IN THE SUPREME COURT OF MISSOURI

EUGENE ZIMMERMAN, ST. CHARLES COUNTY ASSESSOR,	)	
Appellant,	)	
v.	)	**No. SC85905**
DOMINION HOSPITALITY,	)	
Respondent.	)	

On appeal from the Circuit Court of St. Charles County
State of Missouri
The Honorable Lucy Rauch

APPELLANT'S SUBSTITUTE OPENING BRIEF

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Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Jurisdictional Statement

This appeal is based on the interpretation and application of law governing classification of extended stay hotels for tax purposes. The State Tax Commission, in a decision affirmed by the Circuit Court, has held that these hotels are properly classified as both residential and commercial. The issues raised in this case relate to interpretation and application of Section 137.016.1, RSMo, similar to the decision before the Court in *Zimmerman v. Missouri Bluffs Golf Joint Venture*, 50 S.W.3d 907 (Mo. App. E.D. 2001) *Reh'g/Transfer denied* (July 19, 2001) *App.for Reh'g denied* (August 21, 2001). This appeal does not involve any matter that is saved for the exclusive jurisdiction of the Supreme Court of Missouri pursuant to Article V, Section 3 of the Missouri Constitution. Original jurisdiction of this appeal from the 11th Judicial Circuit was vested in the Missouri Court of Appeals, Eastern District, pursuant to Article V, Section 3 of the Missouri Constitution and Section 477.050, RSMo. This Court has sustained Appellant's motion for transfer after opinion.

Statement of Facts

In the summer of 2000, Dominion Hospitality, LLC (hereinafter referred to as "Dominion") appealed the assessment of its extended stay hotel business situated in St. Charles County on the basis that the County Assessor, Eugene Zimmerman (hereinafter referred to as "Assessor"), had erroneously classified the property entirely as commercial real estate. At the time of the 2000 assessment, the Assessor had determined that the subject property had a fair market value of over $3.5 million, and Dominion did not challenge that valuation. (LF 2). The subject property is land improved by structures containing multiple, separate units of living space for human occupancy, accommodations which are regularly offered to the public for a nightly charge. (LF 391, 392, 393). The commercial enterprise that operates at the site is known as TownePlace Suites by Marriott. (LF 421, 423). The State Tax Commission characterized the business as an extended stay hotel. (LF 7, 9). After affording Dominion a hearing, the St. Charles County Board of Equalization ruled that there was a lack of compelling evidence to support a change of assessment and affirmed the decision of the Assessor to place 100% of the property in the commercial class. (LF 2).

Having lost its appeal to the Board of Equalization, on August 28, 2000, Dominion filed a Complaint for Review of Assessment with the State Tax Commission alleging that its 2000 tax assessment was unlawful, unfair, improper, arbitrary or capricious on the ground that its property was mis-classified. Dominion alleged that proper classification of the subject property was not commercial but mixed use and that a partial residential classification was warranted to the extent the property was used for stays over 30 days. (LF

1). Dominion's proposed assessed value, based on the application of commercial and residential rates, was $905,000, almost $265,000 less than its original assessment. (LF 1). In February of 2001, Dominion filed a motion for summary judgment with the State Tax Commission. (LF 3-4). On April 23, 2001, the Chief Hearing Officer of the State Tax Commission signed an order denying Dominion's motion. The order also set forth the contours of what the State Tax Commission considered to be required elements to be proved by Dominion for success on the merits of its appeal. For part of the property to qualify for residential classification, according to the order, a substantial percentage of the business conducted at TownePlace Suites would have to be sales tax exempt. In order for that to be true, guests staying at TownePlace Suites for 30 days or more in the year 2000 would have to meet the definition of "permanent residents" set forth in 12 CSR 10-110.220(2). (LF 9-10). According to the rule, permanent residents are residents that contract in advance for a period of 30 consecutive days or more and who actually stay 30 consecutive days or more. At the time that order was issued, over a year before the evidentiary hearing, the Commission was focused upon whether or not certain periods of occupancy were treated as exempt from state sales tax as the central issue in the classification dispute. (LF 4, 8). The order further identified, according to the Commission, the two issues to be litigated in Dominion's appeal: a) whether the property is **not** used primarily for transient housing and; b) if it is not, what percentage of the property is used for stays by "permanent residents." [emphasis added]. (LF 15). That percentage, stated the Commission, would be used to determine how much of the property

should be removed from the commercial classification and treated as residential property. (LF 15).

On May 3, 2002, after the Assessor filed a motion for summary judgment, the Commission vacated and set aside the April 23, 2001 order, in part because the order had stated conclusions of law, exceeding the Commission's authority. (LF 21). The Commission reinstated Dominion's summary judgment motion, which the Chief Hearing Officer stated he was all but ready to grant, save only an opportunity for the Assessor to "show cause" why he should not waive his right to a hearing. (LF 22). The order specifically identified the percentage of guests paying sales tax and the percentages of taxed and untaxed guest stays for all available rooms as the only two material facts in dispute. (LF 20). Whether or not the property is used primarily for transient housing was characterized by the Commission as an argument and not a material fact in dispute. (LF 21).

A hearing on the record before the State Tax Commission was conducted on July 2, 2002. (LF 34-86). There, Dominion supported its contention that a substantial portion of its business was accommodating "permanent residents" by presenting copies of 138 hotel registration cards from 2000. (LF 230-378). Witnesses for Dominion testified that the hotel registration cards used by the management of TownePlace Suites were the only documents considered to be contracts between the guests and the hotel. (LF 44-45, 56, 62). The same witnesses testified that any guest signing such a card was not expected to pay for any days beyond his or her early departure, even if that guest signed a registration

card indicating the room was reserved for a longer period of occupancy. (LF 43, 62-63). Also in evidence were the entire list of arrivals and the entire list of departures for the year 2000. (LF 89-220). The arrivals list showed registration information for all guest arrivals in 2000, which amounted to a total of 3,043 registrations for the year. Each line of registration information in the list included the name of the guest, the date of arrival and the number of nights the guest stayed. Of those registrations, 203 resulted in stays of 30 consecutive days or more. (LF 89-153). In addition, some of Dominion's monthly accounting records, called FLASH reports, were also taken into evidence. (LF 379-391). Those records indicated the occupancy rates, calculated for each month in 2000, derived by comparing stays of 30 or more days with stays of 29 or fewer days as a percentage of the overall rate at which the hotel was occupied each month. (LF 401, 413-14). Dominion's occupancy calculations of short term to long term stays were percentages of only the rented portion of the hotel and not percentages of the total number of rooms available. (LF 401, 408, 413-14, 424). On September 10, 2002, the State Tax Commission set aside the order of the Board of Equalization and entered its order changing the classification of the property from 100% commercial to 60% residential and 40% commercial. (LF 420-430). The total assessed value of the subject property was set by the Commission at $884,810, over $285,000 less than the original assessment. (LF 420).

