City of Nashua

v.

Department of Revenue Administration

Docket No.: 19466-02ER

DECISION

I. Introduction

A. The Board's Authority

The board, pursuant to its broad authority under RSA 71-B:5, has heard and determined four "appeals by municipalities relating to the equalized valuation of property determined by the commissioner of revenue administration [the "DRA"] pursuant to RSA 21-J:3, XIII." The Towns of Holderness and Sunapee and the Cities of Nashua and Concord (collectively, the "Municipalities") contend they are "aggrieved" by the DRA's equalized valuation determinations because they result in higher values and hence higher proportionate shares in county and state tax allocation formulas.

As stated in the Appeals of Towns of Bow, Newington and Seabrook, 133 N.H. 194, 195-96 (1990) (hereinafter "Bow"), when the DRA's equalization methodology is shown to be incorrect, then "[t]owns are forced to collect and pay more than their fair share of the county [and other] taxes, which are allocated to each town based on the total . . . equalized valuation of

property in each town." The questions posed by these four appeals, although involving the choice of statistical techniques to estimate equalized valuations, are therefore of considerable importance to each municipality and the tax burden shouldered by its property owners.

Because the appeal statute prescribes an expedited hearing and final ruling schedule (60 days from the receipt of each appeal) and certain common issues are present, the board, through a telephone structuring conference on June 5, 2003, ordered and held a consolidated hearing on July 3, 2003 in the four cases: Town of Sunapee v. Department of Revenue Administration, Docket No.: 19465-02ER; City of Nashua v. Department of Revenue Administration, Docket No.: 19466-02ER; Town of Holderness v. Department of Revenue Administration, Docket No. 19467-02 ER; and City of Concord v. Department of Revenue Administration, Docket No.: 19468-02ER.

B. Burden of Proof and Scope of Review

In these appeals, neither the Municipalities nor the DRA dispute the application of TAX 211.04, which provides: "The municipality shall have the burden to prove the DRA erred in calculating the equalized valuation." [1] See also Bow, supra at 204 (town failed to meet its burden of proof in equalization appeal) The burden, therefore, lies with each municipality to prove the DRA erred in calculating the equalization ratio used to compute the equalized valuation.

The board has also considered the appropriate scope of review of the DRA's determination of the equalized valuation for each Municipality and finds it is de novo rather than some lesser standard. The statute authorizing this appeal, RSA 71-B:5, is silent on this issue but,

[1] While RSA 71-B:5, II contains no specific provision as to who has the burden in this type of appeal, it is well settled that in civil actions the burden of proof is generally on the plaintiff to establish its case by a preponderance of the evidence. Dunlop v. Daigle, 122 N.H. 295, 298 (1982); Jodoin v. Baroody, 95 N.H. 154, 157 (1958). The same procedure applies in tax cases. See Appeal of Town of Sunapee, 126 N.H. 214, 217-218 (1985); and TAX 203.09.

as the City of Nashua correctly noted in its Memorandum of Law, "In the absence of a statute restricting the scope of review, the appeal is a de novo proceeding. (Citations omitted)" Cf. RSA 21-J:9-a, V (addressing "Equalization Procedure," where the legislature specifically authorized "de novo" review of the "correctness of the commissioner's actions" in imposing penalties relative to each municipality's reporting requirements).

C. Arguments Presented

The board will first summarize the arguments made by the City of Nashua (the "City") and the DRA in this appeal, before presenting an overview of the relevant constitutional and statutory framework, including the implications of recent legislation, and the relevant case law the board has applied in making the general and specific rulings set forth below.

Unlike the other Municipalities, the City did not argue that use of a weighted mean to compute the equalization ratio was inappropriate. Instead, the City argued the DRA erred in its calculation of the City's equalized valuation for three reasons: 1) the DRA's sample study included two large sales that, being part of multi-state portfolio transactions, do not reflect market value and should be excluded; 2) abatements issued by the City (subsequent to its September 2002 submission of its MS-1 report summarizing the City's valuations (RSA 21-J:3, VIII) to the time the final equalized valuation is determined) should be deducted from the DRA's equalized valuation; and 3) the DRA should stratify the City's sales into either two or three strata and equalize those strata by their respective weighted means and then sum the strata equalized values to arrive at an overall equalized valuation for the City.

At the hearing, the DRA stipulated to the City's first argument by agreeing the two large sales should be excluded from the sample study and the equalized valuation should be adjusted accordingly. However, the DRA argued it had not adjusted valuations reported on the MS-1 for

subsequent abatements in any other municipality except for three instances where the abatements were of very significant magnitude (as shown on DRA Exhibit 7). The DRA also argued the Equalization Standards Board ("ESB") recommended the DRA review the possibility of applying different ratios by stratification but that, to date, such review had not occurred and such stratification should not be utilized until appropriate procedures were in place for it to be done uniformly for all appropriate municipalities. Further, the DRA argued that the indicated weighted means for the respective strata, as calculated by the City, do not necessarily indicate, with any appropriate degree of statistical certainty, any different level of assessment from the DRA's overall weighted mean calculation because the City did not present any evidence as to the confidence intervals for each of its strata calculations; without such confidence levels, no meaningful conclusions can be drawn as to whether stratification is needed to improve the accuracy of the weighted mean.

