

North Country Environmental Services, Inc.

v.

Town of Bethlehem

Docket Nos.: 19709-02PT/20384-03PT/21064-04PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the following assessments by the “Town”:

		<u>Land:</u>	<u>Buildings:</u>	<u>Total:</u>
<u>2002 Assessment:</u>	Map 419/Lot 1	\$ 66,100	\$11,213,900	\$11,280,000
<u>2003 Assessment:</u>	Map 419/Lot 1	\$	\$	*\$9,518,603.16

(*After abatement, the Town did not allocate the assessment between land and buildings.)

<u>2004 Assessment**:</u>	Map 419/Lot 1	\$ 223,700	\$ 1,077,330	\$ 1,301,030
	Map 419/Lot 21	\$ 81,000		\$ 81,000
	Map 419/Lot 22	\$ 75,000		\$ 75,000
	Map 419/Lot 23	\$ 44,000		\$ 44,000

(**Lot 1 in prior years was identified in 2004 as the four lots listed above.)

The “Property” is a sanitary landfill and consists of 105.28 acres as identified above on the Town’s tax maps and assessment-record cards. The Taxpayer also owns, but did not appeal Map 419/Lots 017, 019, 020 and 028 and Map 209/Lots 030 and 035, which contain an additional 23.33 acres.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the assessments were disproportionately high or unlawful, resulting in the Taxpayer paying a disproportionate share of taxes. See RSA 76:16-a; TAX 201.27(f); TAX 203.09(a); Appeal of City of Nashua, 138 N.H. 261, 265 (1994). To establish disproportionality, the Taxpayer must show the Property's assessments were higher than the general level of assessment in the municipality. Id. The Taxpayer carried this burden.

The Taxpayer argued the assessments were excessive because:

- (1) an appraisal ("Main Appraisal") and updates completed by Douglas F. Main, a credentialed appraiser (CRE, CCIM, MAI) employed first by PricewaterhouseCoopers – The Waste Group and then by Deloitte – Financial Advisory Services (see Taxpayer Exhibit Nos. 4-6), estimates substantially lower values for the Property than the assessed values for tax years 2002, 2003 and 2004;
- (2) the Property is operated as a sanitary landfill and is a "wasting asset" because the permitted airspace will be filled up over time: in fact, the Property, as of April 1, 2002, had a "remaining capacity"/"remaining life" of 3.25 years (39 months);
- (3) any additional airspace which has not yet been fully permitted for a landfill should not be valued because of the uncertainties involved in the permitting process and the legal challenges which ensue both before and after a permit is issued;
- (4) the Town's assessed values are based on a discounted cash flow analysis ("DCF Method") performed by Leonard J. Nyberg, Jr. ("Nyberg Appraisal") which, besides containing numerous errors resulting in significant overassessment of the Property, estimates the value of the going concern and not just the taxable real estate;

(5) the Town applied the prior year equalization ratios to the Nyberg Appraisal value in 2002 and 2003 resulting in the Property being assessed in those two years at a higher level of assessment than other properties in the Town; and

(6) the RSA 72:12-a exemption for water and air pollution control facilities as determined by the department of environmental services (“DES”) is applicable to the 2003 tax year because it is when the initial determination was made by the DES, regardless of the subsequent rehearing and supreme court proceedings.

The Town argued the assessments were proper because:

(1) the Town used the DCF Method analysis performed by Mr. Nyberg, which is more appropriate than the Market Rent/Royalty (“Royalty Method”) technique used by the Taxpayer’s expert, Mr. Main;

(2) the Royalty Method technique does not capture all the taxable real estate rights of the Property;

(3) the Town properly utilized the equalization ratios which were known at the time the Property’s values were estimated; and

(4) the percent of exemption determined by the DES under RSA 72:12-a following a rehearing is not retroactive.

The parties agreed to, and presented, several stipulations on the second day of the four-day consolidated hearing held on these appeals. The board has incorporated those stipulations in its findings as appropriate.

Board's Rulings

These appeals were heard over a period of four days, involved scores of exhibits and a number of prehearing motions including a request for a protective order for a number of documents. Given the unique nature of the Property and the long-standing litigious relationship of the parties, such lengthy testimony and numerous exhibits is not surprising. Nonetheless, the board's decision will attempt to be as succinct as possible and yet make adequate findings on the appeals' three basic components: i) market value; ii) the proper level of assessment; and iii) the applicability of the RSA 72:12-a water and air pollution control facilities "exemption".

Despite the parties' many differences, it was agreed the highest and best use of the Property was as a sanitary landfill and the income approach was the most applicable of the three approaches (cost, market, income) to utilize in valuing this special use property.

The parties also stipulated to the following. The equalization ratios determined by the department of revenue administration ("DRA") for tax years 2001, 2002, 2003 and 2004 were, respectively, 78%, 66.3%, 62.6% and 100%. For adjusting the market value estimate for each of the three years under appeal, the Town utilized ratios of 78%, 66.3% and 100% for tax years 2002, 2003 and 2004 respectively. For 2004, the DES determined 82% of the assessed value should be exempt and be applied to tax map 419/lots 1, 22 and 23. For 2003, the parties agreed a legal disagreement existed as to the applicability of the exemption determination. If the board finds the DES' initial March 14, 2003 determination ("initial determination") was applicable to 2003, then 0.72379% of the assessed value should be exempt, but if the board finds the DES' January 5, 2004 rehearing determination ("rehearing determination") was applicable, 82% of the 2003 assessed value was exempt.

The board's decision will address the valuation, level of assessment and exemption in separate sections.

I. Market Value Estimates for Tax Years 2002, 2003 and 2004

A. Valuation Methodology

There is a wide gap in the parties' positions regarding the market values (and the corresponding proportional assessments) of the Property in each year. For tax years 2002 and 2003, for example, the Taxpayer contends the market values were no more than \$1,601,026 and \$981,026, respectively, while the Town contends the market value was \$14,450,000 in each of these years. See, e.g., Taxpayer's Requests for Findings Nos. 6 and 7 and the Town's Requests for Findings No. 16. In light of this great divide, the board's statutory responsibility is to use the available evidence and its learning and experience in real estate valuation and appraisal, see RSA 71-B:1, to determine whether the Taxpayer has met its burden of proving disproportional assessment. The board finds that it has.

The parties agree the income approach was the most applicable approach to employ because the Property, as a landfill, generates a reasonably predictable income stream and has a limited life-span. However, they disagreed as to which method of the income approach to utilize. The Taxpayer's appraiser, Mr. Main, utilized the Royalty Method (see Taxpayer Exhibit No. 1, Tabs 4 and 23), while the Town's appraiser, Mr. Nyberg, Jr., utilized the DCF Method.

For the following reasons, the board finds the value conclusion of the Royalty Method should be given the most weight in this case. However, the DCF Method, with some informed adjustments, can be utilized as a secondary check on the value conclusion of the Royalty Method.

The foremost reason the Royalty Method is given the most weight is because the method inherently values, if properly employed, only the taxable realty portion of the income stream and not the non-realty portion (business, equipment, intangible personalty rights, etc.) of the going concern value of a landfill. The Royalty Method analyzes leases of developed landfills where the landlord is receiving a rent based on a percentage (royalty) of the landfill's gross income. The concept is the landlord incurs minimal or no expense relative to the ongoing operation of the landfill and, thus, the landlord's income is largely, if not exclusively, derived from the real estate.