The Assessor timely petitioned for judicial review by the Circuit Court of St. Charles County. (LF 432-435). There, the decision of the State Tax Commission was affirmed on March 28, 2003 by the Honorable Judge Lucy Rauch. (LF 439-440). This

appeal followed. (LF 441-442).

Points Relied On

I. The State Tax Commission erred in holding that TownePlace Suites was subject to classification as both residential and commercial property because the property is "used primarily for transient housing" and therefore falls outside the definition of residential property as defined in Section 137.016.1(1), RSMo, in that the overwhelming majority of its guests use it for fewer than 30 days and the small minority that actually stay

longer are not "permanent residents" as defined in 12 CSR 10-110.220(2).

American Healthcare Mgmt., Inc. V. Director of Revenue, 984 S.W.2d 496 (Mo. banc 1999).

Hyatt v. Trans World Airlines, Inc., 943 S.W.2d 292 (Mo. App. E.D. 1997).

Magruder Quarry & Company, L.L.C. v. Briscoe, 83 S.W.3d 647 (Mo. App. E.D. 2002).

Curtis v. Board of Police Commissioners of Kansas City, 841 S.W.2d 259 (Mo. App. 1992).

II. The State Tax Commission erred in holding that the property sub judice should be classified as mixed use property pursuant to Section 137.016.4, RSMo, because the facts do not support such a holding in that Section 137.016.1(1) applies to exclude it from the residential classification based on its primary use as transient housing, the immediate most suitable economic use of the property is as a hotel or other commercial enterprise and TownePlace Suites by Marriott is a commercial hotel business within normal contemplation.

State ex rel. Hudson v. Carr, 77 S.W.2d 543 (Mo. 1903).

Zimmerman v. Missouri Bluffs Golf Joint Venture, 50 S.W.3d 907 (Mo. App. E.D. 2001).

Brookside Estates v. State Tax Commission of Missouri, 849 S.W.2d 29 (Mo. Banc 1993).

Kanakuk-Kanakomo Kamps, Inc. v. Director of Revenue, 8 S.W.3d 94 (Mo. banc 1999).

III. The State Tax Commission erred in holding that TownePlace Suites should be classified 60% residential and 40% commercial because the evidence upon which the State Tax Commission relied is neither competent nor substantial and is misleading in that those percentages are based upon projected data rather than actual data, therefore the percentages adopted by the State Tax Commission materially overstate the amount of extended stay business and materially understate the amount of transient business for which the facility is primarily used.

Zimmerman v. Missouri Bluffs Golf Joint Venture, 50 S.W.3d 907 (Mo. App. E.D. 2001).

Pierre Chouteau Condominiums v. State Tax Commission, 662 S.W.2d 513 (Mo. banc 1984).

Brookside Estates v. State Tax Commission of Missouri, 849 S.W.2d 29 (Mo. Banc 1993).

State v. Fisher, 24 S.W. 167 (Mo. 1893).

Argument

I. The State Tax Commission erred in holding that TownePlace Suites was subject to classification as both residential and commercial property because the property is "used primarily for transient housing" and therefore falls outside the definition of residential property as defined in Section 137.016.1(1), RSMo, in that the overwhelming majority of its guests use it for fewer than 30 days and the

small minority that actually stay longer are not "permanent residents" as defined in 12 CSR 10-110.220(2).

Standard of Review

In reviewing a decision of the State Tax Commission, the appellate court is to review the findings and decision of that administrative agency and not those of the circuit court that considered the matter on judicial review. *Village North, Inc. v. State Tax Commission of Missouri*, 799 S.W.2d 197, 199 (Mo. App. E.D. 1990). Where, as here, the administrative agency decision is based upon interpretation and application of statutory and regulatory provisions, the conclusions of law and decision of the State Tax Commission is reviewed de novo and any erroneous interpretations are corrected in this Court. *St. Louis County v. State Tax Commission*, 562 S.W.2d 334, 337-38 (Mo. banc 1978); *Zimmerman v. Missouri Bluffs Golf Joint Venture*, 50 S.W.3d 910. The Court must determine whether or not the agency's findings were supported by substantial and competent evidence on the whole record. *Harrington v. Smarr*, 844 S.W.2d 16, 18 (Mo. App. 1992).

The findings and conclusions of the State Tax Commission that Dominion's property should be classified as partly residential for purposes of calculating ad valorem real property taxes is not supported by substantial and competent evidence on the whole record before the Commission. The issues in this case are similar to those raised in *Zimmerman v. Missouri Bluffs Golf Joint Venture* in that proper interpretation of Section

137.016.1(1), RSMo, is required to determine if the law was properly applied to the facts and if particular real estate can be residential property as a matter of law. 50 S.W.3d 907.

According to the Missouri Constitution and Section 137.016, RSMo, real property is generally classified in one of three categories: residential, commercial or agricultural. The state legislature has defined these classifications to include and exclude real property based upon its use. For purposes of this appeal, Section 137.016.1(1), which defines "residential property," is determinative of the ultimate issue, proper classification of Dominion's property. Proper classification makes a significant difference to the taxpayer and to the taxing jurisdictions (school districts, fire protection districts, library districts and the like) because classification determines what portion of all real property tax collected by the County will be paid by an individual taxpayer. Classification determines assessed value because each class of property is assessed at a different percentage of its fair market value. Pursuant to Section 137.115, RSMo, residential property is assessed at 19% of its fair market value, agricultural property is assessed at 12% and commercial property is assessed at 32%.

