

**Weeks Dairy Food, Inc.**

**v.**

**City of Concord**

**Docket No.: 16143-95PT**

**DECISION**

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "City's" 1995 assessment of \$1,920,100 (land \$476,100; buildings \$1,444,000) on a 10.69-acre lot with various buildings, including a milk-processing plant, office building and garages (the Property). The Taxpayer also owns, but did not appeal, an adjacent 2.54-acre vacant lot with a \$114,200 assessment. For the reasons stated below, the appeal for abatement is denied.

The Taxpayer has the burden of showing the assessment was disproportionately high or unlawful, resulting in the Taxpayer paying a disproportionate share of taxes. See RSA 76:16-a; TAX 203.09(a); Appeal of City of Nashua, 138 N.H. 261, 265 (1994). To establish disproportionality, the Taxpayer must show that the Property's assessment was higher than the general level of assessment in the municipality. Id. The Taxpayer failed to carry this burden.

The Taxpayer argued the assessment was excessive because:

- (1) an April 1995 appraisal (Moore appraisal) estimated the market value to be \$1,300,000 (includes the Property and the 2.54-acre lot not appealed);
- (2) the appraisal involves the land and improvements excluding the vertical storage tanks, machinery and equipment; and
- (3) the City has focused its opinion on the Property's use rather than on real estate.

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The City argued the assessment was proper because:

- (1) the Property's highest and best use is its current use as an ice cream and dairy processing plant which is a special purpose use;
- (2) the tanks are clearly affixed to the Property and are real estate;
- (3) a valuation report estimated the market value to be \$2,200,000 as of April 1995; and
- (4) the Taxpayer's cost approach is flawed because it did not take into account the highest and best use of the Property; the comparable sales analysis used sales that were not properly adjusted or comparable to the Property; and the income approach is also flawed because no backup data was supplied for the rents used and taxes were incorrectly included as an expense.

Subsequent to the hearing the board viewed the Property with the parties and the plant manager, Mr. John Winnie.

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

Based on the evidence, the board finds the Taxpayer did not carry its burden to show the assessment was excessive or that various items were not taxable as real estate.

This appeal raises three general issues: 1) is the Property a special-purpose property or is it easily adaptable to general manufacturing and

accompanying office and warehouse uses; 2) are the exterior "silo" tanks realty; and 3) does the City's assessment adequately depreciate the building to recognize any functional obsolescence in the layout of the building for processing dairy products. The first two issues were raised by the parties at hearing and the third was considered by the board during its deliberations and review of the evidence.

In short, the board finds the Property is a special-purpose property, the silo tanks are taxable as real estate and the depreciation the City applied in its assessment appears reasonable based on the evidence and the board's experience. The board will address these three issues in detail in the following sections.

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However, in answering these issues, the board finds it helpful initially to compare the various values placed on the different components by the parties. The following chart highlights the differences and similarities in the parties' cost approach valuations. The chart is generally arranged in the order in which the City assessed the Property. The second column (City's Assessed Value) is taken directly from the City's assessment-record cards. The third column (City's Appraised Value) is taken from Municipality Exhibit A, valuation report. The fourth column (Taxpayer's Appraised Value) is taken from Taxpayer's Exhibit 1, Moore appraisal. The Taxpayer's Appraised Value is calculated by applying the 22% economic obsolescence estimated in the Moore appraisal to each one of the components' depreciated value. The sum of the Property's component values do not exactly total the Taxpayer's cost approach market value indication of \$1,460,000 due to rounding. While the three different valuations did not consistently group the various components, the

board has attempted to do so.

<u>Property Component</u>	<u>City's Assessed Value</u> (At 98% of Market Value)	<u>City's Appraised Value</u> (Cost Approach)	<u>Taxpayer's Appraised Value</u> (Cost App. with 22% Econ. Dep.)
<b>Land</b> Parcel 3 (10.69 A) (Appealed) Parcel 9 (2.54 A) (Not Appealed)	\$413,500 \$114,200	\$413,500 Not valued	\$312,000 (Parcels valued together)
<b>Office</b>	\$294,300	\$346,000	\$324,921
<b>Site Improvements</b> (paving, lights, fencing, scales, load levelers, UGST, etc.)	\$54,700	\$78,000	\$102,859
<b>Main Plant</b> (exclusive of "silo" tanks but inclusive of freezer/cooler)	\$864,100	\$858,076	\$570,171
<b>Barns</b> (warehousing)	\$63,100	\$36,000	\$47,073
<b>Truck Terminal/Garage</b>	\$121,900	\$110,000	\$111,540
<b>"Silo" Tanks</b>	\$45,900	\$389,515	Not Valued

