

Hodges Development Corporation
Docket Nos.: 14660-93PT and 15342-94PT

and

Hodges Properties, Inc.
Docket No.: 14661-93PT

v.

City of Concord

ORDER

This order responds to the parties' stipulation (filed May 13, 1996).
The board approves the stipulation subject to the conditions stated below.

1) Both Stipulations, Paragraphs C.

The board must review each taxpayer's entire estate in the city. See Appeal of Sunapee, 126 N.H. 214, 217 (1985); TAX 203.09(b). To comply with this requirement, each taxpayer shall file, before or at the hearing, the assessment cards for the nonappealed properties, and the parties shall state on the record (in writing or orally) that the assessments on the nonappealed properties were reviewed and were found proper.

2) Docket No. 14661-93-PT, Paragraph D.

The taxpayer did not file a 1994 appeal. Nonetheless, the parties have asked the board to issue an order for 1994. Under TAX 203.05(d), the board issues a decision only for the appealed years. However, given the parties'

agreement and the board's goal of efficiently resolving this matter to avoid a

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motion and a hearing for 1994 under TAX 203.05(j) and (k), the board will issue a decision for 1994. To accomplish this, the board: (a) pursuant to TAX 103.02, waives TAX 203.05(d); and (b) to the extent needed, asserts RSA 71-B:16 II jurisdiction over the taxpayer for the 1994 tax year.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Member

Ignatius MacLellan, Esq., Member

Michele E. LeBrun, Member

CERTIFICATION

I hereby certify that copies of the foregoing order have this date been mailed, postage prepaid, to Peter D. Wenger, Esq., Counsel for Hodges Development Corporation and Hodges Properties, Inc., Taxpayers; and Chairman, Board of Assessors, City of Concord.

Dated: May 23, 1996

Valerie B. Lanigan, Clerk

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Hodges Development Corp.

v.

City of Concord

Docket Nos.: 14660-93PT and 15342-94PT

Hodges Properties, Inc.

v.

City of Concord

Docket No.: 14661-93PT

DECISION

The "Taxpayers" appeal, pursuant to RSA 76:16-a, the "City's" 1993 and 1994¹ assessments on the following apartment complexes (collectively "the Properties"). These appeals were consolidated for hearing.

Alton Woods (Hodges Properties)	1993	\$13,083,900
	1994	\$13,362,600
Salisbury Green (Hodges Development)	1993	\$6,205,800
	1994	\$6,773,200

Taxpayer Hodges Development Corporation also owns, but did not appeal, numerous other properties in the City.

¹ Taxpayer Hodges Properties, Inc. did not file a 1994 appeal. The board, pursuant to the parties' request, asserted jurisdiction over the 1994 year. See May 23, 1996 order.

For the reasons stated below, the appeals for abatement are granted.

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.

On May 13, 1996, the parties submitted a stipulation to the board. The parties' agreements are incorporated in this decision. At the hearing, the parties agreed the 1993 capitalization rate was 14.2%.

The parties agreed (see tables below):

- (1) the income approach was the best value approach;
- (2) on the Properties' potential gross incomes;
- (3) on Alton Woods' 1993 vacancy and collection loss and on Salisbury Green's 1993 and 1994 vacancy and collection loss;
- (4) the revenue department's equalization ratios represented the City's general assessments level; and
- (5) the nonappealed properties were properly assessed.

The parties disagreed about (see tables below):

- (1) Alton Woods' 1994 vacancy and collection loss;
- (2) the Properties' expenses;
- (3) the 1994 capitalization rates; and
- (4) the personal property deductions.

Note for tables: The City's numbers were based on its valuation reports. The Taxpayer's numbers were based on Mr. Johnson's report.

TAX YEAR 1993
SALISBURY GREEN

	Taxpayer	City
PGI	\$ 1,234,440	\$ 1,234,440
Vacancy	15%	15%
Other Income	\$ 59,000	\$ 59,000
EGI	\$ 1,108,274	\$ 1,108,274
Expenses	\$ 565,496 (51%) \$ 2,502/unit	\$ 387,896 (35%) \$ 1,716/unit
NOI	\$ 542,778	\$ 720,378
Cap Rate	10.80 (14.2%)	10.80 (14.2%)
Tax Rate	3.40 (14.2%)	3.40 (14.2%)
Value	\$ 3,822,380	\$ 5,073,100
PP	\$ - 99,400	\$ - 55,860
Real Estate Value	\$ 3,722,980	\$ 5,020,000

