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 REPLY BRIEF

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I. The property sub judice, which is used primarily for transient housing, should be

excluded from the residential class by virtue of the plain language of Section 137.016.1(1), therefore, its true value in money should not be allocated to the residential class under the provisions of Section 137.016.4.

The State Tax Commission erred in holding that Dominion's property should be classified as mixed use property under Section 137.016.4, RSMo, when the facts do not support such a holding in that 137.016.1(1) applies to exclude it from the residential classification because it is used primarily for transient housing. The plain meaning and proper interpretation of the transient housing exception is to exclude property that is used primarily for transient housing from the residential class. The exception does not apply to as much of the taxpayer's use of the property as may be attributable to long terms stays. It is an exception for the entire property, the primary use of which is for transient housing. Therefore Dominion's evidence related to how much of its business, on average, is attributable to customers that stayed for 30 days or more misses the mark for purposes of proving that the property is not used primarily for transient housing because it only considers long terms stays as a proportion of occupied rooms. It does not take into account how the great majority of guests use the facility, as temporary accommodations. The finding of the State Tax Commission that the property is not used primarily for transient housing is in error. The only finding, with regard to the transient housing exception, that is supported by substantial and competent evidence is that this property is used primarily for transient housing, therefore it cannot be considered anything but

commercial or agricultural property in accordance with Section 137.016.1(1). Only 7 per cent of TownePlace Suites' arriving guests stayed for 30 consecutive days or more. (LF 89-153). Only 1 in 14 registrants maintained continuous occupancy of a room for 30 or more days. (LF 89-153). By far, the vast majority of the business at TownePlace Suites is attributable to short terms stays, which are subject to state sales tax. Dominion's property, TownePlace Suites, belongs in the commercial class of real property for purposes of ad valorem taxation.

The transient housing exclusion is absolute in that property used primarily for transient housing may not be considered residential property. It is not a proportionate exclusion based on the percent of gross rental receipts subject to state sales tax. Had such a scheme been the intent of the legislature, the appropriate statute would have been easy enough to draft. The meaning of transient housing is "*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[.]" Section 137.016.1(1), RSMo [emphasis added]. All rooms at TownePlace Suites are subject to state sales tax whether or not the taxes are ultimately rebated upon fruition a continuous stay of 30 days. All of the rooms available are subject to state sales tax because they are regularly served to the public as provided in Section 144.020.1(6), RSMo. Since the propriety of Dominion's interpretation of the permanent resident exception to the rule of state sales tax is not under review here, suffice to say Appellant does not so interpret the provision and would argue that, in the absence of a contract, there is no tax exempt status for long terms stays.

If strictly comparing transient to long term occupancy rates, Respondent's argument that 60 per cent of the use of the property can be attributed to long term stays might be a compelling one, however an examination of what that number means, in a practical sense, is even more compelling. Assuming that 60 per cent is a true and accurate rate for the relevant tax year, it means that 3 out of 5 rented rooms are occupied by guests that stay 30 or more consecutive days. So based on this average occupancy profile, in a 30 day month, 3 out of every 5 rooms will not be subject to turnover, while the other 2 rooms could potentially turn over 30 times each. While only 3 guests would account for the occupancy of 3 of the 5 rooms, up to 60 different guests could account for the transient occupancy of the other 2 rooms. Based on Dominion's own occupancy figures, up to 60 different transient guests could use 2 of the 5 occupied rooms, while only 3 guests could be said to have used the other 3 occupied rooms. This exercise demonstrates that turnover, even with 60 per cent long term occupancy, may produce up to a 20 to 1 margin of transient to permanent guests actually occupying the hotel in the course of a year. And this figure is supported by and consistent with the evidence in the 2000 Arrivals List showing only 7 per cent of arriving guests continued to occupy the same room after 29 days. (LF 89-153). Despite the occupancy rate percentages that Dominion offers in support of the decision of the State Tax Commission, when scrutinized, those percentages demonstrate that this property is used primarily for transient housing. The State Tax Commission's finding that it is not used primarily for transient housing, and the findings and conclusions arising therefrom, were not supported by competent and substantial evidence on the whole record.