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Because the Taxpayer has the burden of showing the assessment to be disproportionate, the board's rulings address primarily the Taxpayer's evidence and the City's assessment. The City's valuation report (Municipality Exhibit A), while considered by the board, is not given much weight as its value conclusion is not what is being appealed. The City's submission of its valuation report in defense of the assessment is somewhat risky in that it raises questions as to the accuracy of some of the components in either the assessment or the valuation report (especially the silo tanks). However, the board finds these questions are not sufficient to repudiate the assessment. While the board's review of the assessment and the Taxpayer's evidence is

broken down by property components, the board's ultimate determination of proportionality is based on the total assessment. Consequently, even if some components are overassessed, others could be underassessed so that the total is proportionate. "Justice does not require the correction of errors of valuation whose joint effect is not injurious to the appellants." Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985), quoting Amoskeag Manufacturing Company v. Manchester, 70 N.H. 20, 205 (1899). For the reasons that follow, we do not find the Taxpayer's evidence showed the total assessment is disproportionate.

#### **Special-Purpose Property**

The board concludes the Property can be classified as a special-purpose property due to its original construction, subsequent renovations and unique features, making it suited for processing of milk products.

The general concept of special-purpose buildings is that they are uniquely adapted to a single use and any conversion to other uses would require extensive renovations. Further, if a property is constructed for a special purpose, its highest and best use can be considered to be that purpose as long as it can still functionally fulfill its original purpose. See

Appraisal Institute, The Appraisal of Real Estate, 270 10th ed. (1991);

International Association of Assessing Officials, Property Appraisal and  
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Assessment Administration, 169, (1990); Joan Youngman, Legal Issues in  
Property Valuation and Taxation: Cases and Materials, 41 (1994).

The main plant building was originally constructed and added onto for the processing of various milk products. Its layout and the accompanying plumbing, electrical, freezer/cooling space and track system (in-floor track

used to move plastic milk cases throughout the plant) are all features that contribute to the special-purpose nature of the building. Extensive removal of these features and/or retrofitting would be necessary for the building to be suitable for other manufacturing purposes. These special features should be captured in the assessment of the Property as they contribute to the Property's market value. 590 Realty Company, Ltd. v. City of Keene, 122 N.H. 284, 286 (1982); Amoskeag-Lawrence Mills v. State, 101 N.H. 392, 399 (1958). Consequently, the board concludes that the highest and best use for the building is for the special purpose of processing milk, and any valuation approach, to be given any weight, must recognize that as a premise.

The Moore appraisal assumed the highest and best use as general manufacturing, office and warehouse. While the Moore appraisal employed all three approaches, the sales comparison approach was given the most weight. The board gives his valuation conclusion by the sales comparison approach no weight as it is based on an incorrect premise that the Property is not special purpose. The cost and income approaches were also incorrectly based on the premise of general manufacturing being the highest and best use. Consequently, the rents and replacement cost schedules used are not properly reflective of the Property's special purpose. This is highlighted in the appraiser's calculation of the 22% economic depreciation in the cost approach, which was largely derived from rental assumptions in the income approach based on general manufacturing, office and warehousing uses. This calculation as applied in economic depreciation to the cost approach is circular and leads right back to the incorrect assumption that the Property is not a special-purpose property.

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Further, the supreme court has held that in valuing a unique property the owner can be viewed as a hypothetical buyer, and thus, the purchase price (or rent) it would pay can be measured against the cost of constructing an equivalent building (or renting an equivalent plant). Public Service Co. of New Hampshire v. New Hampton, 101 N.H. 142, 146-147 (1957). However, the cost approach is generally "used to estimate the market value of proposed construction...special-purpose property, and other properties that are not frequently exchanged in the market." Appraisal Institute, The Appraisal of Real Estate, 321 10th ed. (1992) (emphasis added). In reviewing the cost approach contained on the assessment-record card and the Moore appraisal, the board concludes the City's replacement cost approach more accurately reflects the special-purpose features of the Property. The Moore appraisal based its cost approach on general light-manufacturing type construction while the City's was based on a "food processing" replacement cost.