In general, the board agrees with the Taxpayer that the Property's landfill gross operating income is significantly affected by the owner's specialized business acumen comprised of such things as the complex management of a vertically integrated business operation, assembled work force, client contracts, client relationships, established relationships with regulatory agencies and non-compete agreements (in short, the specialized business knowledge and relationships which must exist in the highly regulated niche of solid waste management and disposal). Further, another significant portion of the landfill's net operating income is derived from non-realty items, such as the equipment and machinery related to the hauling of waste material, cover material spreading and waste compacting at the landfill. Because such business acumen and equipment-related income will vary depending on the operator and on the type, size and location of landfills, it is difficult to reliably estimate the amount to be deducted from the DCF Method, and thus the board agrees with the Taxpayer that the Royalty Method is the preferred method for estimating the value of the Property's taxable real estate.

B. Rental Rate

While the Royalty Method may be the preferred method, the board finds the Main Appraisal's selection of an 11% rental rate does not adequately reflect all the fee simple taxable rights held by the Taxpayer. The board finds some merit to the Town's argument that the Main Appraisal's five leases (summarized in Taxpayer Exhibit No. 1, Tab 4, p. 17) may not be truly comparable because they are not from the region (all are from outside New England in Arkansas, Illinois, Pennsylvania and Louisiana) due to the fact most landfills in the northeast are either publicly or privately owned and occupied, but not leased.

Further, while some explanation of the lessor and lessee relationships is contained on p. 17 of this exhibit, the testimony of Mr. Main indicated the relative investments of the lessors and lessees in each comparable varied and the lessor interests in all instances were significantly less than the Taxpayer's, who has fee simple title to all the land and improvements necessary to operate the landfill.¹ The board also notes, three of the five comparable leases are owned by governmental entities. These governmental entities lease to private operators at varying rental rates and conditions. A review of the leases indicates the prime motivation for government to own landfills is not to receive market rents for the purpose of making a profit, but rather to provide a reliable waste disposal site for its citizens with minimal management responsibilities. As these leases exhibit, government's financial and management burden is minimized by receiving some offsetting rent from the private operator's use of the landfill and by having the operator be responsible for

¹ A sense of the magnitude of the improvements to all three stages of the landfill is gained from a review of the Taxpayer's application for tax exemption (Taxpayer Exhibit No. 1, Tab 20) and the DES' initial and rehearing determination orders (Tabs 17 and 18). Further, because RSA 72:12-a is an exemption to certain treatment facilities, and part of RSA ch. 72, which deals with real estate taxes, the board deems the DES' percentage exempt is applicable to real estate improvements and not equipment.

managing the landfill efficiently and in compliance with the multitude of health, environmental and safety regulatory requirements incumbent in operating a landfill.

As a consequence, and in the absence of more comparable leases, the board has estimated, utilizing the Main Appraisal's five comparables as benchmarks, a rental rate of 20% to account for the fact the Taxpayer's taxable rights are more expansive than the lessors of the comparables in that the Taxpayer owns all the land and the physical improvements which are detailed in the DES' exemption application documents and in the general descriptions contained in the Main Appraisal and other exhibits.

Further influencing the board's choice of a higher rental rate is our finding the DES' permit to operate the landfill (specifically the permit relative to Stage III; see Taxpayer Exhibit No. 1, Tabs 25-26) is largely an intangible real estate right, which grants use and occupancy of the land for landfill purposes and significantly affects the value of the Property. Cf. Verizon New England v. City of Rochester, 151 N.H. 263, 269 (2004); and New England Tel. & Tel. Co. v. City of Rochester, 144 N.H. 118 (1999) (the rights pole licenses grant to use and occupy public rights-of-ways are taxable). In valuing property, all real estate rights, tangible and intangible, are assessed and all factors affecting value must be considered. See RSA 72:6; RSA 21:21; and Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1975).

The board acknowledges the DES' permitting process contains some aspects which are not directly realty related, but rather, relate to the entity applying, such as financial assurances and the "track record" of the applicant. The board has considered the unique aspects of the DES' permit but, on balance, the board finds the DES' permit relates principally to obtaining the right to develop a specific parcel of land for landfill use and thus is a factor to be considered in

valuing the real estate rights of the Property. While the Main Appraisal does state its income approach inherently considers the effect of the permit (because without it the income stream could not be generated), the Main Appraisal's emphasis that permits are not part of the taxable realty (see pp. 9 and 11 of the Main Appraisal) also supports the board's conclusion that an 11% royalty rent is not high enough to reflect all the rights held by the Taxpayer.

Also influencing the board's estimate of a higher rental rate is the fact the five comparables used in the Main Appraisal have varying arrangements as to whether the lessor or the lessee obtained the initial and subsequent permits. As a consequence, the 11% rate does not capture adequate income to account for the investment and risk and thus the value of all the ownership rights held by the Taxpayer.²

C. Average Market Tipping Fees

The board has adopted the Main Appraisal's tipping fee estimates as the best evidence of average market tipping fees for the Property. The gate rates utilized in the Nyberg Appraisal are stated gate rates, but are not necessarily reflective of what any operator or prospective purchaser

² For example, the 1992 Agreement between the County of Whiteside, Illinois, as lessor and Waste Management of Illinois, Inc., as lessee, (Main Appraisal comparable #2 - see Taxpayer Exhibit No. 1, Tab 4, p. 17 and Taxpayer Exhibit No. 2, Tab 53) created a public/private relationship which conferred the benefits to the "County" of a guaranteed waste disposal site and minimal management responsibilities and conferred to the lessee the right to operate the facility with some support from the County. (Specifically, the legal and engineering fees incurred by the County for the "siting application" are split between the County and the lessee and the County would provide the lessee assistance in obtaining all permits from the Illinois Environmental Protection Agency necessary for the construction and operation of the landfill). Further, some of the leases' rents are not distilled to a simple rent royalty calculation. For instance, the Main Appraisal comparable #3 between the City of Rochelle and Rochelle Waste Disposal (Main Appraisal comparable #3 - see Taxpayer Exhibit No. 1, Tab 4, 17 and Taxpayer Exhibit No. 2, Tab 54) has, in addition to the 6.1% rental rate, "initiation and continuation fees" of \$200,000 for the initial siting approval and future expansion of the landfill operation. Also, in Main Appraisal's comparable #4 (Taxpayer Exhibit No. 2, Tab 55), the lessor (Heindel) simply owns the land and leases it in its entirety to the lessee (Modern Trash Removal) for 11% of income who has the responsibility to obtain all permits to construct and operate a sanitary landfill. The Taxpayer, in this case, owns the land, has borne all the permitting costs and invested in all the physical improvements to the site to make it suitable for a landfill. The 11% rate in comparable #4 reflecting the more limited investment and risk of the lessor supports a finding of a substantially higher rental rate to reflect the greater real estate rights held by the Taxpayer.

would expect to receive on an average or overall basis. As the testimony of Mr. Main and the Report of the Governor's Solid Waste Task Force ("Report") (see Taxpayer Exhibit No. 2, Tab 62) indicate, the actual average fee per ton of waste material is a composite of the payments made by the various entities delivering to a landfill. The gate rate, on the other hand, is a spot rate and it is traditionally the highest rate any individual pays without any prior arrangement with the owner/operator of the landfill and, thus, is not reflective of the average revenue received on a tonnage basis. The Main Appraisal's \$55 per ton average tipping fee is supported by the analysis of the actual income at the Property and supported by the composite average tipping fees for different waste generators shown on p. 48 of Appendix B of the Report. Further supporting the Main Appraisal's estimates are regional and, albeit, undated information contained in the landfill consulting report performed by Real Estate Research Corporation ("RERC Report") (see Municipality Exhibit No. A, Tab 11 at p. 7), which indicates a northeast regional tipping fee of \$56.27.