Those findings are clearly contrary to the overwhelming weight of the evidence presented to the State Tax Commission, therefore its decision must be reversed or other action must be taken to correct the erroneous result reached. *Vlasek v. Alternative System of Police Retirement System*, 435 S.W.2d 726, 729 (Mo. App. 1968); *Moran v. Whaley*, 608 S.W.2d 446, 448 (Mo. App. E.D. 1980).

Similarly, the State Tax Commission's finding that the registration documents at TownePlace Suites are contracts is not supported by substantial and competent evidence. Hotel registration cards are not contracts, and the ones that were used by TownePlace Suites in 2000 are not exceptional in that regard. The hotel and the guest have not agreed to the same terms if the hotel expects the guest to stay for the number of days on the card and the guest leaves whenever he wishes and pays only for the time he stayed. There is no legal duty for any guest to stay 30 days or more by virtue of the hotel registration cards in the record and the language therein. The guest has no legal duty, except to pay for the time he rents a room, which does not require a contract. Whether a contract is made, and if so, what the terms of the contract are, depends upon what is actually said and done by both parties and not on the understanding or supposition of one of the parties. *Bare v. Kansas City Federation of Musicians Local 34-627*, 755 S.W.2d 442, 444 (Mo. App. W.D. 1988). Based on the actions of the hotel and its guests relative to the information printed on the card, the guests and the hotel can hardly be said to be agreeing to the same terms, even if the hotel assumes guests will stay for the duration of their reservations. There is no *mutuality* of assent and obligation and no contract.

At best, the writing on the registration cards is nothing more than an illusory promise and not a contract in advance for a stay of 30 days or more. Dominion has attacked this position by pointing out that the contract in *Magruder Quarry & Company, L.L.C. v. Briscoe* was indeed found to be a contract. 83 S.W.3d 647 (Mo. App. E.D. 2002). There was no question in *Briscoe* that the document at issue was a lease agreement. The bona fide lease agreement at issue in that case contained multiple provisions, approximately 5 complete paragraphs of which were included in the Court's opinion, outlining the terms and conditions under which covenants to perform mining were to be fulfilled. *Id*. at 649. To find that there was a contract requiring the performance of mining and selling rock, the court simply invoked the implied covenants of good faith and reasonable efforts to give effect to the multiple promises to mine in the agreement. *Id*. The court reasoned that it could only imply those covenants because there was no language in the lease agreement negating the express terms pertaining to mining found within the contract. *Id*. at 651-2. In contrast, the hotel guests in this case should not be held to a requirement of good faith and reasonable efforts to stay for the length of time indicated on the registration cards by implication because each registration card contains language that directly negates the alleged duty to stay by stating "shortening your stay may constitute an early checkout and adjustment to your account." Since these so-called contracts contain language that negates the implication of good faith and fair dealing that would require guests to stay for their entire reservation period, these documents are distinguishable from the lease contract in *Briscoe* and should therefore be found lacking in the mutuality required to have a valid

contract. *Id*. at 652.

There was no testimony or other evidence as to the purpose of TownePlace Suites' advertising that no lease is required, so Dominion's argument that it might be mistaken for something other than a hotel but for such advertisement should not be considered. Calling the registration cards contracts that are not leases is a confabulation employed by Dominion for the purpose of making some guests "permanent residents" in order to avoid an entirely commercial classification while promising all guests that the hotel will not actually treat them as such. The argument is disingenuous and untenable. An equally plausible motive for advertising that leases are not required is that TownePlace Suites is intentionally promoting itself as primarily transient housing, particularly to those customers averse to the contractual obligation to stay for a specific period of time.

