IN THE SUPREME COURT OF MISSOURI

No. SC 85905

EUGENE ZIMMERMAN, ST. CHARLES COUNTY ASSESSOR,

Appellant,

v.

DOMINION HOSPITALITY – ST. CHARLES, LLC,

Respondent.

Appeal from the Circuit Court of St. Charles County
Honorable Lucy D. Rauch
Circuit Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Appellant has omitted some facts relevant to this appeal, has argued, and has made errors in his Statement of Facts. To make the record plain, Respondent provides the following statement of facts.

This is an appeal from judicial review of a contested case in the State Tax Commission (the STC). Respondent owns and operates improved real property at 1800 Zumbehl Road in St. Charles County. Appellant classified the subject property for 2000 *ad valorem* real estate tax purposes entirely as commercial property under § 137.016.1.[1] Respondent seeks to have the subject property classified partly as residential property and partly as commercial property. Respondent has not contested Appellant's determination of the true value (*i.e.*, market value) of the subject property. The sole issue is the proper classification of the subject property.

Respondent appealed to the Board of Equalization, which affirmed Appellant's classification of the subject property. (Legal File [L.F.] at 2.) Respondent then appealed to the STC. (L.F. at 1.) In the STC, Respondent moved for summary judgment, which was denied. (L.F. at 7-15.) The hearing officer issued a scheduling order for the parties to file their exhibits and direct testimony in written form. (L.F. at 15-16.) After Respondent filed and served its exhibits and testimony, Appellant moved for summary judgment. The

[1]Except as otherwise indicated, all statutory references are to the Revised Statutes of Missouri as now in effect.

hearing officer asked Appellant to specify the evidence he wished to offer, and Appellant's motion for summary judgment was subsequently denied. (L.F. at 20-25.)

An evidentiary hearing was held on July 2, 2002; Respondent's exhibits and testimony were admitted into the record. (L.F. at 80, 422-23; Appendix at A4-A5.) Appellant chose not to offer any evidence. (L.F. at 80.) The STC entered its decision, reversing the decision of the Board of Equalization. The STC held that under § 137.016.4 the subject property should be classified 60 percent as residential property and 40 percent as commercial property. (L.F. at 420-31; Appendix at A2-A13.) Appellant sought judicial review of the STC's decision in the St. Charles County Circuit Court, which affirmed the STC. (L.F. at 439-40; Appendix at A14-A15.) This appeal follows.

The subject property is located at 1800 Zumbehl Road, St. Charles, Missouri and is improved by two three-story brick veneer and vinyl sided structures containing a total of 95 dwelling units. The structures are used for residential living by human occupants. (L.F. at 1, 391-92, 394-99, 406, 412-13.)

Respondent uses the subject land and buildings as a TownePlace Suites facility. In appearance, the facility resembles an apartment complex. There are three kinds of units– studio, one-bedroom, and two-bedroom units. Each unit has a full kitchen. There are laundry facilities for the residents' use. Respondent furnishes housekeeping to each unit three times per week. Each unit has its individual telephone line, with voice mail. There is no gift shop or restaurant. The facility is marketed toward persons needing temporary residences for stays of 30 consecutive days or more; residents are accepted for shorter

stays. (L.F. at 54-55, 391-92, 394-99, 406-07, 412-13, 415-16; Appendix at A21-A22, A24-A29.)

Upon arrival, residents sign registration cards. (L.F. at 230-378, 414-15, 418.) There are a few registration cards that are unsigned by residents; the STC found that the number of unsigned registration cards is not material. (L.F. at 424; Appendix at A6.) By signing a registration card, each resident agrees to stay for the time shown on the registration card. (L.F. at 230-378, 393, 416, 418, 424; Appendix at A6.) Residents agreeing to stay for 30 consecutive days or more receive a favorable rate. (L.F. at 393; Appendix at A23.) The STC found that, by accepting the favorable rate for a stay of 30 consecutive days or more without signing a registration card, a resident agrees to stay for 30 days or more. (L.F. at 424; Appendix at A6.)

Respondent's practice is to charge each resident state sales tax from the first day of occupancy. Beginning with the thirty-first consecutive day of his or her stay, each resident who has stayed for 30 consecutive days or more is not charged state sales tax for the remainder of his or her stay, and the state sales tax charged to his or her account is not paid over to the state. (L.F. at 43-44, 66, 414.) In addition, each such resident should be credited for state sales tax previously charged. Because of an apparent miscommunication within management, residents were not being credited until shortly before the STC hearing. (Permanent residents had received the proper credits at the affiliated facility in St. Louis County. (L.F. at 47-48.)) As of the time of the STC hearing, Respondent was issuing the proper credits to the residents affected. (L.F. at 66.)