The DRA further argued it was authorized to use the weighted mean in computing the equalization ratio for each municipality and no rulemaking is required in order to do so. The DRA contended it had sufficient authority, especially in light of recent statutory changes, to issue and apply an "Equalization Manual" prepared in March, 2003 (hereinafter the "Manual," DRA Exhibit 3), presumably because it follows the 'recommendations' of the ESB (DRA Exhibit 1), based upon a study of New Hampshire equalization procedures completed by the State's experts (hereinafter the "Wasserstein Report," DRA Exhibit 2), which, in turn, references the "Standard on Ratio Studies" approved in July, 1999 by the International Association of Assessing Officers [hereinafter the "IAAO Report," reprinted in The Assessment Journal (September/October 1999) at p. 23]

II. Equalization Requirements and Standards

RSA 21-J:3, XIII (Supp. 2002) obligates the DRA to equalize annually the valuation of property in each municipality by adjusting the "aggregate valuation" by such amounts to "bring such valuations to the true and market value of the property . . . so that any public taxes that may be apportioned among them shall be equal and just." (Emphasis added) While the DRA is directed to use the "sales-assessment ratio study" procedures set forth in RSA 21-J:9-a, the requirement of a "true and market" valuation to allow "equal and just" apportionment is the acknowledged goal of the equalization process.

More importantly, as noted in Bow, supra at 197, in order to be "lawful, reasonable and constitutional," the procedure or "scheme" of equalization applied by the DRA must comply with Part II, article 5 of the New Hampshire Constitution and must not "cause disproportionate taxation." This constitutional requirement was further emphasized and evaluated in Sirrell v. State of New Hampshire, 146 N.H. 364 (2001), a case analyzing deficiencies in the statewide property tax system in some depth and underscoring the need for a proportionate system of taxation.

A. Changes in Legislation

The legislature responded to Sirrell with a series of enactments briefly summarized below (with all references to Supp. 2002):

- RSA 21-J:3, XXV: authorizes the DRA to petition the board of tax and land appeals to order reassessment;
- RSA 21-J:3, XXVI: authorizes the DRA to review municipal assessments every five years and certify compliance with RSA 75:1;
- RSA 21-J:9-a: procedures for the DRA to follow during the equalization process;

- RSA 21-J:9-b: authorizes the DRA to petition the board of tax and land appeals when it determines property was valued disproportionally within a municipality or assessments reflect a high coefficient of dispersion or a municipality has not complied with the provision of RSA 75:8-a;
- RSA 21-J:11-a and b: further authorizes the DRA's review and certification every five years of municipal assessments and provides the schedule for implementation of such certification;
- RSA 21-J:14-a and b: the creation and the powers and duties of the assessing standards board ("ASB");
- RSA 21-J:14-c and d: the creation and the powers and duties of the equalization standards board ("ESB");
- RSA 21-J:14-e, f and g: authorizes the DRA to inspect appraisals and assessment documents in municipalities and for the DRA to certify or suspend certification of individuals contracted to do appraisal work for assessment purposes in municipalities; and
- RSA 21-J:14-h, i and j: authorizes the DRA to create, and establishes the minimum requirements for, cooperative assessment districts.

The board has carefully reviewed these legislative changes, particularly the responsibilities given to the ESB over the equalization process. The board disagrees with the DRA's position, however, that since the Manual applies certain alleged "recommendations" of the ESB it has the force of law and therefore the use of the weighted mean to compute the equalization ratio cannot be challenged.

As a preliminary matter, it is far from clear whether the ESB actually adopted the "recommendations" the DRA now relies upon in the manner prescribed by the statute. The testimony of Assistant Commissioner Reid of the DRA, a member of the ESB, reflects considerable uncertainty regarding whether the recommendations were ever formally voted upon at any meeting and there is an absence of any minutes or other writings documenting such adoption.

At best, the evidence reflects that the recommendations were circulated and presented at "public forums" conducted by Ms. Reid and other members of the ESB and the recommendations were "published" on the DRA's web site. These actions do not meet the specific statutory requirement in RSA 21-J:14-d, III (Supp. 2002) that the ESB "shall annually determine, vote upon, and recommend to the [DRA] the [equalization] ratio study procedures for use in the forthcoming tax year."

Second, even when considered in isolation, the Manual is an expansive and rambling discourse containing various internal inconsistencies on the procedures, considerations and forms to be used by the DRA in the equalization process. The Manual cites both the Wasserstein Report and the IAAO Report to support its premises and conclusions, even though they are somewhat inconsistent with each other. For all of these reasons, the board does not believe a blanket reliance on the provisions in the Manual is warranted. It is clear, moreover, that if a rulemaking process had been followed, many of the Manual's deficiencies could have exposed and hopefully corrected.

B. Need for Rulemaking

The DRA argues, however, that no specific statute requires either the ESB or the DRA to adopt rules pertaining to the equalization process or any substantive changes to it. The board has made an independent review of the relevant legislative history and notes the original legislation adopted in 2001 as Ch. 297 of the Session Laws contained a specific provision requiring the ESB to adopt such rules,[2] but this provision was removed in 2002 and replaced with a more general direction that the ESB adopt rules pertaining to practices, procedures and duties. See RSA 21-J:14-d, V (Supp. 2002). The DRA, for its part, is required to adopt rules relative to "the forms and other information that shall be furnished to the department to perform annual equalization . . ." in RSA 21-J:13, IX (Supp. 2002).

The board finds it troubling (especially in light of the rulemaking requirements of RSA Ch. 541-A which the board will discuss later below) that the present statutes enunciate many rulemaking authorities that pertain to equalization (including rules relative to tax rate setting which can only be done after equalization has occurred, see RSA 21-J:13, VII) yet through purposeful omission are silent as to whether the DRA or the ESB should adopt rules detailing the equalization process.

The DRA contends (in its Requests for Rulings of Law, No. 36) that "RSA 21-J:9-a is self-executing and therefore does not require rules to be adopted . . .", citing Appeal of Morgan,

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[2] See Ch. 297, Section 2:
"**V.** The board shall adopt rules, on or before December 31, 2001, pursuant to RSA 541-A and with specific attention to RSA 541-A:25, relative to unfunded state mandates, relative to:
(a) Standards and procedures for the calculation of equalization ratios and confidence intervals as recommended by the board.
(b) The equalization manual.
(c) Other forms and procedures necessary to fulfill the duties of the board consistent with board recommendations and to assure a fair opportunity for public comment."