#### **Silo Tanks**

RSA 72:6 requires "[a]ll real estate, whether improved or unimproved, shall be taxed except as otherwise provided." To determine whether the silo tanks are real estate, and thus taxable, requires the board to perform a fixture analysis, which was most recently addressed in New England Telephone & Telegraph Company v. City of Franklin, 141 N.H. 449 (1996) (hereinafter "NET&T"). In NET&T, the supreme court decided the telephone company's central office equipment was personalty and, thus, not taxable. The court, citing The Saver's Bank v. Anderson, 125 N.H. 193, 195 (1984), stated:  
"A chattel loses its character as personalty and becomes a fixture and part of the realty when there exists an actual or constructive annexation to the realty *with the intention of making it a permanent accession to the freehold*, and an appropriation or adaption to the use or purpose of that part of the realty with which it is connected." Id. at 453.

The court went on to state that:

"Whether an item of property is properly classified either as personalty or a fixture turns on several factors, including: the item's nature and use; the intent of the party making the annexation; the degree and extent to which the item is specially adapted to the realty; the degree and extent of the item's

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annexation to the realty; and the relationship between the realty's owner and the person claiming the item. The central factors are "the nature of the article and its use, as connected with the use" of the underlying land because these factors provide the basis for ascertaining the intent of the party who affixes or annexes the item in question." Id. (Citations omitted.)

The board will now apply the NET&T analysis to the silo tanks.

The silo tanks are large metal tanks exterior to the main plant resting on concrete foundations and welded to the building. The silo tanks are used for storing fluid milk for a period of days before it is processed into various milk products. It is clear the intent was to affix these silos to the building to warehouse the milk and to be an integral part of the milk processing plant. Due to their size, welded connection to the building and the accompanying plumbing, such tanks would not be readily removed, and if removed would significantly impact the highest and best use of the remaining portion of the special-purpose building. The board concludes that due to their size, annexation and warehousing function, the silo tanks are distinctly different than the smaller internal tanks used in processing the milk that are not an integral part of the real estate. In short, due to their integral function with the highest and best use of the real estate and their nature of annexation to the real estate, the board concludes the silo tanks are fixtures and should be assessed.

The Taxpayer argued the silo tanks were personalty and, thus, were not

valued. The City's assessment of \$45,900 versus its appraised value of \$389,515 in Municipality Exhibit A raises the question as to what is the proper value of the tanks. However, as the board stated earlier, the burden of proving the total assessment is disproportionate rests with the Taxpayer. Not having valued the tanks certainly does not move the Taxpayer's burden. The City's varying values raises questions but because the Taxpayer supplied no answers, the burden still rests firmly with the Taxpayer.

**Depreciation Appropriate for Cost Approach**

While we have found this is a special-purpose building, the view and evidence submitted at the hearing suggest the building may have some  
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inefficiencies inherent in its layout that need to be recognized in the cost approach by functional obsolescence. Because the building has been built and added onto in several stages and because processing regulations and technology have changed over time, the existing building is not as efficient as one built anew. This issue of functional obsolescence relates primarily to the main processing plant (as the chart on page 3 indicates, the main plant is the major point of departure between the Taxpayer's opinion of value and the City's assessment).

The City's assessment applied a total of 50% depreciation to the replacement cost for the main processing plant. While the depreciation was broken down to 40% physical and 10% functional, the board finds the overall depreciation reasonably reflects the reduction in value due to both physical and functional obsolescence. Consequently, while the Taxpayer's argument has merit that the building is not as efficient as one built today, the board finds the City's overall depreciation adequately addresses this issue lacking

further detailed evidence from the Taxpayer.

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 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.

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Michele E. LeBrun, Member

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Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Bruce D. Hislop, Agent for Weeks Dairy Food, Inc., Taxpayer; and Chairman, Board of Assessors, City of Concord.

Date: December 23, 1997

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Valerie B. Lanigan, Clerk

0006

**Weeks Dairy Food, Inc.**

**v.**

**City of Concord**

**Docket No.: 16143-95PT**

**ORDER**

This order responds to the "Taxpayer's" January 22, 1998 Motion for Rehearing (Motion). The Motion raises three general reasons for rehearing: 1) the board erred in determining the silo tanks were taxable as real estate because subsequent to the board's decision the Supreme Court in Crown Paper Co. d/b/a Crown Vantage v. City of Berlin \_\_ N.H. \_\_, slip op. (December 31, 1997) determined that except in rare instances such factory equipment is not taxable as real estate (paragraph 1 of Motion); 2) the board erred for several reasons in concluding the "Property" was a special purpose facility (paragraphs 2, 3 and 4 of the Motion); and 3) the board erred in accepting the "City's" assessment despite the differences noted between the City's assessment and its valuation report (paragraph 5 of the Motion).