Respondent presented three computations of the percentage of use of the property by residents for long-term stays–that is, stays of 30 or more consecutive days. One computation, based on data on residents who arrived during 2000, showed that 60.6 percent of the use of the property was for long-term stays. The second computation, based on data on residents who departed during 2000, showed that 56.6 percent of the use of the property was for long-term stays. Because the facility had opened for business in February 1999, Respondent's witness placed greater weight on the arrival computation than on the departure computation. The third computation was based on internal accounting reports, called FLASH reports. Those reports reflected all residents present during the year, without regard to when they arrived or departed, and they showed that 63.4 percent of the use of the property during 2000 was for long-term stays. All three computations compared the number of days of all long-term stays to the number of days of all stays. (L.F. at 221-29, 379-90, 407-08, 413-14.)

The STC found that: the subject property is not used primarily for transient housing; the property is used for more than one purpose and such uses result in different classifications–residential and commercial; and the percentage of use of the property by residents for long-term stays for the year at issue is 60 percent. (L.F. at 425; Appendix at A7.)

The STC also found that Respondent rebutted any presumption that the Board of Equalization properly classified the subject property and determined that the classification for the property for tax year 2000 is 60 percent residential and 40 percent commercial. (L.F. at 425; Appendix at A7.)

POINTS RELIED ON

POINT I

(RESPONDS TO APPELLANT'S POINT I)

THE STATE TAX COMMISSION DID NOT ERR IN HOLDING THAT THE SUBJECT PROPERTY WAS PROPERLY CLASSIFIED PARTLY AS RESIDENTIAL PROPERTY AND PARTLY AS COMMERCIAL PROPERTY, BECAUSE THE PROPERTY IS NOT USED PRIMARILY FOR TRANSIENT HOUSING, IN THAT THE PREDOMINANT USE OF THE PROPERTY IS BY PERMANENT RESIDENTS.

Ulman v. Evans, 247 S.W.2d 693 (Mo. 1952)

Missouri Dept. of Transp. ex rel. PR Developers v. Safeco Ins. Co. of America, 97 S.W.3d 21 (Mo. App. 2002)

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

Boyce, Real Estate Appraisal Terminology (Ballinger Publishing Co., Cambridge, Massachusetts, 1984)

POINT II

(RESPONDS TO APPELLANT'S POINT II)

THE STATE TAX COMMISSION DID NOT ERR IN CLASSIFYING THE SUBJECT PROPERTY AS MIXED USE PROPERTY PURSUANT TO §137.016.4, BECAUSE THE PROPERTY IS USED FOR MORE THAN ONE PURPOSE AND THOSE USES RESULT IN DIFFERENT CLASSIFICATIONS, IN THAT SUBSTANTIAL EVIDENCE SUPPORTS THE STATE TAX COMMISSION'S

FINDINGS OF FACT AND THE STATE TAX COMMISSION CORRECTLY APPLIED THE LAW.

Hovis v. Daves, 14 S.W.3d 593 (Mo. banc 2000)

Alpha One Properties, Inc. v. State Tax Com'n, 887 S.W.2d 390 (Mo. banc 1994)

Wilkinson v. Brune, 682 S.W.2d 107 (Mo. App. 1984)

Webster's Third New International Dictionary of the English Language (1986)

POINT III

(RESPONDS TO APPELLANT'S POINT III)

THE STATE TAX COMMISSION DID NOT ERR IN HOLDING THAT THE SUBJECT PROPERTY SHOULD BE CLASSIFIED 60 PERCENT AS RESIDENTIAL PROPERTY AND 40 PERCENT AS COMMERCIAL PROPERTY, BECAUSE THAT HOLDING IS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE ON THE RECORD, IN THAT THE EVIDENCE ACCURATELY MEASURES THE RESIDENTIAL AND COMMERCIAL USES OF THE SUBJECT PROPERTY.

Ulman v. Evans, 247 S.W.2d 693 (Mo. 1952)

Drury Displays, Inc. v. City of Olivette, 976 S.W.2d 634 (Mo. App. 1998)

POINT IV

THE STATE TAX COMMISSION DID NOT ERR IN HOLDING THAT THE SUBJECT PROPERTY SHOULD BE CLASSIFIED 60 PERCENT AS RESIDENTIAL PROPERTY AND 40 PERCENT AS COMMERCIAL PROPERTY, BECAUSE APPELLANT DID NOT CARRY HIS BURDEN OF PROOF BEFORE THE STATE TAX COMMISSION, IN THAT APPELLANT INTRODUCED NO EVIDENCE AND

THE EVIDENCE IN THE RECORD ACCURATELY MEASURES THE RESIDENTIAL AND COMMERCIAL USES OF THE SUBJECT PROPERTY.