The statutory definition of "residential property" as set forth in Section 137.016.1(1) is:

> all real property improved by a structure which is used or intended to be used for residential living by human occupants, vacant land in connection with an airport, land used as a golf course, and manufactured home parks, but residential property shall not include other similar facilities used primarily for transient housing. For the

> purpose of this section, transient housing means all rooms available for rent or lease for which the receipts from the rent or lease of such rooms are subject to state sales tax pursuant to section 144.020.1(6), RSMo[.]

The State Tax Commission correctly found that there was no dispute that the subject property was improved by structures used for residential living by human occupants. (LF 427). But that is hardly the end of the inquiry.

The definition of residential property goes on to provide, "but residential property shall not include other similar facilities used primarily for transient housing." To remove any ambiguity from the statute, the General Assembly defined the term "transient housing" as meaning "all rooms available for rent or lease that are subject to state sales tax pursuant to section 144.020.1(6), RSMo." It is the exception, in the instant case, that defines the rule of law to be applied because the subject property fits each element of the transient housing exception to residential classification. TownePlace Suites is used primarily for transient housing, and, as explained more fully below, all of its available rooms are subject to state sales tax. To remove any doubt about the proper interpretation and application of the transient housing exception, a careful examination of the language used is provided.

Since the word "used" is important to the meaning of the statute but is not defined in the law, it is appropriate to look to the dictionary for its plain and ordinary meaning. *American Healthcare Mgmt., Inc. v. Director of Revenue*, 984 S.W.2d 496, 498 (Mo. banc 1999). Webster's II New College Dictionary (2001) defines the verb "use" as meaning "1.

To bring or put into service or action: employ...2. To put to some purpose: avail oneself..." Although TownePlace Suites is marketed as an extended stay facility, and the units have kitchens, arguably making them more suited to the needs of guests that stay several days, these things merely indicate an intended use of the property to attract guests that stay longer than one night. For classification purposes, it is the actual day to day use of the property that should control for determining its nature as either transient or permanent living space. While the previous clause of the definition of residential property refers to improvements that are "used or *intended* to be used for residential living by human occupants [emphasis added]," the transient housing clause applies to property actually used primarily for transient housing. It does not include that which is intended to be used for long term occupancy, no matter how much of the subject property may be suitable for such use. To determine the actual use of the property, one must look to the guests that use this property, or bring the property into service, by doing business with the hotel and purchasing room nights. The guests control how the property is actually used, regardless of what it looks like or how it is marketed because they determine when and for how long the property and its services are employed.

The property must be excluded from the residential classification if it is used "primarily" for transient housing, another important word that is not defined in the statute. According to Webster's II New College Dictionary (2001), "primarily" is defined as "1. At first: originally. 2. Principally: chiefly." If Dominion's property is chiefly or principally used for transient housing, it cannot be residential.

Since the legislature defined "transient housing" as that to which sales tax applies pursuant to Section 144.020.1(6), RSMo, one must go to that provision to identify the kinds of goods and services that are subject to sales tax. Section 144.020.1(6) states a 4% sales tax is to be collected on sales or charges for all rooms, meals and drinks furnished at any hotel, motel, tavern, inn, restaurant, eating house, drugstore, dining car, tourist cabin, tourist camp or other place in which rooms, meals or drinks are regularly served to the public. The statute contains no inherent exceptions to the rule that these goods and services are taxable.

An exception to taxation for some rental transactions can be found in the Department of Revenue regulation 12 CSR 10-110.220, which states, in subsection 3(b), that sales tax shall not be charged to permanent residents. The term "permanent resident" is defined in subsection 2 of the rule as "[a]n individual who contracts in advance for a room for a period of 30 consecutive days or more and who actually remains a guest for 30 consecutive days or more." Thus sales tax will apply and be charged, pursuant to Section 144.020.1(6), RSMo, in all cases in which a room is rented for a period of time less than 30 consecutive days. To the extent guests of TownePlace Suites use the hotel for stays of fewer than 30 consecutive days, they use it for transient housing. Furthermore, a property that is used principally or chiefly for short term stays of 29 or fewer days is used primarily for transient housing and shall not be included in the residential classification according to Section 137.016.1(1).

As is revealed by the foregoing analysis of the phrase "used primarily for transient housing," whether or not extended stay hotels fall within the transient housing exception is a fact intensive inquiry and not, as the State Tax Commission opined, a matter for mere argument. (LF 21).

The relevant facts were prominent in the record, however the appropriate findings were not made. First of all, a cursory review of the data contained in Dominion's Exhibit A (the Arrivals list) reveals that nearly all of the guests that arrived at TownePlace Suites in the year 2000 stayed for fewer than 30 consecutive days, and the departure list reflects the same apparent trend. (LF 89-153). In fact, the records show that, of the 3,043 total guest arrivals logged for the year, only 203 resulted in stays of 30 or more consecutive days. Simple calculations, based upon the data in Dominion's evidence, demonstrate that the property is used primarily for transient housing and that the point is not even fairly debatable. For example, taking the grand total of guest nights sold to customers arriving that year of 24,868 (LF 153), and dividing it by the total number of guest arrivals of 3,043, shows that the average number of nights per guest arrival in 2000 was only 8.11 nights. And, taking the total number of arrivals that resulted in stays of 30 consecutive days or more (203) and dividing it by the total number of guest arrivals for the year (3,043) shows that a mere 7% of all people checking into TownePlace Suites in the year 2000 actually stayed 30 days or more. The overwhelming majority, the remaining 93% of the guests, stayed for 29 or fewer days. The property was and is used primarily for transient housing.

The Commission erroneously found that TownePlace Suites is not used primarily

for transient housing. That finding of fact is not supported by competent and substantial evidence on the whole record. Based on that pivotal but erroneous finding, the Commission misapplied the law by allowing the property to be classified partly as residential property. If property is used primarily for transient housing, Section 137.016.1(1) mandates that it not be included in the residential classification. The plain language used in the transient housing exception illuminates the legislative intent that hotels, motels and other temporary boarding houses are not part of the residential class, period. Rather than to except hotels and motels from the residential class *to the extent* they are used for transient residents, thereby allowing for partial residential classification, the law simply states if they are used primarily for transient housing, they cannot be residential. Thus, the TownePlace Suites property, being one that is used primarily for transient housing, cannot be included within the residential class as a matter of law.