The Assessor recognizes that state courts have historically given great deference to findings of the State Tax Commission *on matters of assessment and true value in money of real and personal property.* The Assessor has no quarrel with that deference in this matter because it does not apply to this appeal of assessment. This is a classification case, the appropriate outcome of which is dependent upon the correct interpretation and application of the law to the facts. Where the ultimate conclusion of the State Tax Commission is challenged on the basis of a misapplication of the law to the facts, there is no deference to the State Tax Commission decision on appeal. *Goldberg v. State Tax Commission*, 618 S.W.2d 635, 640 (Mo. 1981). In fact, this Court is vested with the power of de novo review of judicial interpretation and application of the law by an

administrative body and is free to draw its own legal conclusions. *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. Had Dominion wished to avail itself of the deference afforded State Tax Commission decisions as to valuation of real estate, Dominion should have challenged its assessed value at the outset but did not. (LF 1). No forbearance is required of the reviewing court where the State Tax Commission's application of the law to the facts is challenged. *Morton v. Brenner*, 842 S.W.2d 532, 540 (Mo. banc 1992).

Correctly applying the law to the facts leads to one conclusion. The value of Dominion's property should never have been allocated to two classes in accordance with Section 137.016.4, because it is used or held for use for one purpose, commercial provision of primarily transient housing. For the sake of argument, if Dominion was entitled to mixed use classification, the classifications are to be allocated to the true value in money of the subject property in proportion to the use to which such portions are devoted.

The statutory definition of residential property defines transient housing as all rooms available for rent or lease that are subject to state sales tax. Contrary to Dominion's position, property used primarily for transient housing is not supposed to be divided between commercial and residential classes based on the ratio of short term to long term occupancy, known as the "occupancy rate." Since the Real Estate Appraisal Terminology text is cited by Dominion as an authoritative work in real property assessment, the General

Assembly's omission of "occupancy rate" must mean that such a formula was not intended to apply. Occupancy rate appears nowhere in the classification statute, including in reference to classifying transient housing. On the other hand, consideration of how *all rooms available* for rent or lease are used at a given property is required. The fact that occupancy rate was omitted from the classification statute supports the Assessor's position that the transient housing exception removes transient accommodations from the residential class, making the occupancy rate of hotels and motels immaterial for classification purposes. Occupancy rate is generally only material to real property assessment to the extent it may be a factor to consider in determining fair market value using the income approach. See, *Equitable Life Assurance Society of the U.S./Marriott Hotels v. State Tax Commission*, 852 S.W.2d 376 (Mo. App. E.D. 1993). The issue in this case is not market value of Dominions' property but classification of it, which does not implicate the application of principles of property appraisal. Any discussion of how to use occupancy rate to apply the income approach to a real estate appraisal problem is immaterial to the appeal, and recitation from the Property Appraisal and Assessment Administration text is introduced as a diversion and

not as an aid the classification analysis. Since fair market value of Dominion's property is not at issue in this case, neither is its occupancy rate.

Dominion invites the Court to consider the outcome of one appellate decision in Colorado as support for its assertion that the State Tax Commission properly interpreted

Missouri law. *E.R. Southtech, Ltd. v. Arapahoe County Board of Equalization*, 972 P.2d 1057 (Colo. App. 1998). Besides the fact it is devoid of precedential value, the decision of the Colorado Court of Appeals is neither coherent nor instructive in its treatment of and disregard for the Colorado statute providing that hotels and motels are not to be included in the residential class of real property. Appellant urges the Court not to import bad law from Colorado when the answer here is exceedingly clear and requires application of the Missouri rules of statutory construction. One of the most important of Missouri's rules requires that a court's interpretation of a statute cannot render words in the statute meaningless, excessive, or superfluous. *Vocational Services, Inc. v. Developmental Disabilities Resource Board*, 5 S.W.3d 625 (Mo. App. W.D. 1999). The Colorado Court did not abide by this rule when it decided that hotels and motels could actually be included in the residential class. In fact, its holding in the case is contrary to its express finding that "it is undisputed that, to the extent the property was used as a hotel [i.e. primarily engaged in lodging and predominantly used on an overnight or weekly basis], it cannot be classified as residential property as a matter of law." *E.R. Southtech, Ltd.* at 1058. The holding is internally inconsistent and analytically flawed. This Court should not be so willing to render the transient housing exception to residential classification meaningless, excessive or superfluous by interpreting it away. In addition, it is unclear what impact the Arapahoe County Assessor's own decision to classify the property as partially residential and partially commercial in several preceding years may have had on the Colorado court's decision. *Id*. at 1059.