TAX YEAR 1994
SALISBURY GREEN

	Taxpayer	City
PGI	\$ 1,230,240	\$ 1,230,420
Vacancy	10%	10%
Other Income	\$ 59,000	\$ 59,000
EGI	\$ 1,166,216	\$ 1,166,216
Expenses	\$ 568,393 (49%) \$ 2,515/unit	\$ 408,176 (35%) \$ 1,806/unit
NOI	\$ 597,823	\$ 758,040
Cap Rate	10.70 (14.2%)	10.31 (13.85%)
Tax Rate	3.53 (14.2%)	3.53 (13.85%)
Value	\$ 4,210,021	\$ 5,473,200
PP	\$ - 99,400	\$ - 55,860
Real Estate Value	\$ 4,110,621	\$ 5,420,000

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TAX YEAR 1993**ALTON WOODS**

	Taxpayer	City
PGI	\$ 2,517,072	\$ 2,517,072
Vacancy	15%	15%
Other Income	\$ 116,000	\$ 116,000
EGI	\$ 2,255,511	\$ 2,255,511
Expenses	\$ 949,896 (42%) \$ 2,474/unit	\$ 744,319 (33%) \$ 1,938/unit
NOI	\$ 1,305,615	\$ 1,511,192
Cap Rate	10.80 (14.2%)	10.80 (14.2%)
Tax Rate	3.40 (14.2%)	3.40 (14.2%)
Value	\$ 9,194,472	\$10,535,700
PP	\$ - 178,350	\$ - 106,470
Real Estate Value	\$ 9,016,122	\$10,540,000

TAX YEAR 1994**ALTON WOODS**

	Taxpayer	City
PGI	\$ 2,564,712	\$ 2,564,712
Vacancy	12.5%	10%
Other Income	\$ 119,000	\$ 119,000
EGI	\$ 2,363,123	\$ 2,427,241
Expenses	\$ 955,276 (40%) \$ 2,488/unit	\$ 800,990 (33%) \$ 2,086/unit
NOI	\$ 1,407,847	\$ 1,626,251
Cap Rate	10.70 (14.23%)	10.31 (13.85%)
Tax Rate	3.53 (14.23%)	3.53 (13.85%)
Value	\$ 9,914,415	\$11,741,900
PP	\$ - 178,350	\$ - 106,470
Real Estate Value	\$ 9,736,065	\$11,640,000

NOTE: "EGI" = effective gross income

"NOI" = net operating income
"PP" = personal property
"OAR w/ETR" = overall capitalization rate plus effective tax rate

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The board viewed these Properties for a prior appeal.

At the hearing, the parties had an opportunity to discuss each disagreement. The board will not reiterate the arguments here but will discuss the arguments as needed to explain the board's decision.

Board's Rulings

Based on the evidence, the board finds the following assessments.

SALISBURY GREEN

Tax Year	Market Value	Ratio	Assessment
1993	\$3,766,520	1.24	\$4,670,480
1994	\$4,214,300	1.25	\$5,267,880

ALTON WOODS

Tax Year	Market Value	Ratio	Assessment
1993	\$9,088,000	1.24	\$11,269,120
1994	\$9,949,600	1.25	\$12,436,980

The board's value conclusions are based on the following tables. The board's conclusions on the parties' disagreements are in text form following the tables.

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TAX YEAR 1993
SALISBURY GREEN

	BOARD'S FINDING
PGI	\$ 1,234,440
Vacancy	15%
Other Income	\$ 59,000
EGI	\$ 1,108,274
Expenses	\$ 565,496 (51%) \$ 2,502/unit
NOI	\$ 542,778
Cap Rate	10.80
Effective Tax Rate	3.40
OAR w/ ETR	14.2
Value	\$ 3,822,380
PP	\$ - 55,860
Real Estate Value	\$ 3,766,520

TAX YEAR 1994
SALISBURY GREEN

	BOARD'S FINDING
PGI	\$ 1,230,240
Vacancy	10%
Other Income	\$ 59,000
EGI	\$ 1,166,216
Expenses	\$ 568,393 (49%) \$ 2,515/unit
NOI	\$ 597,823
Cap Rate	10.47

Effective Tax Rate	3.53
OAR w/ ETR	14.0
Value	\$ 4,270,160
PP	\$ - 55,860
Real Estate Value	\$ 4,214,300

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TAX YEAR 1993
ALTON WOODS

	BOARD'S FINDING
PGI	\$ 2,517,072
Vacancy	15%
Other Income	\$ 116,000
EGI	\$ 2,255,511
Expenses	\$ 949,896 (42%) \$ 2,474/unit
NOI	\$ 1,305,615
Cap Rate	10.80
Effective Tax Rate	3.40
OAR w/ ETR	14.2
Value	\$ 9,194,472
PP	\$ - 106,470
Real Estate Value	\$ 9,088,000