For the sake of argument, even if TownePlace Suites was used by the majority of guests for stays of at least 30 days, its customer transactions should not be exempt from sales tax because guests of TownePlace Suites do not meet the definition of "permanent resident" contained in 12 CSR 10-110.220(2). In order to be permanent residents, and therefore not subject to sales tax, residents must contract in advance for a period of 30 consecutive days or more. If they do not meet the definition of permanent residents, the rent, sales or charges for their rooms are subject to state sales tax pursuant to Section 144.020.1(6), and the accommodations provided to them are considered transient housing for purposes of Section 137.016.1(1). Guests of TownePlace Suites do not contract in

advance for a period of 30 consecutive days or more.

A contract is defined as a promise or set of promises for breach of which the law gives a remedy, or for performance of which the law imposes a duty. *Restatement (Second) of Contracts, 1981, Section 1*. The essential elements of a contract are: 1) competency of the parties to contract; 2) subject matter; 3) legal consideration; 4) mutuality of agreement; and 5) mutuality of obligation. *Hyatt v. Trans World Airlines, Inc.*, 943 S.W.2d 292, 296 (Mo. App. E.D. 1997). To be valid, all essential terms of a contract must be sufficiently definite to enable the court to give them exact meaning. *Riley v. Riley*, 817 S.W.2d 644, 646 (Mo. App. S.D. 1991). Mutuality of agreement implies a mutuality of assent by the parties to the terms of the contract. *Baris v. Layton*, 43 S.W.3d 390, 397 (Mo. App. E.D. 2001). Mutuality of agreement involves a "meeting of the minds," in addition to consideration, and an offer and acceptance, which can be discerned by examining the parties' intentions as expressed or manifested in their words or acts. *White v. Pruiett*, 39 S.W.3d 857, 862 (Mo. App. W.D. 2001).

The relationship between TownePlace Suites and its guests is not a contractual one, despite the finding by the State Tax Commission that a hotel registration card is some form of contract. The relationship between innkeeper and guest embodied in the registration records in this and most instances does not meet the requirements of a contractual relationship because there is no legal consideration, no mutuality of agreement, and no mutuality of obligation. When a hotel guest fails or refuses to pay for his accommodations, it is a civil matter for which Missouri law provides a procedure for

institution of a lien. Section 419.070, RSMo. It is not a matter that is the subject of a suit against the guest for breach of contract.

The registration cards at issue, copies of which appear in the record, contain scant information, including name and address of the guest, expected arrival and departure dates, a disclaimer regarding theft of valuables, method of payment information and an agreement that the guest will be personally liable for the room in the event his corporate guarantor does not fully pay. (LF 230-378). Even though 203 arrivals in 2000 resulted in stays of 30 days or more, less than 150 registration cards or other indicia of transactions were reproduced for the record before the State Tax Commission. (LF 231-378). These materials do not show a meeting of the minds between the parties that the guests are promising to stay for the duration of their reservations or even for at least 30 consecutive days. As Dominion's witnesses testified at hearing, the hotel management does not consider the guest to have a duty or obligation to stay for the length of time indicated on the registration card. (LF 45, 62). The printed notice on the cards indicating that room rates are dependent upon length of stay and that rates will be adjusted upward in the case of early departure signals the guest's lack of obligation to stay for the duration of the reservation and the lack of obligation to pay for all of the reservation nights in case of early departure. (LF 43). The State Tax Commission's finding that residents *agree* to stay any particular length of time is clearly erroneous. (LF 424).

The record shows that TownePlace Suites has a published rate schedule in which nightly charges are dependent upon length of stay. According to the schedule, rates are

reduced after the fourth, eleventh and twenty-ninth continuous nights of occupancy. (LF 393, 427). The registration cards state that rates quoted for lengthy reservations will be adjusted upward and charged at the higher rate if a guest leaves early. However, this practice of honoring the differential pricing in the rate schedule does not equate to sanctioning guests that register for 30 consecutive days or longer and leave early. The descending rates are in the nature of volume discounts. The offer of reduced rates for extended stays is analogous to an offer by a shoe store to sell customers one pair of shoes for regular price and the next pair for half price. If a customer needs and wants only one pair of shoes, that customer does not pay liquidated damages to the store in the amount of savings forgone by the purchase of one pair instead of two. TownePlace Suites does not collect damages from customers that check out early. The customers merely pay for the number of room nights they use, and no more, at a price determined by length of stay. Whether or not they have signed registration cards indicating reservations for 30 days or more is immaterial to this arrangement. By contrast, under a traditional lease or housing contract, a tenant vacating the premises early must either pay all rents accrued in the occupancy period stated in the contract or pay a charge just to be released from that obligation.

The face of the registration card evidences no mutual assent to any terms that one could reasonably identify as a contract in advance for 30 or more days. The finding of the State Tax Commission that "there are sufficient contracts here" is against the weight of the evidence and is arbitrary, capricious and unreasonable. (LF 427). Whether or not there is a

contract in advance for more than 29 consecutive days is a matter of legal conclusion, but careful consideration of all of the record evidence would rule out such a conclusion because there is probative evidence that there is no mutuality of agreement or obligation with respect to length of stay. Sharon Hill, a manager of the facility, testified that guests signed registration cards upon check-in and that the registration cards are the only documents TownePlace Suites considers to be contracts with its guests for purposes of this suit. (LF 44-45). The hotel management's intent, as manifested in its own words and acts, was that the guests were under no obligation to stay for 30 days or more and no obligation to pay for 30 days or more, even if they had reservations of 30 or more days listed on their so-called contracts. Manager Hill testified that the guest's only obligation is to pay "for the room, if you stay"and that the registration card does not obligate a person to pay for any period of time beyond that which he actually occupies the room, regardless of the actual length of stay. (LF 45). She further testified that the card indicates that if the guest stays, he is responsible for the room. The guest's only obligation is to pay for the time the guest actually stays. This does not amount to a contract in advance for 30 consecutive days or more as required for tax exempt permanent residency pursuant to 12 CSR 10-110.220(2).