In short, the board finds the Nyberg Appraisal's use of \$75 per ton is not market related other than it being the stated gate fee and further, the Main Appraisal's estimates are supported and reasonable based on all other evidence submitted.

The board has also adopted the Main Appraisal's estimate of a 3.5% increase in tipping fees for each year under appeal. The Main Appraisal indicates this is based on a market analysis of gate rates (see Taxpayer Exhibit No. 1, Tab 4, p. 28) and a review of the consumer price index for the northeast region, having a 15-year average of 3.3%. This annual increase estimate is generally supported by the Report's findings in Addendum B, pp. 46 and 48 and by the RERC

Report, pp. 6 and 7, which estimates tipping fees have increased nationally at between 2% and 3% annually.

D. Annual Utilized Capacity

Again the board finds the Main Appraisal's estimate of a straight-line depletion for the remaining 3 ¼ years of Stage III life to be reasonable and supported by the evidence. Mr. Main testified each year's remaining capacity was calculated from aerial flight surveys of the landfill and resulted in his estimated remaining tonnage capacity of 400,000, 246,000 and 147,000 for tax years 2002, 2003 and 2004, respectively. These estimates also are consistent with the Stage III operating permit's requirement that the total life expectancy for Stage III of 4 ½ years is to be complied with in such a fashion that the operator is precluded from "operating the facility at token capacity levels in order to achieve 4.5 years of life." (See Taxpayer Exhibit No. 1 at Tab 25, section 7F of permit). In other words, the DES, in granting the Stage III permit, found a public benefit existed in granting it with the condition the capacity and life expectancy be substantively complied with to provide a landfill resource for the citizens in that area of New Hampshire. Thus, the operator is required by permit to "dole out" the capacity over the life expectancy so as to fulfill that public purpose.

The board is unable to give any weight to the Nyberg Appraisal's assumptions of 150,000 tons per year for 3 ½ years. Such calculations exceed both the remaining capacity and the remaining life of the permitted landfill of Stage III and would not be a reasonable assumption for any market participant to make.

E. Discount Rate

The board finds the Main Appraisal's discount rate of 17.5% for tax year 2002 and 18% for tax years 2003 and 2004 is more appropriate than the Nyberg Appraisal's discount rate of 15% for all three years. As extensive evidence and testimony established, the ownership and operation of a landfill (whether the rights are split between a lessor and a lessee or held collectively as the Taxpayer does in this case) entails higher than normal risks and should be discounted at a higher rate than most other types of income producing property with higher than average risk such as hotels, golf courses, etc. While the board does not disregard entirely the discount rate discussion contained in the RERC Report, the board finds the analysis contained in the Main Appraisal and its supporting documentation and discussion is more convincing and more appropriate, especially given the short remaining life-span of the Stage III portion of the landfill, the extensive litigation the Property has been involved with and the uncertainty of additional space being permitted in the future.

Summaries of the Stage III Royalty Method valuation estimates for 2002, 2003 and 2004 are presented below. (These calculations employ a standard present value formula, using the simplifying assumptions of end of tax year flows.)

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NCES, Inc. - 2002 Stage III Value Estimate Bethlehem, New Hampshire Market Rent / Royalty Revenue Analysis						
		2002	2003	2004	2005	
REVENUE:		1st Year	2nd Year	3rd Year	4th Year	TOTAL
		-	-	-	-	
Depletion Rate (Tons)		123,103	123,103	123,103	30,691	400,000
Tip Fee	3.5%	\$ 55.00	\$ 56.93	\$ 58.92	\$ 60.98	
Gross Revenue		\$ 6,770,665	\$ 7,007,638	\$ 7,252,906	\$ 1,871,521	\$ 22,902,730
		-	-	-	-	-
MARKET RENT:	20%	\$ 1,354,133	\$ 1,401,528	\$ 1,450,581	\$ 374,304	\$ 4,580,546
EXPENSES:	2%	\$ 27,083	\$ 28,031	\$ 29,012	\$ 7,486	\$ 91,611
		-	-	-	-	-
NET INCOME:		\$ 1,327,050	\$ 1,373,497	\$ 1,421,570	\$ 366,818	\$ 4,488,935
DISCOUNT RATE:	17.5%				Present Value:	\$3,192,987

NCES, Inc. - 2003 Stage III Value Estimate Bethlehem, New Hampshire Market Rent / Royalty Revenue Analysis						
		2003	2004	2005		
REVENUE:		1st Year	2nd Year	3rd Year	TOTAL	
		-	-	-		
Depletion Rate (Tons)		109,367	109,367	27,266	246,000	
Tip Fee	3.5%	\$ 57.00	\$ 59.00	\$ 61.06		
Gross Revenue		\$ 6,233,919	\$ 6,452,106	\$ 1,664,857	\$ 14,350,882	
		-	-	-	-	-
MARKET RENT:	20%	\$ 1,246,784	\$ 1,290,421	\$ 332,971	\$ 2,870,176	
EXPENSES:	2%	\$ 24,936	\$ 25,808	\$ 6,659	\$ 57,404	
		-	-	-	-	-
NET INCOME:		\$ 1,221,848	\$ 1,264,613	\$ 326,312	\$ 2,812,773	
DISCOUNT RATE:	18.0%				Present Value:	\$2,142,293

NCES, Inc. - 2004 Stage III Value Estimate Bethlehem, New Hampshire Market Rent / Royalty Revenue Analysis				
		2004	2005	
REVENUE:		1st Year	2nd Year	TOTAL
		-	-	
Depletion Rate (Tons)		117,600	29,400	147,000
Tip Fee	3.5%	\$ 59.00	\$ 61.07	
Gross Revenue		\$ 6,938,400	\$ 1,795,311	\$ 8,733,711
		-	-	-
MARKET RENT:	20%	\$ 1,387,680	\$ 359,062	\$ 1,746,742
EXPENSES:	2%	\$ 27,754	\$ 7,181	\$ 34,935
		-	-	-
NET INCOME:		\$ 1,359,926	\$ 351,881	\$ 1,711,807
DISCOUNT RATE:	18.0%		Present Value:	\$1,405,195

F. Value Allocation and Expansion Value

The Main Appraisal and the Nyberg Appraisal both focused their value estimates on the remaining permitted life of Stage III. The Main Appraisal allocated its value amongst the various appealed and non-appealed parcels owned by the Taxpayer by deducting the equalized assessed values of the other parcels from the total value and attributing the residual to the Property. The Nyberg Appraisal value was applied to Lot 1, with the balance of the Taxpayer’s assessments remaining unchanged.

Considering all the evidence the board finds the Taxpayer did not meet its burden of showing how the non-appealed parcels are necessary to support the landfill as an economic unit. Thus, the board’s value estimates for the landfill are not allocated to any of the non-appealed lots and relates solely to the Property (identified as Map 419/Lot 1 for tax years 2002 and 2003 and Map 419/Lots, 1, 21, 22 and 23 for tax year 2004).

