determine due to the complexity of the properties and that the direct sales comparison approach was not considered to be a reliable approach in this case.

2) Upon questioning, the Agent testified that he had not been able to verify all of the sales used, that he had made no adjustments for differences in size, condition, location or existence of a restaurant. No adjustment was made to the Capital Motor Inn/Econo Lodge sale in Concord, NH for the fact that the property suffers from contamination. No adjustment was made to the Town House Motor Inn sale in Lawrence, MA for the fact that the property was razed and turned into a strip mall. Many of the sales were located in

Page 7

Pagata Assoc. v. City of Dover

Docket Nos.: 12063-91PT and 13214-92PT

surrounding states and the Agent made no adjustments for location. The Agent offered no information as to the conditions of the sales, how long the properties had been on the market, how the furniture values had been determined, or any other pertinent information to establish the arm's-length nature of the sales.

In short, the sales evidence submitted left too many variables unaddressed for the board to draw any conclusions. 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 is authorized to select any one of the valuation approaches based on the evidence.

**7) Recalculating the 1993 appraisal supports a trended value of \$1,108,200 before deducting a furniture and business value.**

As stated in its decision and further elaborated in this order, the board placed no significant weight on the Sterling report because: (1) it was dated 1½ to 2½ years subsequent to the tax years under appeal; (2) it did not time adjust the values to the dates of assessments (upon questioning, Mr. Sterling stated his "best guess" was that the values were no greater in 1993, that he did not think there was much change); (3) as discussed in #3 above, it used a short-term, 10-year amortization without adequate support; and (4) it deducted real estate taxes as a fixed expense. The board concurs with the Agent that the board could recalculate the taxes; however, this alone would not have caused the board to give significant weight to the appraisal.

Page 8  
Pagata Assoc. v. City of Dover  
Docket Nos.: 12063-91PT and 13214-92PT

**8) The property sold for \$710,000 in 1994. This included the furniture and business value.**

The board did not consider the 1994 sale to be arm's length because the Property sold from a bank who had worked out an arrangement with the Taxpayers in lieu of foreclosure. The Agent submitted no evidence to suggest that the sale was an arm's-length sale (i.e. how long the Property had been on the

market, whether it was properly advertised, or any other conditions of the sale).

**9) The inconsistencies in the 1991 income analysis can be explained.**

Prior to appraising the Property, Mr. Sterling was provided income and expense data from 1987 through 1991. In his report, Mr. Sterling stated, "After analyzing and discussing the income and expenses provided by the current ownership with knowledgeable industry professionals, a number of discrepancies were noted. There were large unexplained expenses as well as unexplained income... After analyzing the historical data supplied it is evident that it is not reasonable or reliable." The board reviewed the 1990 income and expense statement on page 36 of the Sterling report and compared it to the income and expense information supplied by the Agent for 1990. Again, the figures differ. The total 1990 revenue shown in the Sterling report is \$770,532 versus the Agent's \$728,701. The total expenses shown in the Sterling report (property tax item removed) is \$483,408 versus the Agent's \$542,734 for a total net operating income in the Sterling report of \$287,124 versus the Agent's \$185,967. All of these figures are purportedly "actual"

Page 9  
Pagata Assoc. v. City of Dover  
Docket Nos.: 12063-91PT and 13214-92PT

figures provided by the owner. For comparison purposes only, if the board accepted the Agent's 14% capitalization rate and applied it to the information supplied to Mr. Sterling, this would suggest a value of \$2,050,885 ( $\$287,124 \div .14$ ) before a deduction is made for furniture.

The board seriously questions the credibility of the information provided.

**10) MMC did a revaluation in Nashua the same year as Dover and assessed a superior property for \$21,000 per room.**

Again, if the Agent intended to use the Nashua property as a comparable, no evidence was submitted for the board to review its validity.

**11) The \$1,200,000 workout agreement between the owners and the bank supports a lower assessment.**

The Agent himself testified that he was "not sure of all of the details". The testimony to the board was that the owner was in default of the mortgage, and a workout was made with the bank at a price of \$1,200,000 in lieu of foreclosure. The board, without substantially more information, does not find this workout agreement to be evidence of the Property's value.

**12) The City settled a 1994 abatement request with the new owners for \$1,200,000.**

The tax years under appeal are 1991 and 1992. It is the board's understanding that a 1994 appraisal was performed for the new owners and because the City and the Taxpayers were able to reach a settlement is commendable; however, the settlement has no bearing on the matters before the board. The market data and assumptions contained in the 1994 appraisal are two to three years after the years under appeal and further the appraisal was not submitted as part of the evidence.

Page 10  
Pagata Assoc. v. City of Dover  
Docket Nos.: 12063-91PT and 13214-92PT

### **Conclusion**

In summary, the Agent's evidence lacked credibility because of unsubstantiated and conflicting information. The Agent cited the Appeal of Sokolow, 137 N.H. 642 (1993). The board finds this case is dissimilar to Sokolow because in Sokolow the board found that "the facts presented by the Taxpayers would appear to warrant an abatement" but the board concluded that the taxpayer did not show what that abatement amount should be. The same cannot be said for this case where the board did not find that the facts supported an abatement other than a minor adjustment to the 1991 assessment. The board did not find the adjustment should be applied to the 1992 assessment because the City had undergone its revaluation for the 1992 tax year and the board found that the City reasonably adjusted the building value for that tax year.

However, upon revisiting the issue of a deduction for furniture, the board finds a deduction for the personal property is appropriate and was not deducted from the assessment by the City and amends its decision as follows:

The board finds the proper 1991 assessment to be \$971,610 (\$1,015,110 -

\$43,500 (\$87,000 x .50 ratio).

The board finds the proper 1992 assessment to be \$1,874,610 (\$1,959,000 - \$84,390 (\$87,000 x .97 ratio)).

**Appeal**

Any appeal from this decision must be as follows:

**City.** The City must file a motion for a rehearing of the decision within thirty (30) days of the clerk's date below. RSA 541:3; TAX 201.37; see also Appeal of White Mts. Educ. Ass'n., 125 N.H. 771, 775 (1984) (newly losing party must move for rehearing).

Page 11  
Pagata Assoc. v. City of Dover  
Docket Nos.: 12063-91PT and 13214-92PT

**Taxpayer.** The Taxpayer must file, pursuant to RSA 541:6, an appeal to the New Hampshire Supreme Court within thirty (30) days from the clerk's date below.

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 a copy of the foregoing order has been mailed this date, postage prepaid, to Mark Lutter of Northeast Property Tax Consultants, Agent for Pagata Association, Taxpayer; and Chairman, Board of Assessors, City of Dover.

Dated: October 27, 1995

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Valerie B. Lanigan, Clerk