Rothschild v. State Tax Com'n, 762 S.W.2d 35 (Mo. banc 1989)

Pessin v. State Tax Com'n, 875 S.W.2d 143 (Mo. App. 1994)

Section 137.115, R.S. Mo. 2000

ARGUMENT

Introduction

Section 137.016, reproduced in the Appendix at A16-A18, defines the three subclassifications of real estate for *ad valorem* property tax purposes–residential, agricultural, and commercial. Residential property is "all real property improved by a structure which is used or intended to be used for residential living by human occupants,"[2] except that "residential property shall not include other similar facilities used primarily for transient housing." § 137.016.1(1). All real property not classified as residential or agricultural is classified as commercial. § 137.016.1(3). Residential property is assessed at 19 percent of its true value, and commercial property is assessed at 32 percent. § 137.115.5. In addition, commercial property is subject to the Merchants' and Manufacturers' Replacement Tax under § 139.600.

Taxing jurisdictions set their tax rates to produce the budgeted amount of revenue, §§ 67.110, 137.055.1, 137.073.2, and they may recoup any revenues lost because of reductions in assessed value due to STC and court decisions. § 137.073.3(2). Therefore, contrary to Appellant's implication that the entities relying on property tax revenues will suffer losses if the subject property is classified partly as residential property (Appellant's Substitute Brief at 15), any effect on those entities will be negligible.

[2]This omits the provisions of § 137.016.1(1) relating to airports, golf courses, and manufactured home parks.

STC decisions in contested cases are reviewed under Missouri's administrative procedure act, §§ 536.100 to 536.140, except that venue is in the county where the subject property is located. §§ 138.432, 138.470.4. The evidence must be viewed in the light most favorable to the STC's decision, *Hanford v. City of Arnold*, 49 S.W.3d 707, 710 (Mo. App. 2001), and the decision must be affirmed if it is supported by substantial evidence. *Ulman v. Evans*, 247 S.W.2d 693, 694, 698 (Mo. 1952), *Equitable Life Assurance Society v. State Tax Com'n*, 852 S.W.2d 376, 383-84 (Mo. App. 1993). Substantial evidence is evidence which, if true, has probative force on the issues. *Drury Displays, Inc. v. City of Olivette*, 976 S.W.2d 634, 635 (Mo. App. 1998). The STC's decision is presumed to be valid, *State ex rel. Sure-Way Transportation, Inc. v. Division of Transportation*, 836 S.W.2d 23, 25 (Mo. App. 1992), and courts may not disturb the decision unless it is clearly contrary to the overwhelming weight of the evidence. *Greene Co. Concerned Citizens v. Bd. of Zoning Adjustment of Greene Co.*, 873 S.W.2d 246, 258 (Mo. App. 1994).

As to questions of law, any ambiguities must be resolved against Appellant and in favor of Respondent, since taxing statutes are construed in favor of the taxpayer and against the taxing authority. *Morton v. Brenner*, 842 S.W.2d 538, 542 (Mo. banc 1992); *see also*, § 136.300. While courts review issues of law independently, *Community Bancshares v. Secretary of State*, 43 S.W.3d 821, 823 (Mo. banc 2001), they also show some deference to statutory interpretation by an agency charged with responsibility to administer a law. *Linton v. Missouri Veterinary Medical Bd.*, 988 S.W.2d 513, 517 (Mo. banc 1999), *Rathjen v. Reorganized School District R-II*, 284 S.W.2d 516, 526 (Mo. banc

1955). Because of the STC's preeminence in the administration of the property tax system, Mo. Const. Art. X, § 14, §§ 138.190 through 138.480, its interpretations of the property tax laws–including § 137.016–are entitled to that deference. Therefore, the STC's interpretations of the property tax laws, to the extent embodied in the decision under consideration here, are entitled to some deference.

POINT I

(RESPONDS TO APPELLANT'S POINT I)

THE STATE TAX COMMISSION DID NOT ERR IN HOLDING THAT THE SUBJECT PROPERTY WAS PROPERLY CLASSIFIED PARTLY AS RESIDENTIAL PROPERTY AND PARTLY AS COMMERCIAL PROPERTY, BECAUSE THE PROPERTY IS NOT USED PRIMARILY FOR TRANSIENT HOUSING, IN THAT THE PREDOMINANT USE OF THE PROPERTY IS BY PERMANENT RESIDENTS. *Ulman v. Evans*, 247 S.W.2d 693 (Mo. 1952), *Missouri Dept. of Transp. ex rel. PR Developers v. Safeco Ins. Co. of America*, 97 S.W.3d 21 (Mo. App. 2002), *Magruder Quarry & Co., L.L.C. v. Briscoe*, 83 S.W.3d 647 (Mo. App. 2002), Boyce, Real Estate Appraisal Terminology (Ballinger Publishing Co., Cambridge, Massachusetts, 1984).

The subject property is improved by a structure which is used for residential living by human inhabitants. (L.F. at 391-92, 394-99, 406, 412-13.) Appellant concedes as much. (Appellant's Substitute Brief at 16.) Therefore, the property must be classified as residential property, unless the exclusion for transient housing applies. § 137.016.1(1). Appellant acknowledges that the applicability of the transient housing exclusion is "a fact intensive inquiry." (Appellant's Substitute Brief at 19.) However, Appellant (who

introduced no evidence (L.F. at 80)) fails to acknowledge that substantial evidence supports the STC's fact finding that "[t]he subject property is not used primarily for transient housing." (L.F. at 425; Appendix at A7.)