TAX YEAR 1994
ALTON WOODS

	BOARD'S FINDING
PGI	\$ 2,564,712
Vacancy	12.5%
Other Income	\$ 119,000
EGI	\$ 2,363,123
Expenses	\$ 955,276 (40%) \$ 2,488/unit
NOI	\$ 1,407,847

Cap Rate	10.70
Effective Tax Rate	3.53
OAR w/ ETR	14.0
Value	\$10,056,050
PP	\$ - 106,470
Real Estate Value	\$ 9,949,600

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Vacancy and Collection Loss

The parties basically agreed on the applicable vacancy and collection loss except for Alton Woods in 1994. For the reasons that follow, the board adopts the Taxpayer's 12.5% vacancy and collection loss.

1) The Taxpayer demonstrated that a 12.5% vacancy factor was appropriate for this specific Property. The Taxpayer demonstrated that it competently manages Alton Woods, including doing reasonable advertising to fill vacancies.

The Taxpayer also explained that Alton Woods is unique because of its size (over 300 units), its location, and its generally higher rents.

2) The 12.5% figure was supported by the Taxpayer's actual vacancy.

3) The City argued the Taxpayer's actual higher vacancy rate for Alton Woods was due to the Taxpayer's business decision to have furnished apartments. The City asserted the furnished apartments skewed the actual vacancy to a higher percentage than would have occurred if Alton Woods did not have the furnished units. The Taxpayer, however, contradicted this by asserting its vacancy rate would probably have been higher if Alton Woods did not offer the furnished units. Given the evidence that the Taxpayer competently manages Alton Woods, the board does not accept the City's argument.

4) The City's vacancy survey was only a telephone survey and was not

supported by any other documentation. The Taxpayer pointed out that the Alton Woods' vacancy information from the City's survey was inaccurate compared to the actual vacancy. The Taxpayer attributed this to the respondents' misunderstanding of the meaning of the term "vacancies." The Taxpayer asserted a vacancy rate should be based on the actual number of

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vacant units (an accounting function). The vacancy rate should not be based on what the property manager perceives as vacancies because the property manager may treat a vacant unit as occupied if that unit has already been committed to a tenant who has not yet moved in.

Expenses

The parties disagreed about the expenses deduction for the Properties. For the following reasons, the board adopts the Taxpayers' expense figures on a per-unit basis.

1) The Taxpayers were competently managing these Properties, and therefore, their actual expenses were reasonable.

2) The Taxpayers' appraiser made a competent estimation of per-unit expenses. The appraiser surveyed 17 other properties for expense information, and his conclusion was supported by three other sources. (The board did not give independent support to the three other sources but rather treated them as cumulative and supportive of the appraiser's information.)

3) The Taxpayers' actual expenses were being scrutinized by their lenders, and this supported the conclusion that the actual expenses were reasonable given the competent operations.

4) The board has adopted a per-unit basis rather than a percentage basis because, given the evidence in this case, the Properties had higher fixed

costs versus variable costs. Specifically, the Taxpayers demonstrated that these Properties would require more expenses due to grounds, landscaping, and amenity facilities.

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5) The City's expense survey was limited to the Tarbell properties. A survey that focuses on only one owner does not provide information concerning the general market.

6) The board gave little to no weight to the national survey information.

Capitalization Rate

The parties did not agree on the applicable 1994 capitalization rate. The Taxpayers proffered a 14.2% capitalization rate, and the City proffered a 13.85% capitalization rate. The board has adopted a 14% capitalization rate, which gives equal weight to each party's evidence on this point. As both parties are aware, the capitalization rate plays an important role in the income approach. But absent sufficient sales and actual income and expense information from which to derive a market capitalization rate, the capitalization rate must be developed based on numerous subjective conclusions.

The parties agreed on the 1993 capitalization rate. Further, the parties agreed that in 1994 there was less risk in owning this type of property, which would lower the overall capitalization rate if the borrowing rate remained constant. However, the Taxpayers asserted, and the evidence supported a conclusion, that while the risk may have decreased the borrowing

rates increased. Even the City's own valuation report supported the conclusion that the borrowing rate had increased. Municipality Exhibit B, Addenda, National Mortgage Commitment Survey April 1993 and 1994 and Economic Indicators -- Prime Rate.