144 N.H. 44, 51 (1999). The board disagrees with this contention. Morgan quotes from Petition of Smith, 139 N.H. 299, 307 (1994) to the effect that "[p]romulgation of a rule pursuant to RSA Chapter 541-A is not necessary to carry out what a statute authorizes on its face. [Smith v. N.H. Board of Medical Examiners, 138 N.H. 548, 553 (1994)]." The board finds the facts and holdings in each of these cases are distinguishable and the DRA's reliance on Morgan is therefore misplaced.

In Morgan, a pharmacist was disciplined by a state board (the New Hampshire Board of Pharmacy) for violations of federal pharmacy law and regulations. The court ruled the agency was not required to promulgate a rule (stating its incorporation of the federal law related to pharmacy practice) because the board was "statutorily authorized to take disciplinary action against licensees for, *inter alia*, violations of federal pharmacy law and regulation. See RSA 318:29, II (g)." Morgan (emphasis added), supra at 51. Unlike the Morgan case, the statute relied upon by the DRA (RSA 21-J:9-a) does not specify any particular "law, rule or regulation" or even professional standards, for that matter, to govern the method of equalization, but only certain "procedures" the DRA must follow, such as the "conduct [of] a "sales-assessment ratio study."

Similarly, the Smith cases quoted in Morgan fail to support the DRA's position. These cases involved disciplinary action against several psychologists under a statute which authorized action in case of "[a]ny unprofessional conduct or dishonorable conduct unworthy of, and affecting the practice of, the profession." RSA 330-A:14, II (c). Smith, supra, 139 N.H. at 307. The disciplining agency involved (the New Hampshire Board of Examiners of Psychologists) had previously enacted a rule (Rule 103.01) which required licensees "to adhere to the American Psychological Association's Principles of Ethics" but this rule had "lapsed." Id. On these facts,

the court held the lack (expiration) of a rule was of no consequence because "expiration of the rule does not preclude sanctions for statutorily prescribed unprofessional or incompetent conduct which also would have violated Rule 103.01 had it been in effect." Id. (emphasis added), citing Smith, supra, 138 N.H. at 553.

The DRA's argument that no rulemaking is required with respect to the state's equalization process because "RSA 21-J:9-a is self-executing" does not withstand scrutiny. Cases that permit the lack of rules (such as Morgan and Smith) do so only when the statutes involved are so specifically detailed or directed that further rulemaking is not legally required and indeed might be viewed as superfluous. The board finds RSA 21-J:9-a is not, on its face, a statute of this type.

Further, as argued by the Town of Holderness, the DRA's policy change from general use of the median ratio to the weighted mean ratio is in fact a "rule" as defined in RSA 541-A:1, XV.

> **XV.** "Rule" means each regulation, standard, or other statement of general applicability adopted by an agency to (a) implement, interpret, or make specific a statute enforced or administered by such agency or (b) prescribe or interpret an agency policy, procedure or practice requirement binding on persons outside the agency, whether members of the general public or personnel in other agencies. The term does not include (a) internal memoranda which set policy applicable only to its own employees and which do not affect private rights or change the substance of rules binding upon the public, (b) informational pamphlets, letters, or other explanatory material which refer to a statute or rule without affecting its substance or interpretation, (c) personnel records relating to the hiring, dismissal, promotion, or compensation of any public employee, or the disciplining of such employee, or the investigating of any charges against such employee, (d) declaratory rulings, or (e) forms . . . .

As the Town of Holderness correctly notes, the supreme court has referred to this section to conclude: "When a policy modification constitutes a substantive change in agency policy, it is

defined as a rule, not as an explanation of existing policy as the State asserts. See RSA 541-A:1, XIII (Supp. 1986)." Petition of Daly, 129 N.H. 40, 42 (1986).

The board finds the DRA's adoption of the ESB's recommendation that "the weighted mean (or aggregate) ratio shall be used to estimate the overall value of each municipality in New Hampshire" is an adoption of a standard to implement the DRA's statutory equalization authority that affects not only all municipalities throughout the state but all taxpayers that must bear the resulting allocated tax burden. Such an important standard can only have the force of law if specifically enunciated either in statute or via the adoption of a rule pursuant to RSA Chapter 541-A.[3]

Having concluded such, it does not mean the board will not review and give appropriate weight to the ESB's recommendations or the Manual's policies. The board will consider the ESB's recommendations and the guidelines established in the Manual as long as they comport to the constitutional and statutory provisions of arriving at proportional and equalized values ". . . pursuant to accepted appraisal standards . . . ." Bow, supra at 201.

In summary, while the board recognizes the significant events that have occurred in creating the framework for improving assessment equity and equalization procedures to reflect the concerns of inadequate standards and inconsistent procedures noted in Sirrell, supra, those procedures, if not codified by statute or adopted through the RSA 541-A rule-making process, do not have the binding effect of law on the board in its review of the DRA's equalized valuation

[3] From the Bow decision, supra at 197, it appears the DRA previously had rules in place requiring it to calculate and apply various ratios: the court further noted "the DRA typically uses the discretion afforded it by [former] Rule 602.07 to choose the median ratio over the aggregate ratio in determining the municipality's equalization ratio." Id.

calculations.[4] The board will hold the constitutional and statutory requirements as the touchstone for determining whether such calculations were properly done and will not be bound by uncodified guidelines if they do not result in proportional equalization.

III. Board's Rulings

A. Abatements

For several reasons, the board finds the City's argument of removing abatements subsequent to the MS-1 filing does not result in a more accurate estimate of the City's valuation and, in fact, may result in a disproportionate valuation to the benefit of the City in comparison to other municipalities that do not have subsequent abatements deducted.