The board inquired, at length, of Mr. Main, and, to some extent, of Mr. Nyberg, about whether any value existed relating to future landfill expansion on the Property, not captured by the income approach employed by both appraisers of the remaining life of the Stage III permitted space. In fact, the board, during its deliberations after the December 5-7, 2006 hearing, determined it needed to reopen the record “to receive further testimony on certain documents in Taxpayer Exhibit No. 3 (“Exhibit 3”) which was not discussed during the three-day hearing, relative to the determination of the Property’s market value.” (January 12, 2007 Order and Hearing Notice.) The testimony at the February 5, 2007 hearing (“Second Hearing”) focused largely on gaining a better understanding of a number of the Taxpayer’s financial statements and related documents in Exhibit 3. The documents and testimony helped the board determine whether the market would recognize any value for the Property above and beyond that derived from capitalizing the income stream of Stage III.

Based largely on this evidence, the board finds the Taxpayer would expect to receive some compensation for (and any prospective purchaser would perceive some value in) the Taxpayer’s investments and permitting progress for Stage IV. This finding is at odds with Mr. Main’s conclusions primarily because he tried to distinguish a valuation for tax purposes (which he essentially contended required 100% certainty of the realization of development permits and the end of litigation) from a market value determination for a private investor or financial institution, which would not be so qualified.

The board does not find this distinction and qualification to be meaningful because, in New Hampshire, as in most states, the basis of assessment must be market value. See RSA 75:1. Market value rests on the paradigm of an arm’s-length purchase and sale between unrelated

parties, each having reasonable expectations of the rewards and risks involved in the transaction. Just as it would be unrealistic for a potential purchaser to place no value whatsoever on a developable parcel of land until the point in time when all required permits have been obtained and all potential litigation resolved, the same must be said of the valuation of a landfill for tax purposes. The developmental risks entailed may differ in degree and in kind, but the valuation principles remain the same. In short, a continuum or range of probabilistic risk assessments (rather than an ‘all or nothing’ assumption of the type employed by Mr. Main) would appear to best fit how market participants deal with the potential limitations on the feasibility and profitability of a real estate investment. The board finds Mr. Main’s appraisal is an overly conservative approach but it fails to address both the principle of anticipation, an appraisal principle underpinning of the income approach, and the evidence of the Taxpayer, a knowledgeable participant in the solid waste disposal business, having invested significant funds in pursuing obtaining additional permits to allow the continuance of the landfill.

Value is created by the anticipation of benefits to be derived in the future. In real estate markets, the current value of a property is usually not based on its historical prices or the cost of creation; rather, value is based on the market participant’s perceptions of the future benefits of acquisition. ... The value of income-producing real estate is based on the income it will produce in the future.

Appraisal Institute, The Appraisal of Real Estate, 12th ed. at 35.

In particular, the board finds the following evidence indicates value exists related to the Property which goes beyond the sole capitalization of the remaining years of the Stage III permit.

First, the Taxpayer was granted a “Standard Permit” for a “Solid Waste Management Facility” on March 13, 2003 (the permit indicates in the application history, the application was initially submitted to the DES on April 3, 2002) for Stage IV to be constructed on 11.05 acres

“adjacent to and will tie into the liner system of Stages I and II” and to have a capacity of 2,050,000 cubic yards and a life expectancy of 10.5 years. While the testimony and evidence indicates subsequent permits to construct and operate were yet to be obtained, the granting of the “Standard Permit” is the first, albeit conditional, permit for future anticipated landfill space.³

Second, the Taxpayer spent over \$2.5 million in “landfill development” during the three years under appeal, as shown in the balance sheets at Tab 2 of Exhibit 3 and as testified to by Diane Sander, Director of Taxation for the Taxpayer, at the Second Hearing. It is difficult to believe the Taxpayer, acting as a prudent business entity, would invest such sums without some reasonable expectation of return, either through a future income stream or by some compensation for that investment, if the Property were sold prior to the realization of the future income stream.

Third, and to a lesser extent, the “Amended and Restated Non-Compete Agreement” (Exhibit 3, Tab 11) (“Agreement”) between a prior beneficial owner (Nancy Hager) of the Property and the Taxpayer also provides some indication those market participants believed reasonable potential existed for expansion at the landfill. The Agreement, as resolution of an arbitration proceeding between Hager and the Taxpayer relative to a dispute from an earlier non-compete agreement, provides for Hager to receive a sum to be paid out over four years (2004 – 2008) to not compete and resolve all claims against the Taxpayer. The total sum is split between an initial payment of approximately 45% of the funds with the balance tied to the number of tons disposed at the landfill during that time. The Agreement, at p. 6, also includes a representation by the Taxpayer “that as of April 21, 2004, it has approximately 378,000 tons of

³ While the board has not incorporated in its future expansion value calculation any consideration of modifying the Stage III permitted airspace, evidence and testimony was presented which shows the Taxpayer did pursue this interim expansion potential. (See Taxpayer Exhibit No. 1, Tabs 28-31 documents related to modifying Stage III).

actual and potential additional capacity within the fifty-one acre parcel....”⁴ This representation of remaining “actual and potential capacity” is significantly more than, and is in stark contrast to, the Main Appraisal’s estimate of only 147,000 tons as of April 1, 2004.

Collectively from this evidence, the board concludes the potential, albeit somewhat uncertain, expansion of the landfill must be valued. In the following spreadsheets, the board has estimated this value by capitalizing the rental rate of the projected income stream based on the volume and term contained in the Stage IV permit. The same assumptions (average tipping fees, appreciation rate, straight line volume, expenses, rental rate, etc.) as found for Stage III are applied for Stage IV with the exception of the discount rate. The board has estimated a high discount rate of 50% to reflect the uncertainty inherent in obtaining the necessary permits and resolving any litigation opposing expansion.⁵ While such a calculation inherently involves a number of assumptions which are subject to debate, we believe the resulting values reasonably balance the risk and uncertainty associated with expansion and the perceived potential for expansion, as shown by the Taxpayer’s investment to that end and the prospective provisions of the Agreement. Thus the total market value for each year (except 2002 because the Stage IV permit was not issued until March 13, 2003) is the combination of the value indicated by the above Stage III calculations and the following Stage IV calculations for tax years 2003 and 2004, respectively.

⁴ The Agreement also has provisions for adjusting the portion of the payment tied to the tonnage delivered if a “governmental shutdown” occurs during the four year period.

⁵ In estimating a discount rate of 50%, the board is also mindful of the long litigious history of the parties, including the Town’s suits against the Taxpayer challenging the DES’ determination of public benefit for expansion, a challenge of zoning violations both that the 1992 zoning ordinances were not preempted by state law and a claim that the Taxpayer had not obtained a building permit for the landfill gas utilization facility and whether expansion outside the permitted 51-acre parcel required site plan review. (See North County Environmental Services, Inc. v. Town of Bethlehem, 150 NH 606 (2004); and 146 N.H. 348 (2001)).