The transient housing exclusion turns on whether the receipts are subject to state sales tax pursuant to § 144.020.1(6). In its administration of § 144.020.1(6), the Missouri Department of Revenue has promulgated a regulation, 12 CSR 10-110.220 (reproduced in the Appendix at A19-A20), to determine whether the operator of a residential facility must charge sales tax. Under the regulation, an individual who contracts in advance for a stay of 30 consecutive days or more and actually remains for 30 consecutive days or more is a "permanent resident," who is not subject to state sales tax on his or her charges.

In the STC proceedings, Respondent produced evidence showing that, by three alternative measurements, approximately 60 percent of the use of the subject property during 2000 was by permanent residents.[3] Specifically, the evidence showed that: measured by residents who arrived during the year, 60.6 percent of the use of the property was by permanent residents; measured by residents who departed during the

[3]Contrary to Appellant's complaint in the Court of Appeals (Appellant's Reply Brief at 16-18), this Court recognizes that the State Tax Commission has the benefit of hindsight in reviewing property tax assessments, so that evidence of operations in 2000 (the subject property's first full year of operation) is relevant to the 2000 assessment. *St. Louis County v. State Tax Com'n*, 515 S.W.2d 446, 453 (Mo. 1974). The Court of Appeals recognized as much. (Slip Op. at 13.)

year, 56.6 percent of the use of the property was by permanent residents; and measured by all residents during the year, as reflected in the FLASH reports, 63.4 percent of the use of the property was by permanent residents. (L.F. at 87-229, 379-90, 407-08, 413-14.) Appellant chose not to produce any evidence. (L.F. at 80.) The STC found that the property was used 60 percent as residential property and entered a decision in accordance with § 137.016.4 and that finding. (L.F. at 425, 427-30; Appendix at A7, A9-12.) That finding is supported by substantial evidence on the record. Accordingly, this Court should affirm the STC's decision. *Ulman v. Evans*, 247 S.W.2d at 694, 698, *Equitable Life Assurance Society v. State Tax Com'n*, 852 S.W.2d at 383-84.

Appellant makes a two-pronged attack on the STC's decision. Appellant says that the STC should have found that: (a) the subject property is used primarily for transient housing because a majority of the residents are transients (Appellant's Substitute Brief at 16-21), and (b) the permanent residents did not make contracts with Respondent.[4] (Appellant's Substitute Brief at 21-28.) Appellant must fail in his first attack because

[4]In the process, Appellant misstates the testimony of Christopher Stabile and misinterprets the testimony of Sharon Hill. When asked about a resident's contractual obligations, Mr. Stabile (who is an accountant (L.F. at 411)) gave an ambiguous answer: "No, there's not. Yes." (L.F. at 62.) Ms. Hill testified that residents who agree to stay for 30 days or more receive a favorable rate and that those who leave early have the rate increased. (L.F. at 418-19.) She also testified that a resident is not obligated to pay after the end of his or her occupancy. (L.F. at 45.)

simply counting residents is not a valid measure of use, and he must fail in his second attack because, as the STC found, there are contracts between the permanent residents and Respondent. Respondent will address Appellant's second assertion first.

A. Contracts with Residents.

Appellant correctly notes that the five elements of a contract are: competency of the parties to contract, subject matter, consideration, mutuality of agreement, and mutuality of obligation. *Baris v. Layton*, 43 S.W.3d 390, 396 (Mo. App. 2001). Appellant does not dispute that the first two elements are satisfied but asserts that there is no consideration, mutuality of agreement, or mutuality of obligation. (Appellant's Substitute Brief at 22.) Appellant's assertions do not withstand scrutiny.

Consideration sufficient to support a contract is a detriment to one party or a benefit to the other. *Missouri Dept. of Transp. ex rel. PR Developers v. Safeco Ins. Co. of America*, 97 S.W.3d 21, 32-33 (Mo. App. 2002). The amount of consideration is not important; slight consideration is sufficient. *Id*. at 33. Mutuality of agreement means "mutuality of assent by the parties to the terms of the contract." *Baris v. Layton*, 43 S.W.3d at 397. In other words, there is mutuality of agreement if both parties have agreed to the same terms. Mutuality of obligation means simply that each party has a legal duty to the other. *Garrett v. American Family Mutual Ins. Co.*, 520 S.W.2d 102, 111 (Mo. App. 1975). All three factors are present here.