First, the board notes the City's desire to have $13,942,800 in abatements deducted is less than two-tenths of a percent of its total 2002 equalized valuation. See Nashua Exhibit C. The adjustment would therefore have a relatively insignificant effect on the City's overall valuation. "Absolute mathematical equality is not obtainable in all respects if taxation is to be administered in a practical way." City of Berlin v. County of Coos, 146 N.H. 90, 94 (2001) quoting from Duncan v. Jaffrey, 98 N.H. 305 (1953).

Second, it is reasonable to predict that all municipalities have abatements that occur between the September 1 MS-1 filing deadline and the time the DRA notices municipalities of

[4] In further support of the board's finding that the Manual does not have the effect of law is that it is never affirmatively stated in the statute that the DRA must create such a manual. In fact, as noted earlier, in 2001 the ESB initially was given the authority to adopt rules relative to an equalization manual only to have that authority repealed a year later. The equalization manual is now only mentioned in RSA 21-J:14-d, II, (Supp. 2002) where the authority is given to the ESB to ". . . review, revise, and approve the equalization manual published by the department of revenue administration." The Manual was initially prepared and dated March 2003 and, as a consequence, there has not been the opportunity for the ESB to "review, revise and approve" the Manual prior to its utilization and reliance by the DRA in establishing the 2002 equalized valuations in the spring of 2003.

their equalized valuation by May 1st. The board does not read RSA 21-J:9-a, IV ("the commissioner may consider other evidence as may be available on or before the time of determining the final equalized valuation") to require the DRA to implement a method for MS-1 forms to be revised up to the date the DRA determines each municipality's final equalized value. The DRA's process, as noted at pages 9-10 and 38 of the Manual (DRA Exhibit 3), of only revising the MS-1 reported valuations due to significant changes is reasonable. To do otherwise would require all municipalities to file revised MS-1 reports just prior to the date of the DRA's equalized valuation determination and would require the DRA to make those adjustments as of that point in time. As abatements occur on a rolling basis in all municipalities, the DRA's snapshot use of property valuations as reported on the MS-1 forms on September 1 provides just as accurate an estimate of all municipalities valuations as one reported approximately six or seven months later. The DRA can properly use its judgment in the rare instances, as noted in DRA Exhibit 7, where large abatements, either court ordered or otherwise, occur that would significantly skew the estimate of the municipality's equalized valuation.

B. Stratified Weighted Mean Calculations

There is some basis in accepted appraisal standards for the City's assertion that stratification by property class can result in a more accurate estimate of the City's total equalized valuation. See IAAO Report, Section 4.4.2 and 7.3.5; and Wasserstein Report, pages 29 – 31. However, as the DRA testified and as the ESB's fourth recommendation noted, there does not currently exist the ability for the DRA to obtain through its MS-1 form adequate information to stratify the City of Nashua's properties in three strata.

Both parties agreed, however, that the MS-1 form does gather adequate information to create two strata of taxable property: 1) residential land and building values; and 2)

commercial/industrial land and building values. Despite the capability of doing so and the accepted appraisal standards indicating it is a preferred method in municipalities with a large number of sales in the study sample, the board, in this case, declines to find the City's proposed stratification results in a more accurate estimate of the City's equalized valuation primarily because the City presented no evidence as to the confidence intervals of its two strata.

Given the lack of confidence interval calculations, the board cannot conclude, with any reasonable degree of statistical certainty, that the City's proposed stratification approach is more accurate than the DRA's overall weighted mean estimate. See generally IAAO Report, Section 7.5 (Measures of Reliability). Stated another way, without such calculations, it is possible that the weighted mean point estimates for each of the City's strata may have confidence intervals that overlap with the overall weighted mean and, thus, the City's stratified calculations do not provide a greater level of accuracy than the DRA's overall weighted mean point estimate of 74.6%.

C. Exclusion of Two Sales

At the hearing, the parties stipulated that two sales should be excluded from the City's equalized valuation calculation as they were not reliable indications of market values. Consequently, the board orders the DRA to revise the City's equalized valuation in accordance with that stipulation.

In summary, the appeal is granted, but only as to the issue of excluding the two sales and as stipulated to by the DRA. The board has responded to the DRA's and the City's requests for findings in Addendums A and B in this Decision.

As provided in RSA 71-B:5, any appeal must be filed directly with the supreme court within 20 days after the clerk's date of this Decision.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

_____
Paul B. Franklin, Chairman

_____
Michele E. LeBrun, Member

_____
Douglas S. Ricard, Member

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Albert F. Shamash, Esq., Member

Addendum A

Responses to Requests for Findings of Fact and Rulings of Law by the
Department of Revenue Administration

Docket Nos. 19465-02ER, 19466-02ER, 19467-02ER, and 19468-02ER

The "Requests" received from the DRA are replicated below, in the form submitted and without any typographical corrections or other changes. The board's responses are in bold face. With respect to the Requests, "neither granted nor denied" generally means one of the following:

a. the Request contained multiple requests for which a consistent response could not be given;

b. the Request contained words, especially adjectives or adverbs, that made the request so broad or specific that the request could not be granted or denied;

c. the Request contained matters not in evidence or not sufficiently supported to grant or deny;

d. the Request was irrelevant; or

e. the Request is specifically addressed in the Decision.

Requests for Findings of Fact and Rulings of Law

I. FINDINGS OF FACT:

1. One of the purposes of Equalization process is to determine the total market value of taxable property within each municipality so that state, county, and cooperative school district taxes may be apportioned based on the property value in each municipality.

Granted.

2. Indirect equalization adjusts the total assessed value of a jurisdiction so that it approximates the total market value within the jurisdiction.

Granted.

3. The equalization process used by the DRA is a form of indirect equalization.

Granted.