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Personal Property

Based on the evidence, the board adopts the City's estimate of the personal property deduction. Basically, the Taxpayers' had the burden of proof to show the City's estimate was in error, and the Taxpayers did not carry this burden. The Taxpayers did not present sufficient information concerning the appropriate personal property deduction.

General Comments

The board appreciates the parties' reaching agreement on many of the key factors in this appeal. Hopefully, with a stabilization in the real estate market and rental market, the parties will be able to obtain sufficient information that will enable them to fully address these Properties in the future.

We note that the Taxpayers were well represented by Mr. Johnson and Mr. Kline. The board found them both to be credible witnesses. Mr. Johnson was knowledgeable about the Properties' actual operations, and Mr. Kline was adequately familiar with both the actual operations and the market generally.

The City was also competently represented by Mr. Ryan. The board understands his frustration concerning the Taxpayers' change of certain numbers (some of which were adequately explained by the Taxpayers). The City

may also be disappointed by the board's expense conclusion given the board's prior decision. The board decides cases based on the evidence presented to it in each individual case, and as parties become more informed about what is required, the evidence presented can change. Additionally, taxpayers, as the City also probably does, invest more time and effort into a case once it is going to hearing, and this may result in changes to previously submitted

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numbers. Nonetheless, the board understands the City's frustration that can occur when a taxpayer makes changes during the review process. The board attributed this to the Taxpayers' attempt to prepare and present its best case rather than to the Taxpayers' attempting to change information to gain some kind of advantage.

Refund

If the taxes have been paid in 1993 and 1994, the amount paid on the value in excess of the ordered assessments plus the assessments on any nonappealed properties shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Pursuant to RSA 76:17-c II, and board rule TAX 203.05, unless the City has undergone a general reassessment, the City shall also refund any overpayment for 1995. Until the City undergoes a general reassessment, the City shall use the ordered assessment for subsequent years with good-faith adjustments under RSA 75:8. RSA 76:17-c I.

Rehearing

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 in law. Thus, new evidence and new arguments are only allowed in very limited circumstances as

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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. Generally, if the board denies the rehearing motion, an appeal to the supreme court must be filed within thirty (30) days of the date on the board's denial.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Ignatius MacLellan, Esq., Member

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Peter D. Wenger, Esq., Counsel for Hodges Development Corporation, Taxpayer; and Chairman, Board of Assessors, City of Concord.

Date: July 8, 1996

Valerie B. Lanigan, Clerk

Hodges Development Corp.

v.

City of Concord

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Hodges Properties, Inc.

v.

City of Concord

Docket No.: 14661-93PT

ORDER

This order responds to the "City's" rehearing motions, which are denied. The motions did not demonstrate that the board erred in its decision, and thus, the motions failed to show any "good reason" to grant a rehearing. See RSA 541:3.

The City's motions challenged the Taxpayers' use of varying statements of expenses and estimates of fair market value. No other basis for rehearing was presented.

The City has raised this issue in an untimely manner. Any challenge to the admissibility of the varying numbers should have been raised at the hearing contemporaneously with the submission of the evidence. See New Hampshire Rules of Evidence, Rule 103(b)(1); see also TAX 201.30. The City did not make such objection. If a contemporaneous objection had been made,

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the board would have had the opportunity to then hear from both parties concerning the admissibility of the varying figures. The hearing was the City's opportunity to object to any of the Taxpayers' evidence or arguments; the rehearing process is not the time for this. TAX 201.37(e) ("Parties shall submit all evidence and present all arguments at the hearing.").

Additionally, the City did not state how the new evidence or arguments would have affected the ultimate decision. See Rules of Evidence, Rule 103(b) ("Error may not be predicated upon a ruling which admits *** evidence unless a substantial right of the party is affected ***."). The board's job is to review all of the evidence submitted and to arrive at a value conclusion that best represents an appealed property's value. The board did this, in this case, based on the evidence and arguments made to the board. The board stated in the decision the basis for the board's conclusions as to the matters at issue. The City's objection, had it been made at the hearing, probably would have been denied with the City's argument about differing values going to the weight of the Taxpayers' evidence and not its admissibility. We reiterate

here that we found the Taxpayers' evidence and testimony to be credible and competent. If the board had thought either party was trying to withhold or alter evidence to achieve a different result than the proper result, the board would not have hesitated to chastise that party. The Taxpayers' in this case were not perceived in any way as manipulating the numbers or the process.

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Member

Ignatius MacLellan, Esq., Member

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Peter D. Wenger, Esq., Counsel for Hodges Development Corporation, Taxpayer; and Chairman, Board of Assessors, City of Concord.

Date: September 16, 1996

Valerie B. Lanigan, Clerk