When a resident registers at the subject property, he or she signs a registration card[5] that has the following language by the signature:

> RATES ARE DETERMINED BY LENGTH OF STAY. SHORTENING YOUR STAY MAY CONSTITUTE AN EARLY CHECK OUT ADJUSTMENT TO YOUR ACCOUNT, PAYABLE AT DEPARTURE. EXTENSIONS ARE ACCEPTED ON AN AVAILABLE BASIS.
>
> The management is not responsible for any valuables not secured in safety deposit boxes provided at the front office. I agree that my liability for charges is not waived and agree to be held personally liable in the event that the indicated person, company or association fails to pay for any part or the full amount of such charges.

(L.F. at 230-378; emphasis in original.) The registration card shows, among other things, the resident's arrival and departure dates, the type of room or unit, the room or unit number, and the rate.

Clearly, Respondent is agreeing to make the unit available to the resident for the indicated period at the indicated rate. That is a detriment to Respondent and a benefit to the resident. Just as clearly, the resident is agreeing to pay for the unit for the indicated period at the indicated rate. That is a detriment to the resident and a benefit to Respondent. Therefore, without articulating other consideration that may be present, there is ample consideration to support the contract.

[5]As noted *supra* at 10, a non-material number of registration cards are not signed.

Nothing on the face of the registration card or in the record indicates that Respondent and the resident are agreeing to different things. To the contrary, the contract is relatively simple and straightforward, with no indication that the parties are not agreeing to the same thing. It is apparent from the record that residents routinely arrive at the property, register, reside there for their time, pay their charges, and go on their way. (*E.g.*, L.F. at 56-73, 413-15.) That would not be occurring if Respondent and the residents believed they were agreeing to different things. The only plausible conclusion from the record is that there is mutuality of agreement.

Clearly, each party has a legal duty to the other. Respondent has the duty to keep the unit available for the period of time indicated on the registration card, and the resident has the duty to pay at the indicated rate. Therefore, there is mutuality of obligation.

Thus, all five required elements of a contract are present, and there are contracts between Respondent and the residents. When a resident signs a registration card showing an arrival date, a departure date, and a rate (which rate depends on the length of stay), the resident contracts to stay for the time specified. *E.g.*, *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 21 (Mo. banc 1995) (contracts to be interpreted in light of all facts and circumstances). No particular form of contract is required. *Cornwell v. Zieber*, 599 S.W.2d 22, 24 (Mo. App. 1980). A signature is not necessarily required. *Stege v. Hoffman*, 822 S.W.2d 517, 518-19 (Mo. App.1992). In fact, an implied contract would be sufficient. *E.g.*, *Marro v. Daniels*, 914 S.W.2d 16 (Mo. App. 1996) (contract between landlord and tenant implied in fact). Therefore, there are contracts with the permanent residents within the meaning of 12 CSR 10-110.220.

Appellant makes several subsidiary arguments in an attempt to bolster his assertion that there are no contracts. He argues that the registration card represents an illusory promise on the part of the resident. (Appellant's Substitute Brief at 25-26.) Appellant cites *Magruder Quarry & Co., L.L.C. v. Briscoe*, 83 S.W.3d 647 (Mo. App. 2002) but fails to recognize the lesson of that case. In *Magruder Quarry*, the lessor argued that a lease for mining rock lacked mutuality of obligation and therefore was void. The lessor claimed that the lessee's promises were illusory, because the lease did not explicitly require the lessee to mine any rock. Therefore, according to the lessor, the lessee could choose not to mine any rock at all. The Court of Appeals rejected the lessor's argument and held that the contract was enforceable. *Id*. at 652. In so holding, the court stated that (a) the law tends to uphold a contract by finding the promise is not illusory where it appears that the parties intended a contract and, (b) covenants of good faith and fair dealing are implied in all contracts. *Id*. at 650-51. In this case, a resident signs a registration card that specifies arrival and departure dates and a rate dependant on the length of stay, and the resident explicitly agrees to pay the charges. That makes a contract even without regard to the *Magruder Quarry* holding. *Supra* at 21-22. Application of *Magruder Quarry* secures this case for Respondent. Good faith and fair dealing obligate a resident to stay for the time specified on his or her registration card, just as the lessee in *Magruder Quarry* was obligated to use reasonable efforts to mine and sell rock. The residents' promises are not illusory.

Appellant also argues that the operator of a hotel has no breach of contract remedy against a defaulting resident because of the innkeeper's lien statute, § 419.070

(Appellant's Substitute Brief at 22), and therefore there are no contracts. Appellant is trying to make the tail wag the dog. In the first place, the statute does not apply to permanent residents. *Jackson v. Engert*, 453 S.W.2d 615, 618 (Mo. App. 1970) (lien applies only to guests and boarders, not to lodgers[6]). In the second place, it is beyond dispute that the lien exists to enforce an existing indebtedness. *Id*. at 617. Nothing in the statute suggests that the lien is an innkeeper's only means to enforce that indebtedness. If the lien did not exist, an innkeeper would have a breach of contract remedy against a defaulting guest or boarder. Even if there were an exclusive remedy, it would enforce the contract, not invalidate it.