The board grants the Motion for the first reason, but denies it for reasons #2 and #3. The board finds the issues raised in reasons #2 and #3 were addressed properly in its decision of December 23, 1997 and do not form a

basis for granting a rehearing pursuant to TAX 201.37. A rehearing on the issue raised in the first reason is scheduled for March 5, 1998, at 1:00 p.m. at the offices of the board. At the rehearing the parties should be prepared to argue and explain the relevance of Crown Paper to the taxability of the silo tanks.

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Following the rehearing, the board will issue an order relative to the taxability of the silo tanks and, to any extent it determines necessary, further clarify its decision relative to reasons #2 and #3. Any appeal to the Supreme Court pursuant to RSA 71-B:12 shall be filed from the board's order following the rehearing.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Michele E. LeBrun, Member

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Douglas S. Ricard, Member

**Certification**

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Margaret H. Nelson, Esq., Counsel for Weeks Dairy Food, Inc., Taxpayer; and Chairman, Board of Assessors, City of Concord.

Date: February 12, 1998

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Valerie B. Lanigan, Clerk

**Weeks Dairy Food, Inc.**

**v.**

**City of Concord**

**Docket No.: 16143-95PT**

**ORDER**

This order further responds to the "Taxpayer's" January 22, 1998 motion for rehearing (Motion). As summarized in the board's February 12, 1998 order (Order) the three issues raised in the Motion were: 1) the board erred in determining the silo tanks were taxable as real estate because subsequent to the board's decision the Supreme Court in Crown Paper Co. d/b/a Crown Vantage v. City of Berlin \_\_ N.H. \_\_, slip op. (December 31, 1997) determined that except in rare instances such factory equipment is not taxable as real estate (paragraph 1 of Motion); 2) the board erred for several reasons in concluding the "Property" was a special purpose facility (paragraphs 2, 3 and 4 of the Motion); and 3) the board erred in accepting the "City's" assessment despite the differences noted between the City's assessment and its valuation report (paragraph 5 of the Motion). The Order granted a rehearing on the first issue of the taxability of the silo tanks but denied the rehearing on issues 2 and 3; the rehearing on issue 1 was held on March 5, 1998.

Based on the legal arguments and additional facts received during the rehearing, the board reverses its findings in its December 23, 1997 decision (Decision) and finds the silo tanks to be personal property, and thus, not taxable. Since the Decision, Crown Paper Co. d/b/a Crown Vantage v. Berlin, \_\_ N.H. \_\_ (December 31, 1997) further enumerated factors that must be considered in determining whether factory machinery is personalty or taxable

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as real estate. Also, information requested by the board at the rehearing as to the size and function of the silo tanks presented new evidence that justifies finding the silo tanks personal property<sup>1</sup>.

Consequently, the board amends its Decision on page 7 deleting the following.

~~\_\_\_\_\_ The board will now apply the NET&T analysis to the silo tanks.~~

~~\_\_\_\_\_ The silo tanks are large metal tanks exterior to the main plant resting on concrete foundations and welded to the building. The silo tanks are used for storing fluid milk for a period of days before it is processed into various milk products. It is clear the intent was to affix these silos to the building to warehouse the milk and to be an integral part of the milk processing plant. Due to their size, welded connection to the building and the accompanying plumbing, such tanks would not be readily removed, and if~~

<sup>1</sup> The affidavit from John M. Whinnie, plant manager, was requested by the board during the rehearing to clarify the size and function of the various silo tanks. The board understands, but dismisses the City's objection to this new evidence. It was not raised in the Taxpayer's Motion for rehearing, which arguably would have been prohibited by TAX 201.37(e). Rather, the affidavit was requested by the board to clarify factual information about the silo tanks so that the legal analysis of fixtures as further enumerated in Crown Vantage could be performed.