4. The DRA conducts a sales/assessment ratio study each year as part of the equalization process.

Granted.

5. The sales/assessment ratio study is used to calculate the level of assessment of all "land, buildings, and manufactured housing" (LBMH) property.

Granted.

6. The most appropriate ratio is selected to represent the level of assessment of LBMH property.

Neither granted nor denied.

7. For the 2002 ratio study, the DRA used the weighted mean to calculate the total equalized value of LBMH property in most jurisdictions. The DRA did not adjust the modified assessed values of those municipalities whose confidence intervals of the weighted mean overlapped 1.0. Testimony of Linda Kennedy; DRA Exhibit 3, Equalization Manual page 36. Additionally, the DRA did not use the weighted mean for the town of Roxbury because of a very small sample size. Testimony of Linda Kennedy.

Granted.

8. The weighted mean is calculated by dividing the sum of the assessed values for the entire sample by the sum of the sales prices for the entire sample.

Granted.

9. The International Association of Assessing Officers 1999 Standard on Ratio Studies recommends the use of the weighted mean in indirect equalization.

Neither granted nor denied.

10. A report was prepared by Dr. Ronald Wasserstein and Peter Davis on the equalization procedures in New Hampshire on October 5, 2001.

Granted.

11. Dr. Wasserstein and Mr. Davis recommended that the DRA use the weighted mean in its equalization process. DRA Exhibit 2, p.13.

Granted.

12. The recommendations of Dr. Wasserstein and Mr. Davis were presented to the Equalization Standards Board.

Granted.

13. The Equalization Standards Board considered the recommendations of Dr. Wasserstein and Mr. Davis and made recommendations to the DRA regarding the Equalization procedures.

Neither granted nor denied.

14. The Equalization Standards Board recommended that the DRA use the weighted mean in the 2002 Equalization process. DRA Exhibit 1.

Neither granted nor denied.

15. Mr. Angelo Marino, the Chief Assessor of Nashua, testified that the weighted mean is the best suited measure of central tendency for purposes of indirect equalization.

Granted.

16. Mr. William Cochoran, Assessing Agent for the Town of Holderness, testified that he subscribes to the I.A.A.O. standards.

Granted.

17. Outliers are samples with ratios that differ markedly from the measure of central tendency.

Denied.

18. The process of trimming outliers removes the outlier samples before the statistics are finally calculated.

Denied.

19. The DRA used a mathematical formula with a trim factor of 3 to trim outliers in the 2002 equalization study. DRA Exhibit 3, pg. 30.

Granted.

20. Dr. Wasserstein and Mr. Davis recommended that the DRA use a mathematical formula with a trim factor of 3 to trim outliers. DRA Exhibit 2, pg. 13.

Granted.

21. The Equalization Standards Board concurred with the DRA's use of a mathematical formula with a trim factor of 3 to trim outliers. DRA Exhibit 1.

Neither granted nor denied.

TOWN OF SUNAPEE

22. There were 13 sales of lakefront property (Sample Lakefront Properties) included in the DRA's 2002 Ratio Study. Sunapee Exhibit B.

Granted.

23. These 13 sales had a median ratio of 50.0 and a weighted mean of 40.9. Sunapee Exhibit B.

Granted.

24. The total assessed value for the Sample Lakefront Properties is 3,601,3000 and the total selling prices for these properties was 8,814,500. Sunapee Exhibit B.

Granted.

25. The assessed value of the Sample Lakefront Properties divided by the median ratio of the Sample Lakefront Properties (.50) equals $7,202,600. $7,202,600 is only 82% of $8,814,500, the true market value of the Sample Lakefront Properties.

Denied.

26. There were 105 sales of properties (Sample Properties) included in the DRA's 2002 Ratio Study.

Granted.

27. These 105 sales had a median ratio point estimate of 72.0 and a weighted mean point estimate of 58.6. Sunapee Exhibit B.

Neither granted nor denied.

28. The total assessed value for the Sample Properties was 13,377,844 and the total selling prices for these properties was 22,812,096. Sunapee Exhibit B.

Granted.

29. The assessed value of the Sample Properties divided by the median ratio of the Sample Properties (.72) equals $18,580,339. $18,580,339 is only 81% of $22,812,096, the true market value of the Sample Properties.

Neither granted nor denied.

30. There was no evidence that the 13 Lakefront Sample Properties either under-represented the lakefront property in Sunapee or over-represented the lakefront property in Sunapee.

Neither granted nor denied.

31. If the three sales with the lowest ratios (Million Dollar Lakefront Sample Properties) are trimmed, the weighted mean of the Non-Million Dollar Properties is 65.8 and the median is .72. Sunapee Exhibit B.

Granted.

32. Sunapee did not present any evidence regarding generally accepted appraisal standards for what is the appropriate level of representativeness for a ratio study.

Neither granted nor denied.

33. The upper limit of the confidence interval of the weighted mean of Sunapee is 65.4 and the lower limit is 52.2. DRA Extended Statistics Sunapee 2002 Ratio Study.

Granted.

34. This indicates that the true weighted mean may fall anywhere between 52.2 and 65.4. Testimony of Angelo Marino.

Granted, based on the DRA's ratio study, not testimony of Angelo Marino.

35. The lower limit of the median ratio is 66.7 and the upper limit is 74.3. DRA Extended Statistics Sunapee 2002 Ratio Study.

Granted.

36. This indicates that the true median may fall anywhere between 66.7 and 74.3. Testimony of Mr. Marino; DRA Exhibit 2, pg. 16.

Granted, based on the ratio study, not testimony of Angelo Marino.

TOWN OF HOLDERNESS

37. There were 46 sales of properties (Sample Properties) included in the DRA's 2002 Ratio Study for the Town of Holderness ("Holderness").

Granted.