II. The State Tax Commission erred in allocating part of the true value in money of the subject property to the residential class because Section 137.016.1(1), RSMo, specifically excludes any property primarily used for transient housing from the residential class.

While *Brookside Estates v. State Tax Commission* is no longer good law with respect to classification of real property improved with structures containing more than four dwelling units, since the legislative abolition of the rule of four, it offers excellent rationale for sticking with legislative intent in matters of statutory construction when it comes to assessing commercial property at a higher than residential rate. 849 S.W.2d 29, 32-33 (Mo. Banc 1993). It is neither for the State Tax Commission nor the courts to confer legislative largesse upon a group of commercial taxpayers when the plain language of the statute militates against it. *Zimmerman v. Missouri Bluffs Joint Golf Venture*, 50 S.W.3d 907, 912 (Mo. App. E.D. 2001). Dominion's property is used primarily for transient housing and should not be classified, even in part, as residential. *Brookside* is still good precedent for taxing property used for commercial pursuit as commercial property for ad valorem taxation. 849 S.W.2d at 32.

The Assessor does not argue that Section 137.016.1(1) is invalid. Rather, the argument is that the statute, interpreted and applied as it was by the State Tax Commission,

is made to violate the uniformity clause in the Missouri Constitution and leads to a palpably arbitrary classification scheme with respect to hotel property. The statute is valid on its face, and if it is correctly interpreted and applied to the facts of this case, it does not run afoul of the Constitution.

III. One of the absurd results that has already sprung from the State Tax Commission's failure to properly exclude TownePlace Suites from the residential class is existentially addressed by the intensely complicated appellate arguments as to how to allocate true value in money of the subject property.

Dominion's response to the Assessor's analysis of the evidence presented to the State Tax Commission further highlights the administrative impossibility of living with the State Tax Commission's decision in this case. In defense of the Assessor's analysis and computations related to Dominion's FLASH reports, none of the additional 4 January guests that Dominion claims the Assessor failed to consider as long term guests were guests at the property for all 31 days in January. In fact, the earliest arriving guest of the 4 checked in on January 10, so it would not have been appropriate to credit the extended stay statistics with an additional month of room nights for any of the 4. Additionally, it should be noted that Dominion's evidence, and resulting occupancy calculations, contain many stays of 30 or more days that began late enough in the year that Dominion would not be entitled to count all of the days of the stay as a percentage of business for 2000 because

they concluded well into 2001. In one case, Dominion is counting 54 extended stay days for 2000 on a stay that commenced December 31, 2000, and in another, a stay is counted as 120 extended stay days for 2000 when the guest arrived on December 15, 2000. (LF 222). Moreover, most of the guests that stayed over 30 days were actually at the facility for 60 days or less, so Dominion should not be able to account for them has having stayed in "permanent" residence for two full months.

Besides the obvious administrative impossibility in applying the statute to all similar properties in Missouri the way the State Tax Commission has applied it to Dominion's property, the application of Section 137.016.4, RSMo, assumes that the property is used or held for use for more than one purpose. The property at issue is used for one purpose, which is to generate revenue by rendering taxable service of rooms to the public on a regular basis, at retail, as described in Section 144.020.1(6), RSMo.

While a comprehensive treatment of statutory construction was offered in Appellant's opening brief, it bears assertion that the ultimate goal of any statutory construction analysis is to determine the legislative purpose inherent in the plain language of the statute and to give effect to that intent. *Lewis v. Gibbons*, 80 S.W.3d 461, 465 (Mo. banc 2002). It is clear that when the legislature finally abandoned the rule of four, previously used to classify dwellings for human occupancy with more than 4 units as commercial, it added the transient housing exception to insure that hotels and motels would continue to be classified and taxed as commercial property. (Compare, Appendix A-1 to Appendix A-4). This statute ought to be read in light of its purpose to tax commercial

property at commercial rates and not in the light most favorable to the economic interests of a few taxpayers similarly situated to Dominion. Once the rule of four was officially abandoned, the only logical way to preserve the taxation of commercial enterprises as commercial property was to tie the classification to the actual operation of the business that owned the multi-unit dwellings. As long at the units are regularly offered to the public and subject to state sales tax, and Dominion's evidence demonstrates that they are here, then the property shall not be included within the residential classification. While the legislature was unable to stop the erosion of the distinction it sought to make between rental property used to generate profit and residential property used for investment, by the subsequent amendment to Section 137.016.1(1) wherein the transient housing exception was codified, it sought to preserve and maintain the commercial classification of hotels, motels and boarding houses. Thus improvements made for human occupancy that are used primarily for transient housing shall not be included in the residential class. The new provision and the legislative intent underlying it, particularly in light of the history of the rule of four, is plain and unambiguous, and that intent should be given effect accordingly.