In light most favorable to the conclusion that there is a contract in advance for at least 30 days, at best the registration card represents an illusory promise by the guest to stay 30 days or more, which the law does not recognize as a legal promise at all. *Magruder Quarry & Company, L.L.C. v. Briscoe*, 83 S.W.3d 647, 650 (Mo. App. E.D. 2002). An illusory promise is an indication of assent for which no consideration is furnished because

nothing has been promised. *Id*. Where one party to an apparent agreement retains the right to avoid his promise, as the guests that indicate they will stay for 30 days or more do, it is an illusory promise that is not enforceable, and no contractual obligation exists. See, *American Laminates, Inc. v. J. S. Latta Company*, 980 S.W.2d 12, 23 (Mo. App. W.D. 1998).

Further probative evidence that no contract for 30 or more days exists is the fact that TownePlace Suites routinely charges sales tax to all guests, even those who say they are staying at least 30 days. (LF 43). Sales tax is imposed only on transient and not on permanent residents, as that term is defined in 12 CSR 10-110.220(2). If TownePlace Suites and some of its guests were actually entering into contracts for stays of 30 days or more, it would be unnecessary for TownePlace Suites to collect sales tax on those rooms, which they routinely do. (LF 424). This practice is further evidence that management has no expectation that guests will stay for 30 consecutive days or more, even where they sign registration cards stating an intent to do so. (LF 43-44). Typically, permanent residents that contract in advance for 30 days or more are found in apartment buildings where no sales tax is collected.

The finding of State Tax Commission that "there are sufficient contracts [in advance for 30 or more consecutive days] here" is unsupported by competent and substantial evidence on the whole record, is unreasonable, and is an abuse of discretion. And this error was compounded by the erroneous conclusion that the 7% of guests that stayed at TownePlace Suites for 30 or more days made up a "substantial percentage of its residents."

(LF 427). Such findings simply ignore the facts. Registration cards are just registration cards. The small number that appear in the record reflect registration information for less than 5% of the guests in 2000. They are, most probably, very similar in their indicia of intended length of stay to some of the cards signed by the 93% of guests that left in fewer than 30 days. Guest registration is customary business practice for hotels as well as a requirement under Missouri law. Section 315.079, RSMo. The signature and room rate indicate the assent of the guest to have his or her credit card charged at the end of the stay. Moreover, Dominion placed into evidence the only documents it could even argue were contracts in advance for at least 30 consecutive days, but there was direct evidence that the hotel management did not intend to bind guests to such a contractual obligation and no evidence that any guests intended to be similarly bound.

To determine if an agency has abused its discretion, the Court must look to see if the decision is clearly against the logic of the circumstances, and is arbitrary and so unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Curtis v. Board of Police Commissioners of Kansas City,* 841 S.W.2d 259, 262 (Mo. App. 1992). The findings of the State Tax Commission that there were contracts in advance for 30 days or more, that a substantial percentage of TownePlace Suites' guests entered into such contracts and that the property is not used primarily for transient housing are clearly against the logic of the circumstances. For all of the reasons previously discussed herein, they are arbitrary and unreasonable, so much so that these findings, and the decision for which they serve as a foundation, shock the sense of justice and demonstrate a lack of

careful consideration.

II. The State Tax Commission erred in holding that the property sub judice should be classified as mixed use property pursuant to Section 137.016.4, RSMo, because the facts do not support such a holding in that Section 137.016.1(1) applies to exclude it from the residential classification based on

its primary use as transient housing, the immediate most suitable economic use of the property is as a hotel or other commercial enterprise and TownePlace Suites by Marriott is a commercial hotel business within normal contemplation.

The purpose of engrafting Section 144.020.1(6), RSMo, in the statute defining residential property is to define non-residential transient housing in a way that guarantees a commercial classification for property which is used primarily for retail transactions to which a sales tax applies. The definition of transient housing in Section 144.020.1(6) was not meant to be applied to determine percentages of hotel property to be allocated to residential and commercial classifications. Rather, it is there to insure that predominantly retail operations remain subject to commercial classification by expressly barring them from the residential class. The State Tax Commission decision misapplies Section 144.020.1(6) by making it, and the rule defining "permanent residents" promulgated thereunder, the critical test for classifying Dominion's property as partly residential. In making the applicability of sales tax to guest stays the test for whether or not residential classification of the property is appropriate, the decision largely ignores the definition of residential property, and the transient housing exception, provided in Section 137.016.1(1).

Sales tax is a tax on retail commercial transactions and is found in an entirely separate chapter of the Missouri statutes than any dealing with ad valorem tax. Explicitly tying sales tax to real property classification for ad valorem taxes makes clear the

connection between commercial transactions and the proper commercial, and not residential, classification of the real estate used primarily for such transactions. Section 144.020.1(6), RSMo, states that:

> A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:
>
> . . .
>
> (6) A tax equivalent to four percent on the amount of sales or charges for all rooms, meals and drinks furnished at any hotel, motel, tavern, inn, restaurant, eating house, drugstore, dining car, tourist cabin, tourist camp or other place in which rooms, meals or drinks are regularly served to the public;
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> . . .

The principle expressed in the preamble to Section 144.020, RSMo, is that engaging in retail business is a privilege. Through imposition of the sales tax, the General Assembly has recognized that with this privilege comes the responsibility to bear the burden of taxation on retail transactions. Missouri courts have long recognized that all taxation is a burden of which each citizen has a duty to bear his portion and that the taxpayer cannot be permitted to escape his duty to pay where there is no sound basis for it in the law. *State ex rel. Hudson v. Carr*, 77 S.W.2d 543, 546 (Mo. 1903). In this case, Dominion has a duty to

pay commercial real estate taxes based on the nature of the business conducted on its property. The legislature has mandated that the burden Dominion should bear for the privilege of engaging in the business of rendering taxable service at retail in Missouri is more than the burden borne by owners of residential dwellings.