38. These 46 sales had a median ratio point estimate of 73.4 and a weighted mean point estimate of 61.8. DRA 2002 Ratio Study for Holderness Extended Statistics.

Granted.

39. There were 1,787 taxable properties in Holderness in 2002. The 46 sales used in the study represent 2.5% of the taxable properties in Holderness. See Holderness Exhibit F.

Granted.

40. Dr. Wasserstein and Mr. Davis recommended that a sample size of at least 40 valid ratios is adequate for estimating the weighted mean ratio. See DRA Exhibit 2, pg. 20.

Granted.

41. 22% of the sales in the DRA's ratio study represent waterfront properties. 17% of the properties in Holderness are waterfront properties. See Holderness Exhibit F.

Neither granted nor denied.

42. 2% of properties in town are condominium. No sales of condominiums are in the sample. See Holderness Exhibit F.

Granted.

43. Holderness did not present any evidence regarding generally accepted appraisal standards for what is the appropriate level of representativeness for a ratio study.

Neither granted nor denied.

44. The upper limit of the confidence interval of the weighted mean of Holderness is 69.1 and the lower limit is 56.6. DRA 2002 Ratio Study for Holderness Extended Statistics.

Granted.

45. This indicates that the true weighted mean may fall anywhere between 56.6 and 69.1. Testimony of Angelo Marino.

Granted, based on the DRA ratio study, not testimony of Angelo Marino.

46. The lower limit of the median ratio is 69.2 and the upper limit is 80.8. DRA 2002 Ratio Study for Holderness Extended Statistics.

Granted.

47. This indicates that the true median may fall anywhere between 66.7 and 74.3. Testimony of Mr. Marino; DRA Exhibit 2, pg. 16.

Denied.

48. The DRA did not adjust the assessed values for any municipality as the result of abatements in the 2002 equalization process.

Granted.

49. On rare occasion, the DRA has adjusted the assessed values reported by a municipality on DRA Form MS-1 where the court ordered abatements significantly impacted the original reported values and the abatements were granted prior to the determination of total equalized value.

Granted.

50. The Equalization Standards Board has recommended that the DRA not apply different ratios to different strata until the ESB has reviewed this method and guidelines are developed for its use.

Neither granted nor denied.

51. Nothing of value comes from stratification if the strata chosen do not differ with respect to the quantity being measured. If strata are homogeneous with respect to the quantity being measured, in this case the sales/assessment ratio, stratification does not improve measurement. DRA Exhibit 2, p.27.

Neither granted nor denied.

52. Mr. Marino did not calculate the confidence intervals around the weighted means of the three strata proposed by Nashua, residential, commercial, and vacant land.

Granted.

53. Confidence intervals around the weighted mean indicate the range within which the true level assessment may fall because it is unlikely that the point estimate equals the level of assessment.

Neither granted nor denied.

54. Confidence intervals would indicate whether the three strata could in fact be assessed at the same level.

Neither granted nor denied.

II. RULINGS OF LAW:

1. The DRA may equalize properties in any way such that the result enables public taxes to be apportioned among the towns, cities, and municipalities in an equal and just manner. See Appeal of Bow, 133 N.H. 194, 201 (1990).

Granted.

2. "Absolute mathematical equality is not obtainable in all respects if taxation is to be administered in a practical way." Sirrell v. State, 146 NH 364, 370 (2001).

Granted.

3. To comply with RSA 21_J:3 , XIII, the DRA's total equalized valuation for the [Towns] must merely represent, pursuant to accepted appraisal standards, 'the true and market value' of the property within the Town." Appeals of Bow et.al, 133 NH 194, 201 (1990).

Granted.

4. If a jurisdiction is total equalized assessed value is less than market value and other jurisdictions' total equalized assessed value equals market value, then the taxpayers in the jurisdictions assessed at market value will bear a disproportionate share of the public expense.

Granted.

5. In order to reach the most accurate determination of a municipalities total equalized value, and therefore the fairest division of the public expense, this Board may choose any equalization ratio the use of which will most accurately approximate market value and is supported by the evidence. See R.S.A. 541-A:33, VIII. See Appeals of Bow et al, 133 N.H. 194, 201 (1990).

Granted.

6. While this Board is not required to use the weighted mean to equalize any municipality, it should consider whether the use of a different ratio than used by other jurisdictions will result in disproportionate taxation.

Granted.

7. The Burden of Proof rests with the appealing municipality to establish the true market value of the municipality. If the municipality does not establish the true market value of the municipality it cannot meet its burden of proof to establish that the DRA erred in its calculation of the true market value of the municipality. See Tax Rul. 211.04.

Neither granted nor denied.

8. Based on the evidence before the Board, it is generally accepted in the appraisal profession that for purposes of indirect equalization the weighted mean provides the most accurate measure of a jurisdiction's overall value.

Denied.

CITY OF CONCORD

9. Concord failed to present any witness or evidence to rebut the evidence presented that the weighted mean is generally accepted in the appraisal profession as the most accurate measure of a jurisdiction's overall value for purposes of indirect equalization.

Granted.

10. Concord failed to present any witness or evidence that rebutted the DRA's evidence that the outlier trimming formula with a trim factor of 3 is the most reliable method to trim outliers.

Granted.

11. The evidence presented established that the outlier trimming method advocated by Concord is not a generally accepted appraisal practice. Testimony of Linda Kennedy.

Granted.

12. Concord failed to meet its burden of proof to establish that the DRA had erred in its calculation of the market value of the property in the City of Concord.

Granted.

TOWN OF SUNAPEE

13. The DRA's use of the weighted mean to determine Sunapee's total equalized assessed value is supported by generally accepted appraisal practices.

Denied.

14. Sunapee failed to establish that using the median ratio would result in a more accurate determination of the market value of the property in Sunapee. The evidence before the Board establishes that the use of the median would in fact significantly underestimate the market value of the property in Sunapee. See Request For Findings of Fact Nos. 25 and 29.