~~removed would significantly impact the highest and best use of the remaining portion of the special purpose building. The board concludes that due to their size, annexation and warehousing function, the silo tanks are distinctly different than the smaller internal tanks used in processing the milk that are not an integral part of the real estate. In short, due to their integral function with the highest and best use of the real estate and their nature of annexation to the real estate, the board concludes the silo tanks are fixtures and should be assessed.~~

~~— The Taxpayer argued the silo tanks were personalty and, thus, were not valued. The City's assessment of \$45,900 versus its appraised value of \$389,515 in Municipality Exhibit A raises the question as to what is the proper value of the tanks. However, as the board stated earlier, the burden~~  
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~~of proving the total assessment is disproportionate rests with the Taxpayer. Not having valued the tanks certainly does not move the Taxpayer's burden. The City's varying values raises questions but because the Taxpayer supplied no answers, the burden still rests firmly with the Taxpayer.~~

The board amends the Decision on Page 7 as follows:

*"Further, Crown Paper Co. d/b/a/ Crown Vantage v. Berlin, \_\_ N.H. \_\_ (December 31, 1997) found that §[f]or a piece of factory machinery to be intimately intertwined with the underlying realty and thus taxable, the trial court must determine that some characteristic of the underlying realty makes a special or other use of the factory machinery useful, and that the special or other use of the factory machinery renders the underlying realty useful.τ (Citations omitted.) §[S]uch a relationship is rare ....τ While the board finds the Property is a special purpose property, it also finds the silo tanks*

do not have the rare intimately intertwined relationship with the real estate as cited in Crown Vantage to make them taxable.

The board finds three of the silo tanks receive raw milk from milk tankers and four silo tanks are used for the intermediate storage of milk after it has been pasteurized and homogenized but before it is packaged. All seven tanks are exterior to the building resting on concrete foundations and are welded to the building. While the sheer size and the method of physical annexation of the tanks to the real estate raise legitimate arguments as to their taxability, the board finds, on balance, the Taxpayer's argument of the tanks being part of a seamless web of production to be more convincing. Due to the perishable nature of milk and health regulations, the tanks can only hold the raw and processed milk for limited periods of time, different from other unique warehousing structures. All the tanks, in addition to being refrigerated, contain agitators to keep the milk thoroughly mixed and stable.

These cooling, temporary storage and mixing functions of the tanks, while obviously connected to the real estate's highest and best use, are more closely connected to the processing functions within the building.

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Consequently, the board orders the \$45,900 assessment related to the silo tanks abated as they are not taxable as real estate."

Further, the board amends the Decision on page 8 after the second paragraph with the following.

"If the taxes have been paid for the tax year 1995, the amount paid on the value in excess of \$1,874,200 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 1996 and 1997. 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."*

As to the second issue, the board reaffirms its determination of the Property as a special-purpose property due to its original construction, renovations and unique features for processing milk. Despite the Taxpayer's assertion in the Motion that the record did not contain evidence that the highest and best use of the Property would be a continuation as the milk processing plant, the board finds the "City's" testimony and the board's view of the Property supports the special-purpose property finding. While New Hampshire caselaw has no decisions relative to milk processing plants, an eminent domain case in New York, Norman Kill Farm Dairy Co. v. State of New York, 279 N.Y.S. 2d 292 (1967), determined a milk processing plant to be a special-purpose property. As stated in the Decision, while the Property contains some inherent functional issues due to its history and changing technology and regulations, it clearly can continue to function as a milk processing plant. The board did note on the view that a relatively small portion of the plant produces ice cream and that it is not fully utilized (processing only several days/week) due to market demand. However, as noted in the Decision, the board finds the City's total depreciation reasonably accounts for this underutilization. And the Taxpayer did not submit any

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evidence as to any depreciation for this underutilization. The majority of the plant, moreover, is set up for packaging of fluid milk especially in half-

pint containers for the school lunch market. No evidence was submitted that this niche in the milk processing market is an uneconomic use of the Property.

Thus, the board concludes the Property's highest and best use is a continuation as a special-purpose property for processing milk.

Lastly, on the Taxpayer's third issue, the board reaffirms that the burden is with the Taxpayer to prove the assessment is disproportionate. The City's conflicting values in its appraisal report versus its assessments, while raising questions, were not adequately answered by the Taxpayer, and thus, the burden of persuasion did not move to the City.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Michele E. LeBrun, Member

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Douglas S. Ricard, Member

**Certification**

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid to, Margaret Nelson, Esq., counsel for the Taxpayer; Bruce D. Hislop, Agent for Weeks Dairy Food, Inc., Taxpayer; and Chairman, Board of Assessors, City of Concord.

Date: March 31, 1998

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Valerie B. Lanigan, Clerk