Even though Dominion has argued that its property is subject to two uses, it is not subject to two different classifications for two reasons. First, as previously discussed, it is used primarily for transient housing and thus may not be included in the residential class. Second, Section 137.016.4, RSMo, cannot be applied to this property as explained below.

The part of the classification statute which applies to mixed use property, Section 137.016.4, RSMo, states, in relevant part:

> Where real property is used or held for use for more than one purpose and such uses result in different classifications, the county assessor shall allocate to each
>
> classification the percentage of the true value in money of the property *devoted* to each use...
>
> [emphasis added]

Since "devoted" is important to the meaning of this provision and not otherwise defined in the law, Webster's II New College Dictionary (2001) indicates that the plain ordinary meaning of "devote" is to "1. To give or apply (one's time, attention or self) entirely to a particular activity or cause." The word "devoted" applies to "property" pursuant to the last antecedent rule of statutory construction. *Citizens Bank and Trust v. Director of*

Revenue, 639 S.W.2d 833, 835 (Mo. 1982). Therefore the correct interpretation of this provision is that application of more than one classification to a piece of real property should be according to the percentage of the property applied entirely to a specific use.

The record is devoid of evidence that Dominion physically allocates portions of the property to long term and short term accommodations. The mixed use statute recognizes that real property is a tangible fixed asset which can be physically divided and put to more than one use. An example of such property is a building that has both residential living space that is used as one or more apartments and storefront space occupied by retail business. There is no question that such properties are used for more than one purpose, one fitting the definition of residential property and one fitting the definition of commercial property under Section 137.016. But properties such as the one in this example are such that the use of the property can be easily ascertained on the basis of use to which the physical space is devoted. Thus the proper allocation of such a piece of property to more than one classification is relatively easy to ascertain (and therefore nonarbitrary) and tends to remain stable over time. Such is not the case with property like that of Dominion.

Just as this Court in *Missouri Bluffs* opined that the legislative largesse permitting land used as a golf course to be classified as residential ought not to be extended to portions of a country club in which commercial activity is conducted, the same temptation to expand unduly favorable tax treatment to a commercial enterprise should be resisted in this case. See, *Missouri Bluffs Golf Joint Venture* at 912. Dominion seeks to have its

cake and eat it too by claiming entitlement to residential classification for ad valorem taxes while it markets itself and conducts its business as a commercial enterprise specializing in transient housing. The fact that TownePlace Suites advertises that its guests are not required to enter leases makes the contradiction particularly blatant. (LF 393, 398). If a parcel of real property is used primarily for the purpose of generating profit, it is assessed at a commercial rate. Commercial properties are generally situated in places that are not conducive to residential development or that do not permit it, and they are typically located on or near main thoroughfares in order for the businesses to reap the benefit of ease of access for potential consumers of their goods and services. Dominion owns a commercial enterprise specializing in the provision of transient housing. Dominion is a permanent, commercial resident of St. Charles County and should not be permitted to reap the benefit of paying a reduced share of the property tax burden in the County based on the minuscule percentage of its customers who may wind up staying 30 consecutive days or more each year.

The legislature has defined residential property to specifically exclude those properties that are used primarily for transient housing, recognizing that the commercial aspects of owning such a property are dominant even though there may be an occasional guest that remains for an extended period. The fact that the property was built to house a commercial enterprise and that customers of the enterprise are invited to stay there for a daily fee demonstrates that the commercial aspects of this business dominate its character and should control for tax classification purposes. See, *Brookside Estates v. State Tax*

Commission of Missouri, 849 S.W.2d 29, 32 (Mo. Banc 1993).

Although Dominion has sought to avail itself of the lower property taxes meant for residential property owners, it can hardly claim that it did not develop the subject property for a commercial purpose, a purpose which TownePlace Suites now serves for its financial benefit. See, *Brookside Estates* at 32-33. TownePlace Suites is always used for transient housing as that term is defined by Missouri statute, despite the fairly recent practice of refunding sales tax to guests after they have stayed at least 30 consecutive days. (LF 424). The property is used primarily for transient housing, which is a commercial use. The vast majority of guests use it for transient housing. This is not a case in which the Assessor may allocate the property into two classifications based upon the use to which portions of it are devoted in accordance with Section 137.016.4, RSMo, because it is all devoted to commercial use.

Even where a parcel of real estate seems easily included or excluded from the residential class based on the definition in Section 137.016.1(1), RSMo, confirming the proper classification may still be aided by considering its immediate most suitable economic by looking at the factors listed in Section 137.016.5, RSMo. See, *Missouri Bluffs Joint Golf Venture* at 913. According to that part of the statute, property may be classified according to its immediate most suitable economic use by considering several factors, including (1)immediate prior use; (2) location; (3) zoning classification; (4) other legal restrictions on the use of the property; (5) availability of water, electricity, gas, sewers, street lighting, and other public services; (6) size of the property; (7) access to

public thoroughfares; and (8) any other relevant factors. Where the property is and how business is produced and conducted there are relevant factors indicating its immediate most suitable economic use.

Examination of the evidence, based on these factors and ordinary understanding, suggests that the immediate most suitable economic use of this property is commercial. For example, the property is obviously operating within an area permitting commercial activity. Urban communities such as St. Charles typically do not permit the operation of a hotel business in a residential zoning district. The immediately surrounding parcels are also committed to commercial use in that TownePlace Suites shares a driveway with a Golden Corral restaurant, and there is a Schnuck's Supermarket located next door. (LF 391). Other relevant factors to the immediate most suitable economic use of the property are the fixtures, amenities and on-site services there. For example, a guest laundry is available for washing clothes, and linen service is provided to guests, who are not required to bring or wash their own towels and sheets. (LF 398). The hotel is equipped to provide regular housekeeping service to guests. (LF 55, 392, 393, 398). Additionally, there is a front desk with business service available, valet dry cleaning and 24 hour staffing, which would not typically be found in an apartment complex. (LF 392, 393). Phone service is provided to each room, as are other utilities. (LF 393). Marketing is another relevant factor that has rendered the immediate most suitable economic use of the property commercial. Promotional incentives such as Marriott Reward Points, frequent flyer miles and a contest to win a trip to the Olympic games are offered to guests for choosing to use

TownePlace Suites for their temporary accommodations. (LF 58, 64, 392, 393, 397, 398). The business is marketed to people that do not want a lease because its promotional materials promise that a lease is not required. (LF 393, 398). Based on consideration of these relevant factors, the immediate most suitable economic use of Dominion's property is as a hotel.