Appellant goes on to argue that there are no contracts because, if a resident has agreed to stay for 30 or more days and leaves early, he or she does not have to pay for the balance of the agreed stay, as (according to Appellant) a tenant under a lease would. (Appellant's Substitute Brief at 24.) Once again, by working backwards from a remedy, Appellant is trying to make the tail wag the dog. Appellant's argument fails because the contracts between Respondent and the residents are not leases and because Appellant's measure of damages is not appropriate in any event. Appellant is arguing for a penalty against a hypothetical defaulting resident, but damages for breach of contract only place the non-breaching party in the same position as if the contract had been performed. *Boten*

[6]"Guests" are transients, "boarders" are permanent residents who receive meals, and "lodgers" are permanent residents who do not receive meals. *Id*. By those definitions, the permanent residents here are lodgers, because Respondent does not supply meals.

v. Brecklein, 452 S.W.2d 86, 93 (Mo. 1970). The contracting parties may (as here) agree on a measure of damages, but that measure may not extract a penalty. *E.g., Highland Inns Corp. v. Am. Landmark Corp.*, 650 S.W.2d 667, 674 (Mo. App. 1983); *see, Purcell Tire & Rubber Co., Inc. v. Executive Beechcraft, Inc.*, 59 S.W.3d 505, 510 (Mo. banc 2001). A lost profits measure of damages (which an adjustment to a higher rate approximates) is appropriate. *Wisch & Vaughan Const. Co. v. Melrose Prop.*, 21 S.W.3d 36, 42 (Mo. App. 2000). In the event of a breach, Respondent would have the duty to mitigate damages (as with any contract) by offering the unit in question to others. *Harvey v. Timber Resources, Inc.*, 37 S.W.3d 814, 819 (Mo. App. 2001). In any event, Appellant did not offer any evidence, and nothing in the record indicates, that residents leave early to any material extent.

Appellant also argues that, because Respondent collects sales tax for the first 30 days of a permanent resident's stay (which Appellant says is unnecessary), there is no contract for the resident to stay for at least 30 days. (Appellant's Substitute Brief at 26.) In so arguing, Appellant ignores 12 CSR 10-110.220(2), which specifies two conditions for permanent resident status–(a) contracting to stay for at least 30 consecutive days, and (b) actually staying for at least 30 consecutive days. By provisionally charging sales tax for the first 30 days of a permanent resident's stay, Respondent is simply following the regulation and protecting itself against the possibility that a resident, who has contracted to stay for 30 days or more leaves (in violation of his contract) before he is entitled not to be charged sales tax. Appellant is grasping at straws to suggest that this shows the absence of a contract between Respondent and a permanent resident.

Because all required elements of a contract are present, residents who register for a stay of 30 consecutive days or more are permanent residents within the meaning of 12 CSR 10-110.220. Under § 137.016.4, Respondent is entitled to have the subject property classified as residential property in proportion to the property's use by those permanent residents.

B. Calculation of Use.

Appellant takes issue with the STC's calculation of the use of the property by permanent residents. (Appellant's Substitute Brief at 16-21.) In his argument, Appellant ignores the principle that courts will defer to findings on technical matters within the expertise of an administrative agency. *Drury Displays, Inc. v. City of Olivette*, 976 S.W.2d at 636. In particular, courts have shown great deference to the STC's expertise in methods of assessment, to the exclusion of circuit courts substituting their own assessments for the STC's assessments. *Savage v. State Tax Com'n*, 722 S.W.2d 72, 74--75 (Mo. banc 1986), *Xerox Corp. v. State Tax Com'n*, 529 S.W.2d 413, 415-17 (Mo. banc 1975), *John Calvin Manor, Inc. v. Aylward*, 517 S.W.2d 59, 63 (Mo. 1974). The STC's calculation of the residential and commercial uses of the subject property does not rely on statutory interpretation; rather, it is a comparison of the two uses in accordance with § 137.016.4 and within the STC's discretion. But, even without deference to the STC's discretion, its decision should be affirmed.

Section 137.016.4 provides that property used for purposes that result in different classifications shall be classified according to the percentage of each use. Appellant calculates the use of the subject property by comparing the number of permanent

residents with the number of transients. Appellant concludes that, because there were more transients than permanent residents, and because the average stay of all residents was less than 30 days, that the subject property was used primarily for transient housing. (Appellant's Substitute Brief at 19-20.) In that argument, Appellant seeks to compare not two uses but the numbers of two kinds of users. As a result, Appellant's comparison is fallacious.