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		2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	
REVENUE:				1st Year	2nd Year	3rd Year	4th Year	5th Year	6th Year	7th Year	8th Year	9th Year	10th Year	11th Year	TOTAL
Depletion Rate (Tons)		\$ -	-	105,000	140,000	140,000	140,000	140,000	140,000	140,000	140,000	140,000	140,000	111,000	1,476,000
Tip Fee	3.5%	\$ 57.00	\$ 59.00	\$ 61.06	\$ 63.20	\$ 65.41	\$ 67.70	\$ 70.07	\$ 72.52	\$ 75.06	\$ 77.69	\$ 80.40	\$ 83.22	\$ 86.13	\$ -
Gross Revenue		\$ -	\$ -	\$ 6,411,300	\$ 8,847,594	\$ 9,157,260	\$ 9,477,764	\$ 9,809,486	\$ 10,152,818	\$ 10,508,166	\$ 10,875,952	\$ 11,256,610	\$ 11,650,592	\$ 9,560,559	\$ 107,708,100
															-
MARKET RENT:	20%	\$ -	\$ -	\$ 1,282,260	\$ 1,769,519	\$ 1,831,452	\$ 1,895,553	\$ 1,961,897	\$ 2,030,564	\$ 2,101,633	\$ 2,175,190	\$ 2,251,322	\$ 2,330,118	\$ 1,912,112	\$ 21,541,620
EXPENSES:	2%	\$ -	\$ -	\$ 25,645	\$ 35,390	\$ 36,629	\$ 37,911	\$ 39,238	\$ 40,611	\$ 42,033	\$ 43,504	\$ 45,026	\$ 46,602	\$ 38,242	\$ 430,832
															-
NET INCOME:		\$ -	\$ -	\$ 1,256,615	\$ 1,734,128	\$ 1,794,823	\$ 1,857,642	\$ 1,922,659	\$ 1,989,952	\$ 2,059,601	\$ 2,131,687	\$ 2,206,296	\$ 2,283,516	\$ 1,873,870	\$ 21,110,788
DISCOUNT RATE:	50%													Present Value:	\$ 1,447,765

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NCES, Inc. Bethlehem, New Hampshire Market Rent / Royalty Revenue Analysis														
		2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	
REVENUE:			1st Year	2nd Year	3rd Year	4th Year	5th Year	6th Year	7th Year	8th Year	9th Year	10th Year	11th Year	TOTAL
		-												
Depletion Rate (Tons)		-	105,000	140,000	140,000	140,000	140,000	140,000	140,000	140,000	140,000	140,000	111,000	1,476,000
Tip Fee	3.5%	\$59.00	\$ 61.06	\$ 63.20	\$ 65.41	\$ 67.70	\$ 70.07	\$ 72.52	\$ 75.06	\$ 77.69	\$ 80.40	\$ 83.22	\$ 86.13	
Gross Revenue		\$ -	\$ 6,411,300	\$ 8,847,594	\$ 9,157,260	\$ 9,477,764	\$ 9,809,486	\$ 10,152,818	\$ 10,508,166	\$ 10,875,952	\$ 11,256,610	\$ 11,650,592	\$ 9,560,559	\$107,708,100
		-												-
MARKET RENT:	20%	\$ -	\$ 1,282,260	\$ 1,769,519	\$ 1,831,452	\$ 1,895,553	\$ 1,961,897	\$ 2,030,564	\$ 2,101,633	\$ 2,175,190	\$ 2,251,322	\$ 2,330,118	\$ 1,912,112	\$ 1,541,620
EXPENSES:	2%	\$ -	\$ 25,645	\$ 35,390	\$ 36,629	\$ 37,911	\$ 39,238	\$ 40,611	\$ 42,033	\$ 43,504	\$ 45,026	\$ 46,602	\$ 38,242	\$ 430,832
		-												-
NET INCOME:		\$ -	\$ 1,256,615	\$ 1,734,128	\$ 1,794,823	\$ 1,857,642	\$ 1,922,659	\$ 1,989,952	\$ 2,059,601	\$ 2,131,687	\$ 2,206,296	\$ 2,283,516	\$ 1,873,870	\$ 21,110,788
DISCOUNT RATE:	50%												Present Value:	\$2,171,648

G. Nyberg Discounted Cash Flow

While the board has found the Royalty Method of the Main Appraisal to be the more reliable indicator of value in these appeals, we find the DCF Method can provide a supportive indication of value, if, and this is key, reasonable assumptions and adjustments are applied to the resulting going concern value.

Before addressing those assumptions, the board must note it is unable to give any weight to the market value conclusions of the DCF Method calculations as presented in the Nyberg Appraisal, not because the DCF Method is inherently inapplicable to valuing a landfill, but rather because a number of the assumptions made in the Nyberg calculations are not correct and they produce a value for the going concern which includes both realty and non-realty components. Mr. Nyberg simply made no attempt to isolate or adjust his value conclusion for the presence of significant income generation from non-realty components of the going concern value conclusion.

If, however, reasonable assumptions are made from the evidence submitted and if an informed estimate is made for the non-realty components (including equipment, assembled work force, long-standing business relationships and contracts, specialized business knowledge and relationships with regulators, etc.), the DCF Method can be used as a secondary check to the Royalty Method market value conclusion. The board has performed a discounted cash flow estimate for each of the three years under appeal, utilizing certain findings which are similar to those already made in the revised Main Appraisal's calculations, such as estimated annual tonnage, effective tipping rates and reasonable discount rates. The board has also reviewed the income and expense information for the three years under appeal contained in Exhibit 3 and

concludes the Nyberg Appraisal's estimate of an operating expense of 50% is not unreasonable and is generally supported by the Property's recent actual expense ratios, which the board calculated to range from 47% to 57%.

As the calculations shown below indicate, the DCF Method's market value conclusions are significantly higher than the revised market value conclusion of the Royalty Method, but include significant cash flow attributable to business acumen, including the factors noted in the previous paragraph. One notable exception, as noted earlier, is the board finds the permits to operate a landfill are largely part of the taxable real estate rights and, thus, we do not ascribe as much as the Taxpayer argued to the business or non-realty portion of the DCF Method's going concern value. The board has estimated the non-realty component of the DCF Method going concern value to be 60% resulting in market value indications by the DCF Method of \$3,258,150 ($\$8,145,375 \times 0.4$) for tax year 2002, \$2,186,014 ($\$5,465,034 \times 0.4$) for tax year 2003, and \$1,433,873 ($\$3,584,682 \times 0.4$) for tax year 2004. These values are similar to and supportive of the Stage III estimates by the Royalty Method.

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NCES, Inc. - 2002 DCF Stage III Value Estimate						
Bethlehem, New Hampshire						
Discounted Cash Flow						
		2002	2003	2004	2005	TOTAL
REVENUE:						
Depletion Rate (Tons)		123,103	123,103	123,103	30,691	400,000
Tip Fee		\$ 55.00	\$ 56.93	\$ 58.92	\$ 60.98	\$ 57.26
Gross Revenue:		\$ 6,770,665	\$ 7,007,638	\$ 7,252,906	\$ 1,871,521	\$ 22,902,730
EXPENSES:	50%	\$ 3,385,333	\$ 3,503,819	\$ 3,626,453	\$ 935,761	\$ 11,451,365
NET OPERATING INCOME:		\$ 3,385,333	\$ 3,503,819	\$ 3,626,453	\$ 935,761	\$ 11,451,365
DISCOUNT RATE	17.5%					
GOING CONCERN VALUE:						\$8,145,375
LESS NON-REALTY ITEMS:	60%					\$4,887,225
VALUE - REAL ESTATE:						\$3,258,150