Where activities that take place in a setting are activities of a dual nature, another appropriate test for determining use is the primary purpose test. *Kanakuk-Kanakomo Kamps, Inc. v. Director of Revenue*, 8 S.W.3d 94, 96-97 (Mo. banc 1999). Even though the *Kanakuk* Court employed the primary purpose test for applying a sales tax statute, it is relevant to the inquiry before this Court because the real property classification statute bases its transient housing exception on the use to which the property is primarily put. The primary purpose test requires consideration of how the subject of the tax is viewed within normal contemplation. *Id*. at 97. In ascertaining the primary purpose of a facility in which activities having a dual purpose are routinely conducted, it is appropriate to consider how the property is subjectively viewed by the public. Within normal contemplation, one would view TownePlace Suites by Marriott to be a facility in which a person or business could purchase transient housing. Conversely, it would not be regarded, in normal contemplation, as a place used primarily for permanent housing.

III. The State Tax Commission erred in holding that TownePlace Suites should be classified 60% residential and 40% commercial because the evidence upon which the State Tax Commission relied is neither competent nor substantial and is misleading in that those percentages are based upon projected data rather than actual data, therefore the percentages adopted by the State Tax Commission materially overstate the amount of extended stay business and materially understate the amount of transient business for which the facility is primarily used.

In support of its claim to a partial residential classification, Dominion introduced 12 accounting reports, called FLASH reports, generated internally to analyze occupancy data for TownePlace Suites on a month to month basis. (LF 401). Copies of these reports make up Exhibits E through P that were before the State Tax Commission. There is one report for each month in 2000 reflected in the record. (LF 379-390).

These FLASH reports materially overstate the use of the property by long term guests and understate its use by short term guests because of the way in which Marriott's Hospitality Accountant arrived at the figures used in the reports. The total room nights shown on the reports for each one-month period are based upon guests that have *indicated* they will be staying for 30 or more consecutive days. (LF 414). According to the uncontroverted pre-filed direct testimony of Dominion's Hospitality Accountant, Christopher Stabile, the FLASH report occupancy rates are derived by including "resident[s] who ha[ve] agreed to stay for 30 or more consecutive nights...in the category for 30 or more nights." (LF 414). Thus the numbers in the FLASH reports are based on mere projections or best estimates by guests as to when they are planning to leave the hotel and do not necessarily reflect true arrival and departure data. When compared to numbers of actual room nights used each month, based on data in the arrival and departure logs for stays of 30 or more consecutive days, the *actual* numbers of guests staying 30 days or more and room nights sold to them are much lower. (LF 89-229). Rather than set forth the relevant numbers in narrative form, this information is set forth below in table format for easy comparison of the data on a month by month basis.

The number of long term guests ("Total actual long term guests") for each month, shown in regular typeface, was determined by counting all stays of 30 or more consecutive days in the arrival log for each month ("Arrivals") and adding the total stays of 30 or more consecutive days found in the departure log for the same month ("Departures") as contained in Dominion's Exhibit A. (LF 87-220). The total number of arriving and departing long

terms guests for each month is followed by the projected number of long term guests for each month indicated in the FLASH reports. The projected number of long term guests is determined by dividing the number of room nights attributed to 30 day guests in the FLASH reports (bottom left corner of “Period to

Date" information as displayed on the right half of each FLASH report) by the number of days in each month. Actual room nights sold each month is similarly computed by taking the actual number of long term arriving and departing guests and multiplying it by the total number of days in each month.

January

Arrivals (30 days or more)	16
Departures (30 days or more)	4
Total actual long term guests	20
Projected long term guests	**21.9**
Total actual room nights	620
Projected total room nights	**678**

February

Arrivals	11
Departures	8
Total actual long term guests	19
Projected long term guests	**32.1**
Total actual room nights	551
Projected total room nights	**931**

March

Arrivals	7
Departures	19
Total actual long term guests	26
Projected long term guests	**32.9**
Total actual room nights	806
Projected total room nights	**1020**

April

Arrivals	15
Departures	5
Total actual long term guests	20
Projected long term guests	**31.0**
Total actual room nights	600
Projected total room nights	**930**

May

Arrivals	21
Departures	12
Total actual long term guests	33
Projected long term guests	**43.3**
Total actual room nights	1023

Projected total room nights	**1342**

June

Arrivals	12
Departures	18
Total actual long term guests	30
Projected long term guests	**46.8**
Total actual room nights	900
Projected total room nights	**1405**

July

Arrivals	19
Departures	15
Total actual long term guests	34
Projected long term guests	**44.0**
Total actual room nights	1054
Projected total room night	**1363**

August

Arrivals	34
Departures	18

Total actual long term guests	52
Projected long term guests	**60.9**
Total actual room nights	1612
Projected total room nights	**1888**

September

Arrivals	19
Departures	27
Total actual long term guests	46
Projected long term guests	**58.5**
Total actual room nights	1380
Projected total room nights	**1754**

October

Arrivals	22
Departures	14
Total actual long term guests	36
Projected long term guests	**54.0**
Total actual room nights	1116
Projected total room nights	**1673**

November

Arrivals	20
Departures	27
Total actual long term guests	47
Projected long term guests	**58.0**
Total actual room nights	1410
Projected total room nights	**1741**

December

Arrivals	6
Departures	34
Total actual long term guests	40
Projected long term guests	**39.1**
Total actual room nights	1240
Projected total room nights	**1212**

Considering that the FLASH report numbers are based on registration information provided by all guests, which determines how guest nights are allocated to categories of lengths of stay of 1-4 nights, 5-11 nights, 12-29 nights and 30+ nights based on expected length of stay, a lower actual percentage of stays of 30+ days would and does create a corresponding increase in the percentage of business from the shorter stays. In other

words, since the hotel is counting guests that merely say they are going to stay for 30 days or more as "extended stay" residents each month, even if they actually stay for a shorter period, it is artificially inflating its report of percent of business from extended stays and under-reporting the percent of its business derived from the sale of less than 30 room nights. For this reason, the data in the FLASH reports is not reliable, is not competent and substantial evidence and is misleading with respect to how this property is actually used.