Dominion has challenged its year 2000 tax assessment on the grounds that its sales data for 2000 indicate that its average occupancy rate for tax year 2000 was 60 per cent and that this should be the basis for allocation of true value in money for purposes of applying Section 137.016.4, RSMo. Respondent's evidence is irrelevant and immaterial for tax year 2000, as the assessment and levy on the property was complete prior to December 31,

2000, and its tax liability was fixed at a sum certain as a matter of law. The right of a taxpayer to pay a sum certain in taxes becomes a vested right when the mere expectation as to tax liability becomes an expectation to pay a fixed sum. *Beatty v. State Tax Commission*, 912 S.W.2d 492, 498 (Mo. banc 1995). Rights under the tax law, as it exists in January of the relevant tax year, are not vested in the taxpayer until the tax becomes a sum certain at the conclusion of levying process. *Id*. at 497. The *Beatty* Court held that a right to pay a sum certain in tax vests in the taxpayer some time not later than September 20 of the tax year, the date upon which the tax rates must be fixed by the county commission pursuant to Section 137.055, RSMo. *Id*. at 497. Although the Court does not identify the date upon which the right to pay a sum certain vests in the taxpayer, it is clear from the decision that such a time occurs, and is fixed as a matter of law, months before the end of the calendar year for which the assessment is made. In the case at bar, Dominion sought to reclassify its property and to have the resulting assessed value for tax year 2000 determined upon the cumulative sales data for the subject property through December 31, 2000. Because the time for assessment and levy was complete for the tax year well in advance of the final months' sales figures being available for consideration in the levy process, Dominion's evidence cannot be used to support an allocation for the property for the 2000 tax year.

IV. The burden of proof and deference to the State Tax Commission arguments are without merit, distort the procedural posture of this case and are simply a

distraction from the real issue of statutory construction on which this case turns.

Dominion's assertion that the Assessor failed to carry his burden in this matter is wholly without merit in that sustaining its valid assessment was not the taxing authority's burden to carry. When the taxpayer appeals from an assessment, the taxpayer bears the burden of proving the vital elements of its case. *Cupples Hesse Corp. v. State Tax Commission*, 329 S.W.2d 696, 702 (Mo. 1959); *Westwood Partnership v. Gogarty*, 103 S.W.3d 152, 161 (Mo. App. 2003). Dominion has failed to prove any set of facts, based on substantial and competent evidence in the whole record, that would entitle it to prevail on the classification issue as a matter of law. Since this case is not a valuation case, Section 137.115.1 is irrelevant and adds nothing to the analysis. Since Dominion's position was that it was entitled to a different assessment based on allocation to two classes of property, Dominion was required to present substantial and persuasive evidence that its proposed change in the assessment is indicative of the appropriate assessment of the property on tax day, January 1, 2000. *Daly v. P.D. George Co.*, 77 S.W.3d 645, 651 (Mo. App. 2002). Since Dominion's evidence was all from the year 2000 and therefore incompetent for showing the appropriate assessment as of January 1, 2000, it is Dominion that failed to carry its evidentiary burden in this matter. Moreover, considering the record before the State Tax Commission, which is now before this Court, Dominion has failed to prove by substantial and competent evidence that it is entitled to a partial residential classification as a matter of law.

For the foregoing reasons and for the reasons set forth fully in Appellant's Substitute Opening Brief, this Court must correct the misinterpretation and misapplication of the law by the State Tax Commission by reversing its Decision and Order.

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 4,880 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 Reply Brief were served this 15th day of June, 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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