NCES, Inc. - 2003 DCF Stage III Value Estimate						
Bethlehem, New Hampshire						
Discounted Cash Flow						
		2003	2004	2005	TOTAL	
REVENUE:						
Depletion Rate (Tons)		109,367	109,367	27,266	246,000	
Tip Fee		\$ 57.00	\$ 59.00	\$ 61.06	\$ 58.34	
Gross Revenue:		\$ 6,233,919	\$ 6,452,106	\$ 1,664,857	\$ 14,350,882	
EXPENSES:	50%	\$ 3,116,960	\$ 3,226,053	\$ 832,429	\$ 7,175,441	
		-	-	-	-	
NET OPERATING INCOME:		\$ 3,116,960	\$ 3,226,053	\$ 832,429	\$ 7,175,441	
DISCOUNT RATE	18.0%					
GOING CONCERN VALUE:						\$ 5,465,034
LESS NON-REALTY ITEMS:	60%					\$ 3,279,020
VALUE - REAL ESTATE:						\$ 2,186,014

NCES, Inc. - 2004 DCF Stage III Value Estimate				
Bethlehem, New Hampshire				
Discounted Cash Flow				
		2004	2005	TOTAL
REVENUE:				
Depletion Rate (Tons)		117,600	29,400	147,000
Tip Fee		\$ 59.00	\$ 61.07	\$ 59.41
		-	-	-
Gross Revenue:		\$ 6,938,400	\$ 1,795,311	\$ 8,733,711
EXPENSES:	50%	\$ 3,469,200	\$ 897,656	\$ -
		-	-	-
NET OPERATING INCOME:		\$ 3,469,200	\$ 897,656	\$ 8,733,711
DISCOUNT RATE	18.0%			
GOING CONCERN VALUE:				\$ 3,584,682
LESS NON-REALTY ITEMS:	60%			\$ 2,150,809
VALUE - REAL ESTATE:				\$ 1,433,873

II. Level of Assessment

As noted earlier, the Parties stipulated the equalization ratios determined by the DRA for tax years 2001, 2002, 2003 and 2004 were 78%, 66.3%, 62.6% and 100% respectively. They also agree the level of assessment is best estimated by use of this ratio.

The Town argued it was appropriate to apply the prior year's equalization ratio to its market value determination as that was the ratio known at the time of the assessment. (The Town appears to have followed this approach for tax years 2002 and 2003, but not 2004, when it used the current year ratio.) The Taxpayer argued use of prior year ratios results in disproportionate assessment.

The board finds the Taxpayer's position is supported by well-settled case law: see Stevens v. City of Lebanon, 122 N.H. 29, 33-34 (1982) (once the municipality chooses to employ an equalization ratio determined by the DRA, the municipality is obligated to use the proper current equalization ratio, not a prior year's equalization ratio.); Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985) (taxpayers can carry their burden of proving disproportionality if they establish that their property is being assessed at a higher percentage of market value than the percentage at which all other property in town is being assessed); Appeal of Town of Seabrook, 133 N.H. 365, 374-375 (1990) (the ratio of a property's assessed value relative to market value can be no higher than the ratio of all other property's relative assessed value throughout the municipality); Appeal of Andrews, 136 N.H. 61 (1992) (New Hampshire Constitution requires all taxpayers within a taxing jurisdiction be assessed at the same proportion to market value and thus the use of two ratios is prohibited); and Appeal of City of Nashua, 138 N.H. 261, 266 (1994) ("in the event of a disparity, the board, in its role as finder of fact, RSA 76:16-a, V (1991), shall determine the equalization ratio most reasonably representative of the general level of assessment.")

When the Town determined in 2002 to engage the services of Mr. Nyberg to perform a market value appraisal of the Property, the Town also needed to determine, through a separate analysis, what the level of assessment was in 2002 before the DRA's 2002 ratio became available in the spring of 2003. It is the responsibility of municipalities when either initially appraising new property, which did not exist at the time of the last full market reassessment, or adjusting properties' assessments under RSA 75:8 which may have become disproportionately assessed, to determine the level of assessment for all other properties in the taxing jurisdiction as

of April 1 of that year. Here, the best evidence of the level of assessment for each year is the ratio for each year ultimately determined by the DRA. To conclude otherwise would result in properties in Town being disproportionately assessed at two different levels of assessment as prohibited by Part 2, Article 5 of the New Hampshire Constitution. Thus, the board finds its market value findings shall be adjusted by 0.663 for 2002, 0.626 for 2003 and 1.00 for 2004.

The Town also argued the Taxpayer did not raise the Town's application of the 2001 ratio for the 2002 tax year in its abatement request to the selectmen, but only challenged the assessed value, and, as a consequence, this board has no jurisdiction to determine the appropriate ratio to be utilized.

First, the Town's argument misses a fundamental principle of any appeal and attempts to improperly bifurcate the process. RSA 76:16 provides, "anyone aggrieved by an assessment of the tax may appeal." Inherent in the assessment of a tax is both a market value determination and a level of assessment determination; said another way, any appeal inherently encompasses both the market value and level of assessment components which need to be addressed to jointly ascertain proportionality.

Second, all property tax appeals to the board are *de novo* and are based on the long established case law cited above. The board, in performing its appellate responsibilities, must do more than simply make a finding of market value; it must also relate that market value to the level of assessment within the community. Thus the ratio question is squarely before the board.⁶

⁶ Also the board notes tangentially that TAX 203.03(g) provides the grounds contained in the abatement application filed with the municipality and the grounds contained in the appeal subsequently filed with the board may differ; thus even if the Taxpayer did not specifically raise the ratio issue in its abatement application with the Town, it can raise it on appeal with the board as it did.

III. Applicability of the RSA 72:12-a Exemption Determination

The exemption at issue is authorized by RSA 72:12-a, which provides for any person installing a pollution control facility to apply to the DES to determine its eligibility for tax exemption. RSA 72:12-a, in part, provides as follows:

- III. The department shall investigate and determine whether the purpose of the facility is solely or only partially pollution control. If the department finds that the purpose of the facility is only partially pollution control it shall determine by an allocation of the applicant's investment in the facility what percentage of the facility is used to control pollution. In making its investigation, the department may inspect the facility and request such other information from the applicant as is reasonably necessary to assist it in making its determination.
- IV. Upon making its determination, the department shall notify the applicant and the taxing authorities of the municipality where the facility is situated whether the purpose of the facility is solely pollution control, or, if not, what percentage of the applicant's investment in the facility should be allocated to pollution control.
- V. The taxing authorities shall each year separately appraise and describe the facility and related real estate and cause such appraisal and description to appear in their inventory. In accordance with the provisions of this section, the taxing authority shall exempt from the taxes levied under this chapter the appraised value of the facility and any real estate necessary therefore; or the exempt percentage thereof, determined by the department. The exemption period shall begin as of the April 1 next following the receipt of the department's determination.
- VI. Either the municipality or the owner of the facility may request a rehearing or appeal from such determination in accordance with the provisions of RSA 541. (Emphasis added.)

Because of the lengthy process of the DES' initial determination and resolution of the rehearing by the DES and appeal to the New Hampshire Supreme Court, (Appeal of Town of Bethlehem) (New Hampshire Department of Environmental Services), No. 2004-435, slip op.

(November 2, 2006) (“Bethlehem”), the parties disagree as to the exemption percentage applicable to tax year 2003.

The Taxpayer filed its application with the DES for a RSA 72:12-a exemption determination on March 4, 2002. On March 14, 2003 (prior to the assessment date of April 1, 2003), the DES made its “initial determination” that 0.72379% percent of the facility was exempt under the statute. The Taxpayer filed a rehearing motion with the DES and, after a rehearing, the DES issued a “decision on motion for rehearing” on January 5, 2004 increasing the percentage of exempt value from 0.72379% to 82%. The Town then appealed the DES’ rehearing determination to the New Hampshire Supreme Court, which issued its decision affirming the DES’ rehearing determination on November 2, 2006.