Denied.

15. The use of the median is not justified by Sunapee's failure to assess the high value properties at a lower level than other assessments in the town. "Widespread disproportionality is no defense." Appeal of Town of Sunapee, 126 NH 214, 219 (1985)

Denied.

16. If the Board selects the median ratio to equalize the assessed values of Sunapee, the result of Sunapee's assessment of its high value properties at a lower rate than the rest of its property will be that Sunapee will not be equalized to market value.

Neither granted nor denied.

17. Sunapee failed to establish that the DRA's ratio study was not representative of the properties in Sunapee because it failed to present sufficient evidence regarding the composition of the properties in Sunapee.

Neither granted nor denied.

18. Sunapee failed to establish that the DRA's ratio study was not representative of the properties in Sunapee because it failed to present sufficient evidence regarding generally accepted appraisal standards for what is the appropriate level of representativeness for a ratio study.

Neither granted nor denied.

19. For indirect equalization, the inclusion of high value properties is necessary to achieve representativeness. I.A.A.O. Standard on Ratio Studies, Sec. 5.5.2.

Neither granted nor denied. The IAAO standard cited does not relate to the facts in this appeal.

20. The use of the weighted mean to equalize the modified assessed value of the LBMH of Sunapee results in the most accurate determination of the market value of the property in Sunapee.

Denied.

21. Alternatively, the use of the ratio 65.4, the upper limit of the confidence interval of the weighted mean, to equalize the modified assessed value of the LBMH would provide the most accurate determination of the market value of the property in Sunapee.

Denied.

22. The use of the ratio 65.4 provides a conservative adjustment to Sunapee's assessments. See DRA Exhibit 2, p. 17.

Neither granted nor denied.

23. The use of the upper limit of the weighted mean not only provides a more accurate determination of the value of property in Sunapee, but is consistent with the way the DRA determined the equalized value of other jurisdictions in the State whose confidence interval of the weighted mean overlapped 1.0.

Neither granted nor denied.

TOWN OF HOLDERNESS

24. The DRA's use of the weighted mean to determine Holderness' total equalized assessed value is supported by generally accepted appraisal practices.

Denied.

25. Holderness failed to establish that using the median ratio would result in a more accurate determination of the market value of the property within its borders. The evidence before the Board establishes that the use of the median would in fact significantly underestimate the market value of the property in Holderness. Compare With DRA Request for Findings of Fact (Sunapee)25 and 29.

Denied.

26. Holderness failed to establish that the DRA's ratio study was not representative of the properties in Holderness because it failed to present sufficient evidence regarding the composition of the properties in Holderness.

Neither granted nor denied.

27. Holderness failed to establish that the DRA's ratio study was not representative of the properties in Holderness because it failed to present sufficient evidence regarding generally accepted appraisal standards for what is the appropriate level of representativeness for a ratio study.

Neither granted nor denied.

28. The use of the median is not justified by Holderness' failure to assess the high value properties at a lower level than other assessments in the town. "Widespread disproportionality is no defense." Appeal of Town of Sunapee, 126 NH 214, 219 (1985)

Denied.

29. If the Board selects the median ratio to equalize the assessed values of Holderness, the result of Holderness' assessment of its high value properties at a lower rate than the rest of its property will be that Sunapee will not be equalized to market value.

Neither granted nor denied.

30. The use of the weighted mean to equalize the modified assessed value of the LBMH of Holderness results in the most accurate determination of the market value of the property in Holderness.

Denied.

31. Alternatively, the use of the ratio 69.1, the upper limit of the confidence interval of the weighted mean, to equalize the modified assessed value of the LBMH would provide the most accurate determination of the market value of the property in Holderness.

Denied.

32. The use of the ratio 69.1 provides a conservative adjustment to Sunapee's assessments. See DRA Exhibit 2, p. 17.

Neither granted nor denied.

33. The use of the upper limit of the weighted mean not only provides a more accurate determination of the value of property in Holderness, but is consistent with the way the DRA determined the equalized value of other jurisdictions in the State whose confidence interval of the weighted mean overlapped 1.0.

Neither granted nor denied.

34. The Commissioner of Revenue Administration has plenary authority to equalize the valuation of property in the municipalities and unincorporated places of the State pursuant to RSA 21-J:3, XIII.

Denied.

35. RSA 21-J:3, XIII requires the Commissioner to use procedures set forth in RSA 21-J:9-a to equalize the valuation of the property in the State.

Granted.

36. RSA 21-J:9-a is self-executing and therefore does not require rules to be adopted pursuant to the requirements of RSA 541-A in order for the Commissioner to carry out its provisions. See Appeal of Morgan , 144 NH 44, 51 (1999) (Holding that promulgation of a rule is not necessary to carry out what a statute authorizes on its face.)

Neither granted nor denied.

CITY OF NASHUA

37. The abatements that the City of Nashua do not significantly affect its overall assessed values.

Neither granted nor denied.

38. Moreover, in any given tax year there may be multiple municipalities within a county providing abatements for over_assessment, and thus Nashua's neighboring municipalities could also seek a reduction of their equalized assessed valuation based on abatements granted. "Virtually no certainty could exist in the fiscal management of local and county affairs." Berlin v. Coos County, 146 NH 90, 95 (2001).

Neither granted nor denied.

39. "The commissioner . . . may consider such other evidence as may be available to the commissioner on or before the time the final equalized value is determined." R.S.A. 21-J:9-a,IV.

Granted.

40. The abatements of Nashua were not made available to the DRA until after final equalized value was determined.

Granted.

41. Nashua's equalized value should not be adjusted because Nashua did not provide this information before equalization was set and therefore the Commissioner could not consider it.

Neither granted nor denied.