Appellant does not account for each resident's duration of use. In the appraisal of real estate, occupancy is measured in relation to duration. An occupancy rate "is derived by multiplying the number of units *by the number of days rented* and dividing by the number of rentable units multiplied by the number of days of the year." Boyce, Real Estate Appraisal Terminology (Ballinger Publishing Co., Cambridge, Massachusetts, 1984) at 176 (emphasis added). Similarly, the appraisal of income-producing property relies on measurement of annual income and expenses, which necessarily encompasses duration of use because that is the basis for tenants' payments. Property Appraisal and Assessment Administration (The International Association of Assessing Officers, Chicago, Illinois, 1990) at 234-35.

Any comparison of uses must also take the duration of each use into account. To illustrate the importance of taking duration into account: if a truck is driven 1,000 miles, the number of drivers makes no difference; whatever the number, the truck has been used for 1,000 miles. As far as use of the truck is concerned, one driver for 1,000 miles is the same as 10 drivers for 100 miles each. Similarly, if a person occupies a unit for 30 days, he or she has used the facility as much as three people, each of whom occupies a unit for

10 days. In order to measure use accurately, as the STC did, the duration of each resident's use must be taken into account. Appellant fails to do that.

The STC properly measured use according to occupancy rates, which take the duration of each resident's use into account. This approach is also followed in Arizona, Colorado,[7] and Kansas. (L.F. at 409.) In addition, South Dakota allocates between uses that are exempt from property tax and those that are subject to property tax in the same way that the STC allocated the uses here; the duration of each use is compared and days of non-use are not allocated to either use. *Lutherans Outdoors in South Dakota, Inc. v. South Dakota State Bd. of Equalization*, 475 N.W.2d 140, 144, 145-46 (S.D. 1991). Practices in other states with similar taxing schemes are of assistance in applying Missouri law. *E.g., Thatcher v. Trans World Airlines*, 69 S.W.3d 533, 546 (Mo. App. 2002), *Plaza 3 Restaurant v. Labor & Industrial Relations Com'n*, 703 S.W.2d 510, 513 (Mo. App. 1985).

The STC took the duration of each resident's use into account and did not allocate unused units to either side of the issue. That method produced the most accurate comparison of the two uses. In fact, that method follows from the plain language of the transient housing definition: "all rooms available for rent or lease for which the receipts

[7] *E.R. Southtech, Ltd. v. Arapahoe County Board of Equalization*, 972 P.2d 1057, 1060 (Col. App. 1998) (stays of less than 30 days were commercial use and stays of 30 days or more were residential use; based on those uses, property was classified 50 percent commercial and 50 percent residential).

from the rent or lease of such rooms *are* subject to state sales tax pursuant to section 144.020.1(6), RSMo." § 137.016.1(1) (emphasis added). Until a resident contracts for a unit, and until a permanent resident occupies his or her unit for at least 30 consecutive days, no one can determine finally whether the charge for that unit is subject to state sales tax. One can only say that the charge might or might not be subject to state sales tax. Because of that fact, unused units should not be allocated to either use. The STC correctly compared the residential and commercial uses of the property.

Appellant also seeks to apply an erroneous legal standard by ignoring § 137.016.4. In the construction and application of statutes, courts have the duty to reconcile any apparent inconsistencies and apply all parts of the statute. *County of Jefferson v. Quiktrip Corp.*, 912 S.W.2d 487, 490 (Mo. banc 1995).[8] The STC reconciled § 137.016.4 with the transient housing exclusion in § 137.016.1(1) by finding that the exclusion should apply only if use by permanent residents is not a substantial percentage of use. (L.F. at 428; Appendix at A10.) Under the evidence, the majority of the use of the subject property is by permanent residents. Therefore, the transient housing exclusion does not apply.

[8]In accordance with Article III, § 28 of the Missouri Constitution, the entirety of § 137.016 was enacted at one time. 1995 Mo. Laws 460, 1997 Mo. Laws 506. Therefore, contrary to the dissent's suggestion in the Court of Appeals (Mooney, J., dissenting, Slip. Op. at 2), § 137.016.1(1) can not have repealed or amended § 137.016.4 by implication. *State ex rel. McNary v. Stussie*, 518 S.W.2d 630, 635 (Mo. banc 1974).

In the course of his argument on the transient housing exclusion, Appellant makes a remarkable misstatement: "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." (Appellant's Substitute Brief at 20-21.) Appellant ignores both the plain language rule of statutory construction and the plain language of the statute. In fact, the transient housing exception plainly refers to § 144.020.1(6), which in turn is (and has for many years been) interpreted by 12 CSR 10-110.220 and its predecessor regulation, 12 CSR 10-3.216, [9] rescinded 26 Mo. Reg. 450. The clear meaning of the statute is that use by permanent residents is residential use and use by transients is commercial use.

In summary, there are contracts with the residents, so that residents registering for stays of 30 consecutive days or more are permanent residents as defined in 12 CSR 10-110.220. The STC properly measured the uses of the subject property. The STC's fact findings on both points are supported by substantial evidence on the record, and the STC correctly applied the law. This Court should affirm the decision of the STC.