The board rules the rehearing determination and the supreme court’s affirmation of it is applicable to the 2003 tax year. To conclude otherwise would make meaningless the rehearing and appeal remedy provisions specifically provided for in RSA 72:12-a, VI and the general appeal provisions of RSA ch. 541 cited therein. As with any rehearing and appeal of any agency’s order or decision, the applicable date of any subsequent decision is the statutory effective date. Here, RSA 72:12-a, V explicitly states the effective period of the exemption begins on April 1 following the department’s determination. The legislature, if it wished to delay the applicability of the exemption determination by the DES, could have stated so clearly in the statute. (Cf. RSA 71-B:5, II(b)(c): in equalization appeals to the supreme court, the applicability date depends on whether the supreme court issues its decision prior to or after September 1 of the year in which the equalization applied.)

Further the board notes the DES' subsequent rehearing determination resulted from a "broader construction" of the statutory terms and was influenced by case law developed between the initial determination and the Taxpayer's rehearing motion. See Appeal of Town of Newington, 149 N.H. 347 (2003).

Finally, the supreme court has recognized "[t]he clear intent of RSA 72:12-a (Supp. 1988) was to create tax incentives for industry to construct pollution control facilities," see Appeal of City of Berlin, 131 N.H. 285, 289 (1988), quoted in Bethlehem at p. 8, where the court further noted "the legislature has recognized protection against water and air pollution as a matter of legislative and statewide interest. (Citations omitted.)" In Bethlehem, the supreme court affirmed the DES' rehearing determination, resulting in an 82% exemption for tax year 2003, because this fulfilled the statutory intent of granting exemptions for such facilities that are applied for and approved prior to the start of the next tax year. To conclude otherwise, as the Town argues, would deprive a taxpayer eligible for such exemption from the benefit of such exemption merely due to protracted litigation and would not be in keeping with the intent of the statute. Consequently, the board rules the rehearing determination exemption of 82% should be applied to the assessed value conclusions for both tax years 2003 and 2004.

IV. Summary

In summary, the board finds both parties' arguments relative to market value do not accurately reflect the reasonable market assumptions, expectations and risks for the Property. On the one hand, the Nyberg Appraisal arrives at an exceedingly high assessed value based on gate fees which exceeded the overall market tipping fees, a discount rate which does not

accurately reflect the risks involved in such a property and without any deduction from the going concern value for nontaxable realty items. Certainly the Town cannot have it both ways: asserting the landfill has not complied with various zoning provisions and challenging the DES' determination of the landfill's public benefit, while at the same time attempting to assess the Property as if it entailed only a nominal risk in its continued operation.

Similarly, the Taxpayer cannot limit its valuation to only the non-litigated and fully permitted rights held by the Taxpayer. The Taxpayer's long history of challenging the Town's assertion of zoning violations and its substantial investment in obtaining and developing additional landfill capacity are illustrative of the anticipated value, albeit with significant legal expenses and uncertainty, which the Taxpayer perceives exists at the Property.

As detailed above, the board finds the most reasonable estimate of market value lies somewhere between the parties' respective positions. As the board noted earlier (see Paras v. City of Portsmouth, 115 N.H. at 63, 67-68 (1975)), all factors affecting value must be considered as long as they are not highly speculative. In this case, the board finds the Taxpayer's continued use and expansion after 2005 of the landfill is uncertain, but also significant evidence exists of substantial investment and planning for expansion by the Taxpayer. Thus the board's assumption of some value for expansion is more reasonable and less speculative and less arbitrary than the Taxpayer's contrary assumption of no value.

Consequently, the board concludes the best value estimate is a combination of valuing the income stream from the permitted Stage III landfill area and discounting (at a significantly high

rate) the potential income stream from Stage IV which had significant permitting and litigation exposure as of the assessment dates.⁷

The board finds the following market values and the assessed values after application of the applicable levels of assessment and RSA 72:12-a exemptions.

2002

Stage III Market Value	\$3,192,987
2002 Level of assessment	<u>x .663</u>
No RSA 72:12-a exemption applicable	N/A
2002 Assessed Value	\$2,116,950

2003

Stage III Market Value	\$2,142,293
Stage IV Market Value	\$1,447,765
Subtotal	\$3,590,058
2003 Level of Assessment	x .626
RSA 72:12-a exemption (82% exempt)	<u>x .18</u>
2003 Assessed Value	\$404,528

2004

Stage III Market Value	\$1,405,195
Stage IV Market Value	\$2,171,648
Subtotal	\$3,576,843

⁷ The parties should be aware the board's methodology has entailed the process of making reasonable assumptions of what potentially could occur as of April 1, 2003 and 2004, not what did subsequently occur with the benefit of hindsight because those future events would not have been necessarily perceived by market participants in 2003 and 2004.

2004 Level of Assessment	x 1.00
RSA 72:12-a exemption (82% exempt)	<u>x .18</u>
2004 Assessed Value	\$643,832

If the taxes have been paid, the amount paid on the value in excess of \$2,116,950, \$404,528, and \$643,832 for tax years 2002, 2003 and 2004 respectively, shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

Responses to Requests of Findings of Fact and Rulings of Law

The board's responses to the parties' Requests for Findings and Ruling are as follows: the "Requests" received from the Town and the Taxpayer are replicated below, in the form submitted and without any typographical corrections or other changes. The board's responses are in bold face. In these responses, "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 overly broad or narrow so 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.

**THE TOWN OF BETHLEHEM'S
REQUESTS FOR FINDINGS OF FACT
AND RULINGS OF LAW**

FINDINGS OF FACT

1. The Taxpayer as of April 1, 2002 was the owner of property located at Trudeau Road, Bethlehem, New Hampshire (the "Property").

Granted.

2. The Property is used as a private sanitary landfill.

Granted.

3. The Property contains 105 acres of land with certain improvements thereon, 51 of which are used in order to operate a sanitary landfill.

Granted.

4. This appeal involves the tax year 2002, 2003 and 2004.

Granted.

5. The Town of Bethlehem assessed the Property for 2002 at \$11,280,000.00.

Granted.

6. The assessment remained unchanged for 2003 but was adjusted for an exemption issued by the DES in March, 2003 pursuant to RSA 72:12-a in the amount of \$69,396.84, making the actual assessment, after applying the 2002 equalization ratio, \$9,518,603.16.

Granted.

7. The equalization ration for the tax year 2001 as published by the Department of Revenue Administration for the Town of Bethlehem was 78%.

Granted.

8. The highest and best use for the Property is as the present use as a sanitary landfill.

Granted.

9. The Town of Bethlehem undertook an appraisal of the property by Dr. Leonard (Joe) Nyberg.

Granted.

10. At the time of the appraisal and throughout the years under appeal, Dr. Nyberg was a principle of Nyberg Purvis and Associates and is qualified as an expert to value the Property.

Denied.

11. The Town assessed the property according to the income approach using a discounted cash flow analysis.

Granted.

12. The Town's expert used the income approach to determine the fair market value of the property as of April 1, 2002.

Denied.

13. The income approach using the discounted cash flow analysis to appraise the property in 2002 is an acceptable method of assessing property for ad-valorem taxes in New Hampshire.

Granted.

15. The Taxpayer's property was appraised according to generally acceptable assessment standards.

Neither Granted nor Denied.