42. There is insufficient evidence to determine that the residential, commercial, and vacant land strata are assessed at different levels.

Granted.

43. The use of two different strata in Nashua is not justified because it has not been established that the commercial and residential strata are assessed at different levels. See Request for Findings of Fact Nos. 51-54.

Neither granted nor denied.

44. The use of a separate stratum for vacant land in Nashua is not justified because the sample size is too small to produce a reliable statistic.

Granted.

Addendum B

Responses to Requests for Findings of Fact and
Rulings of Law by the City of Nashua

Docket No. 19466-02ER

The "Requests" received from the City of Nashua are replicated below, in the form submitted and without any typographical corrections or other changes. The board's responses are in bold face. With respect to the Requests, "neither granted nor denied" generally means one of the following:

a. the Request contained multiple requests for which a consistent response could not be given;

b. the Request contained words, especially adjectives or adverbs, that made the request so broad or specific that the request could not be granted or denied;

c. the Request contained matters not in evidence or not sufficiently supported to grant or deny;

d. the Request was irrelevant; or

e. the Request is specifically addressed in the Decision.

Requests for Findings of Fact and Rulings of Law

1. Under RSA 21-J:3 XIII, the City's total equalized value must be determined pursuant to accepted appraisal standards. Appeals of Bow, et al., 133 N.H. 194, 201 (1990).

Granted.

2. Under RSA 71-B:5 II, this matter is an appeal de novo. See 2 Am Jur. 2d, Administrative Law, Section 372, pp. 371-72; RSA 76:16; RSA 76:16-a.

Granted.

3. RSA 21-J:9-a IV provides for use of new or corrected information that becomes available prior to the equalized value becoming final.

Granted.

(Stratification)

4. Pursuant to accepted appraisal standards, in a ratio study, where feasible, ratios should be stratified by property characteristic, and the measures of central tendency should be weighted for the strata in proportion to the strata's shares of the total valuation in the jurisdiction. IAAO 1999 Standard on Ratio Studies Sec. 7.3.5, p. 43; Wasserstein & Davis, Recommendations Regarding New Hampshire Equalization Procedures, pp. 29-31.

Neither granted nor denied.

5. Pursuant to accepted appraisal standards, three strata are recommended: residential, commercial/industrial, and vacant land. W&D, pp. 29-31. See also DRA Equalization Manual, pp. 56-57, referencing the Assessing Standards Board.

Granted.

6. Simply by combining DRA Property Classification Codes in the ratio study and using information from the MS-1 form, the weighted means of two strata, residential and industrial/commercial, can be determined.

Granted.

7. Stratified weighted mean analysis for commercial/industrial and residential strata yields a total equalized valuation of $7,123,668,172 and a ratio of .7539 for Nashua in 2002.

Neither granted nor denied.

8. With the addition of the City of Nashua's information on vacant land, the recommended vacant land stratum can be added to the analysis.

Neither granted nor denied.

9. Stratified weighted mean analysis for commercial/industrial, residential and vacant land strata yields a total equalized valuation of $7,124,296,127 and a ratio of .7538 for Nashua in 2002.

Neither granted nor denied.

(Exclusion of Non-arms' Length Sales)

10. Under accepted appraisal standards, sales involving packaged deals that do not accurately allocate sale prices to individual parcels should be excluded from ratio studies. W&D, p. 22; IAAO, Sec. 6.4.3, p. 36; DRA Exclusion Code 66.

Neither granted nor denied.

11. The Best Buy (#60) and Royal Crest Apartments (#1875) sales were both items in large multi-state bulk sales that did not accurately allocate value and thus should be excluded.

Neither granted nor denied.

12. The City believed these sales would be excluded from the study by DRA and had no opportunity to furnish more detailed information to support exclusion prior to learning in late April that the sales were actually included in the study.

Neither granted nor denied.

13. With the Best Buy and Royal Crest sales excluded, the weighted mean changes significantly and, with stratification, yields a total equalized valuation of (a) $6,952,027,607 and a ratio of .7725 for commercial/industrial and residential strata and (b) $6,945,718,707 and .7732 for the three strata.

Neither granted nor denied.

(Abatements)

14. Abatements occurring after the filing of MS-1 form should be recognized in the interest of improved accuracy. DRA Equalization Manual Sec. 3.02, pp. 9-10; Berlin v. County of Coos, 146 N.H. 90, 93, 95 (2001).

Denied.

15. Abatements are an ongoing process such that the best information on total assessed valuation is not available until the latest possible time.

Neither granted nor denied.

16. As of the filing of this appeal, abatements granted since the filing of the MS-1 form reduced total assessed valuation by $13,942,800.

Granted.

17. Stratified weighted mean analysis (a) for three strata – commercial/industrial, residential, and vacant land – (b) excluding the Royal Crest and Best Buy sales; and (c) removing the abated assessed value yields a total equalized valuation of $6,912,032,688 and a ratio of .7729.

Neither granted nor denied.

18. The City of Nashua equalized valuation for 2002 should be $6,912,032,688 exclusive of payments in lieu of taxes and railroad value.

Denied.

Certification

I hereby certify that a copy of the foregoing Decision has this date been mailed, postage prepaid, to: City of Nashua, 229 Main Street, Post Office Box 2019, Nashua, New Hampshire 03061; David R. Connell, Esq., Office of Corporation Counsel, 229 Main Street, Post Office 2019, Nashua, New Hampshire 03061-2019, counsel for the City of Nashua; Kathleen Sher, Esq., Department of Revenue Administration, 45 Chenell Drive, Concord, New Hampshire 03301, counsel for the DRA; and Earls Neider Perkins, LLC, Post Office Box 7887, 58 Route 129, Suite 126, Loudon, New Hampshire 03307, Interested Party.

Date: July 25, 2003

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Anne M. Bourque, Deputy Clerk

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