Moreover, the above exercise demonstrates that even if it was necessary to determine which portion of the real estate is used for permanent versus transient housing, the task is a daunting one and is subject to many approaches. According to Section 137.016.4, it is the Assessor's responsibility to determine proper allocation of a mixed use property between applicable classes each time he assesses a parcel of real estate. In the case of a property like that of Dominion, if it must be allocated between the commercial and residential classes, it will be impossible for the Assessor to independently assess such property upon visual inspection. The majority of mixed use properties, like parcels containing apartments and retail space, can be and are assessed in this way. The regular assessment of the subject property and other similar parcels will be speculative and meaningless if extended stay hotels may calculate and present their own sales data to support an allocation between classes. Such an application of the law will set the stage for boards of equalization across the state to hear form hospitality accountants armed with sales data to prove entitlement to a maximum allocation to the residential classification for hotels of all descriptions that have some guests that stay for 30 or more consecutive days.

The assessment of real estate should be based upon use of the subject property in accordance with the definitions of classes of real estate set forth in Section 137.016. Only where it is appropriate, and not where the property is used primarily for transient housing, should percentages of use be ascertained to allocate property among the residential, commercial and agricultural classes pursuant to Section 137.016.4. The classification of real estate should not be based upon reporting of retail sales data by the owner.

The decision of the State Tax Commission to treat Dominion's property as both residential and commercial on the basis of its yearly sales history violates Article X, Section 3 of the Missouri Constitution, which requires that assessment and collection of taxes be uniform within the classes and subclasses. If the Constitution prohibits the legislature from creating a tax subclass without reason, it follows that the State Tax Commission is prohibited from doing the same thing by adding to the subclass of residential property an arbitrarily determined percentage of commercial real estate. See, *Missouri Bluffs Golf Joint Venture* at 912. The dual classification scheme set forth in the decision and order of the State Tax Commission presents the type of palpably arbitrary classification that violates equal protection because it has no rational basis in a legitimate legislative purpose. See, *Pierre Chouteau Condominiums v. State Tax Commission*, 662 S.W.2d 513, 514 (Mo. banc 1984). There is a legitimate legislative purpose served by classifying transient housing as commercial property. The Court in *Brookside Estates* concluded that a rational analysis of the legislative intent undergirding the residential/commercial conundrum with respect to land used for residential living by human

occupants is that lawmakers have recognized that owners of apartment buildings and other ready-to-occupy places of permanent residence invest much more of their resources in the property than those that buy and operate similar property on a retail basis. This analysis entitles the former type of investor to a lower tax rate allowing faster recoupment of investment costs, recognizing that the profit margin for investment in residential property is lower than profits from investment in commercial property. 849 S.W. 2d at 32.

The State Tax Commission's misinterpretation and misapplication of the law in this case must be corrected because TownePlace Suites is not the only business for which it has application. There is no doubt that the quest for higher profit margins based on lower fixed costs, including real estate taxes, will drive similar businesses to find more advantageous ways to process and present their sales data in order to demonstrate a predominantly residential use while continuing to advertise for higher profit, transient business by offering customers hotel-like amenities and freedom from obligation to enter rental contracts. Given that the decision arguably applies to most hotels with occasional guests staying 30 or more consecutive days in a year, it is unlikely that all effected business entities would calculate their sales data in the same manner, thus virtually identical properties put to the same use could be assessed at substantially different rates. County assessors, boards of equalization and the State Tax Commission would have to pass judgment upon the reliability of internal sales statistics for assessment of real property on a case by case basis for all such property. Ultimately, the State Tax Commission interpretation and application of Section 137.016.1(1) weakens the law. It is precisely this

kind of arbitrary and potentially discriminatory application of the law that has traditionally led courts to find that exceptions, privileges and exemptions are not favored in the law. *State v. Fisher*, 24 S.W. 167, 168 (Mo. 1893). At best, the decision of the State Tax Commission grants Dominion a legal privilege to which it is not entitled under the law. At worst, it creates a loophole for abuse of the tax law despite the clear intent of the legislature. The decision creates an exception to the rule that commercial property used for commercial purposes is assessed at the commercial rate. Misuse or misapplication of an exception in the tax law is discriminatory and violates the constitutional requirement of uniform application. Mo. Const. Article X, Section 3.

Conclusion

In the tax year 2000, the management of TownePlace Suites by Marriott in St. Charles County, conducting business at the property owned by Dominion, logged the arrival of over 3,000 guests. Of the 3,043 guests that arrived at the desk of TownePlace Suites for registration that year, a mere 203 actually stayed at the hotel for 30 or more consecutive days. Of the small percentage of people staying 30 consecutive days or more, none of them were "permanent residents" because they had made no contracts in advance that obligated them to stay for 30 days or more. The remaining 2,830 registered guests used the facility for periods of 29 days or less. On average, all 3,043 guests presenting at the desk would only stay at the facility for just over 8 days. TownePlace Suites is used primarily for transient housing and, the legislature has commanded, must therefore not be

included in the residential class of real property in accordance with Section 137.016.1(1), RSMo. For the foregoing reasons, this Court must correct the misinterpretation and misapplication of the law by the State Tax Commission and hold that the subject property should be classified as commercial property for tax year 2000.

Respectfully submitted,

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Rule 84.06(b) Certificate

I certify that this brief complies with Rule 84.06(b), as effective July 1, 2001 and amended January 1, 2003, and that this brief contains approximately 10,543 words exclusive of the appendix. Further, I certify that the floppy disk served with the brief has been scanned for viruses using Computer Associates eTrust InoculateIT and, according to that software, is virus free.

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Certificate of Service

The undersigned hereby certifies that two copies of Appellant's Substitute Opening Brief were served this 14th day of May, 2004, by first-class mail, postage prepaid, upon Mr. James P. Gamble, 8909 Ladue Road, St. Louis, Missouri 63124, Attorney for Respondent.

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