16. Using the discounted cash flow analysis, the Town's appraiser determined the fair market value of the property to be \$14,450,000 for the year 2002.

Denied.

17. Applying the equalization ratio for 2001 to the fair market value of the property reflects an assessed value of \$11,280,000 for the tax year 2002.

Denied.

18. The Town assessment of \$11,280,000 for 2002 for the Property is just, reasonable and proportional to similarly assessed property.

Denied.

19. Pursuant to RSA 76:17-c, the Town carried forward the assessment for 2003 to 2003 but applied the 2002 equalization ratio to the fair market value to reach a proper assessment of \$9,588,000.

Denied.

20. The DES granted a pollution control exemption pursuant to RSA 72:12-a to the property resulting in an exemption percent of .72379%.

Neither Granted nor Denied.

21. The final assessment for 2003 including the DES granted pollution control exemption was \$9,518,603.

Granted.

21. In 2004 the Town undertook a Town-wide reappraisal.

Granted.

22. Using the discounted cash flow analysis, the Town's appraiser determined the fair market value of the property to be \$6,720,700 for the year 2004.

Denied.

23. The DES granted a further pollution control exemption pursuant to RSA 72:12-a on January 4, 2004 to the property equal to 82% for purposes of these tax years.

Denied.

24. The Town assessment of \$1,501,030 for 2004 for the Property is just, reasonable and proportional to similarly assessed property.

Denied.

25. The Taxpayers' request for abatement should be denied.

Denied.

TAX 201.36(c) limits the number of requests for findings of fact and/or rulings of law to 25. The Town did not file a request for leave to submit more than 25. While the board has not responded to the balance of the Town's requests, the board's decision provides adequate findings and rulings as required. See RSA 541-A:35 and Appeal of City of Nashua, 138 N.H. 261, 264 (1994).

**THE TAXPAYER'S REQUESTS
FOR FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

1. In Tax Years 2002, 2003, and 2004, NCES owned a landfill in the Town of Bethlehem, New Hampshire, (the "Town"), situated on 51 acres of a 105-acre parcel denominated as Parcel 1, as depicted on the Town's Tax Map 419, revised through April of 1988, and Parcels 1, 21, 22, and 23, as depicted on the Town's Tax Map 419, revised through April of 2002 (the "Landfill Parcel").

Granted.

Market Value

2. The cost approach to valuation is an unreliable method for determining the market value of the Landfill Parcel.

Granted.

3. The comparable sales approach to valuation is an unreliable method for determining the market value of the Landfill Parcel.

Neither Granted nor Denied.

4. The income approach to valuation is the best method for determining the market value of the Landfill Parcel, provided that the value of the real property is isolated from the nontaxable elements of the going concern value of the business conducted on the Landfill Parcel.

Granted.

5. The market rent/royalty to real property method is an income approach that isolates the value of real property from the nontaxable elements of the going concern value of the business conducted on the real property.

Granted.

6. Based on the market rent/royalty to real property method and market-supported assumptions concerning (1) the Landfill Parcel's remaining useful life, (2) the net rental income it could generate in the market during its useful life, and (3) a discount rate that provides a rate of return commensurate with risks associated with ownership of the Landfill Parcel, the market value of the Landfill Parcel was no more than \$1,601,026 as of April 1, 2002.

Denied.

7. Based on the market rent/royalty to real property method and market-supported assumptions concerning (1) the Landfill Parcel's remaining useful life, (2) the net rental income it could generate in the market during its useful life, and (3) a discount rate that provides a rate of return commensurate with risks associated with ownership of the Landfill Parcel, the market value of the Landfill Parcel was no more than \$981,026 as of April 1, 2003.

Denied.

8. Based on the market rent/royalty to real property method and market-supported assumptions concerning (1) the Landfill Parcel's remaining useful life, (2) the net rental income it could generate in the market during its useful life, and (3) a discount rate that provides a rate of return commensurate with risks associated with ownership of the Landfill Parcel, the market value of the Landfill Parcel was no more than \$410,300 as of April 1, 2004.

Denied.

Exemption

9. On March 4, 2002, NCES applied with the New Hampshire Department of Environmental Services ("DES") for a determination that certain facilities installed at the Landfill Parcel (the "Facilities") were tax-exempt pollution control facilities under RSA 72:12-a.

Granted.

10. On March 12, 2003, the DES determined that some of the Facilities were pollution control facilities but most were not (the "Determination").

Granted.

11. On April 11, 2003, NCES filed a motion for rehearing (the “Motion for Rehearing”) on the Determination, contending that the DES had made numerous errors.

Granted.

12. On January 5, 2004, in its decision on the Motion for Rehearing, the DES acknowledged that it had made numerous errors in the Determination and therefore corrected it by finding that most of the Facilities were tax exempt (the “Exempt Facilities”).

Neither Granted nor Denied.

13. The January 5, 2004, decision on the Motion for Rehearing relates back to the date of the Determination.

Neither Granted nor Denied.

14. As of April 1, 2003, NCES’s investment in the Exempt Facilities equaled 82% of its total investment in the Landfill Parcel and improvements.

Granted.

15. As of April 1, 2003, 82% of the value of the Landfill Parcel was tax exempt.

Granted.

16. As of April 1, 2004, NCES’s investment in the Exempt Facilities equaled 82% of its total investment in the Landfill Parcel and improvements.

Granted.

17. As of April 1, 2004, 82% of the value of the Landfill Parcel was tax exempt.

Granted.

Equalization

18. “[O]nce having chosen to employ an equalization ratio determined by the department of revenue administration, [a municipality is] obligated to use the proper equalization ratio.” *Stevens v. City of Lebanon*, 122 N.H. 29, 33 (1982).

Granted.

19. In Tax Year 2002, the Town chose to employ an equalization ratio determined by the New Hampshire Department of Revenue Administration (“DRA”).

Granted.

20. In Tax Year 2002, the Town was obligated to use DRA’s 2002 equalization ratio of 66.3%.

Granted.

21. In Tax Year 2003, the Town chose to employ an equalization ratio determined by DRA.

Granted.

22. In Tax Year 2003, the Town was obligated to use DRA’s 2002 equalization ratio of 62.6%.

Granted.

Abatement

23. For Tax Year 2002, NCES is entitled to abatement of taxes in the amount of \$319,839.68 plus statutory interest.

Denied.

24. For Tax Year 2003, NCES is entitled to abatement of taxes in the amount of \$311,971.31 plus statutory interest.

Denied.

25. For Tax Year 2004, NCES is entitled to abatement of taxes in the amount of \$28,971.97 plus statutory interest.

Denied.

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(f). 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

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Robert A. Olson, Esq., Bryan K. Gould, Esq. and Philip R. Braley, Esq., Brown, Olson & Gould, P.C., 2 Delta Drive - Suite 301, Concord, NH 03301, Taxpayer Representative; Edmund J. Boutin, Esq., Brenda E. Keith, Esq. and Steven A. Clark, Esq., Boutin & Altieri, P.L.L.C., PO Box 1107, Londonderry, NH 03053, Municipality Representative; Brett S. Purvis, Brett S. Purvis & Associates, Inc., 3 High Street, 2A - PO Box 767, Sanbornville, NH 03872, Town Contracted Assessing Firm; and Chairman, Board of Selectmen, Town of Bethlehem, PO Box 189, Bethlehem, NH 03574.

Date: May 7, 2007

Anne M. Stelmach, Clerk