POINT II

(RESPONDS TO APPELLANT'S POINT II)

THE STATE TAX COMMISSION DID NOT ERR IN CLASSIFYING THE SUBJECT PROPERTY AS MIXED USE PROPERTY PURSUANT TO §137.016.4,

[9]The note on Authority under 12 CSR 10-3.216 states that the regulation was based on previous S.T. Regulation 020-4, which was last filed December 31, 1975.

BECAUSE THE PROPERTY IS USED FOR MORE THAN ONE PURPOSE AND THOSE USES RESULT IN DIFFERENT CLASSIFICATIONS, IN THAT SUBSTANTIAL EVIDENCE SUPPORTS THE STATE TAX COMMISSION'S FINDINGS OF FACT AND THE STATE TAX COMMISSION CORRECTLY APPLIED THE LAW. *Hovis v. Daves*, 14 S.W.3d 593 (Mo. banc 2000), *Alpha One Properties, Inc. v. State Tax Com'n*, 887 S.W.2d 390 (Mo. banc 1994), *Wilkinson v. Brune*, 682 S.W.2d 107 (Mo. App. 1984), Webster's Third New International Dictionary of the English Language (1986).

In his second point, Appellant argues that § 137.016.4 can not apply to the subject property because there is no evidence that portions of the subject property are devoted exclusively to use by permanent residents and transients respectively. (Appellant's Substitute Brief at 31-33.) Appellant seeks to engraft onto § 137.016.4 a requirement not found in the statute–that mixed uses should apply only where portions of a property are used exclusively for one use or another. Rules of statutory construction do not allow courts to add conditions in the guise of interpretation or construction. *Wilkinson v. Brune*, 682 S.W.2d 107, 111 (Mo. App. 1984). This Court should reject Appellant's addition to the statute.

An allocation of classification is required "[w]here real property is used or held for use for more than one purpose and such uses result in different classifications." § 137.016.4. Without question, the subject property meets that standard. It is used both by permanent residents–a use resulting in residential classification–and by transients–a use

resulting in commercial classification. Therefore, the statute requires Appellant to ascertain the percentage of true value devoted to each use.

Appellant asserts that the word "devoted" includes an element of exclusivity, which in turn requires that each use be physically exclusive from the other. Appellant's assertion is misplaced in two ways. First, Appellant argues for a construction that is internally inconsistent. Appellant effectively argues that the assessor's duty to allocate "… to each classification the percentage of the true value in money of the property devoted to each use" cancels the immediately preceding requirement, "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 … ." Appellant's result would be absurd. In statutory construction, courts avoid absurd results and seek to reconcile parts of a statute that seem to be in conflict. *Hovis v. Daves*, 14 S.W.3d 593, 596 (Mo. banc 2000), *Headrick v. Jackes-Evans Mfg. Co.*, 108 S.W.3d 114, 117 (Mo. App. 2003). Also, any ambiguities must be resolved in favor of the taxpayer Respondent and against Appellant. *Morton v. Brenner*, 842 S.W.2d at 542. For those reasons, this Court should reject Appellant's argument.

Appellant's argument is also misplaced in that the word "devote" does not include the element of exclusivity. The authoritative Webster's Third New International Dictionary of the English Language (1986) has several definitions of the word; the definition relating to the use of property is simply, "[1]b: to provide (something) for use." *Id*. at 620. There is nothing in that definition precluding the idea that property may be devoted to more than one use.

The legislature evidently agrees that property may be devoted to more than one use, since the statute under consideration (in § 137.016.1(2)) and § 137.021 (dealing with the assessor's valuation of agricultural property) use the term "devoted primarily."[10] That term clearly contemplates that the same property is devoted to more than one use–one use being primary and the other(s) secondary. Furthermore, both the constitution[11] and numerous statutes[12] use the term "devoted exclusively" or "devoted solely" or some variant. If "devote" included the element of exclusivity, those modifiers would not be necessary. There is a presumption against superfluous words in statutes. *Norwin G. Heimos Greenhouse, Inc. v. Director of Revenue*, 724 S.W.2d 505, 508 (Mo. banc 1987), *Welborn v. Southern Equipment Co*., 386 S.W.2d 432, 436 (Mo. App. 1965). Appellant is grasping at straws to suggest that the meaning of "devote" requires physically exclusive uses for the application of § 137.016.4.

Finally, the Appellant's notion of exclusivity simply does not work. Perhaps the classic example of the allocation of classification based on different uses is a building with a store or restaurant on the first floor and apartments on upper floors. In such a case, the land below the building is not used exclusively for either the residential use or the

[10]§§ 195.010, 197.020, 376.960, and 383.130 also include "devoted primarily."

[11]Mo. Const. Art. X, § 7 (authorizing property tax relief for forest croplands).

[12]§§ 71.525, 209.258, 254.020 (defining forest croplands for purposes of property tax relief), 307.250 (Article VII), 313.040, 361.170, 369.324, 370.107, 374.150, 386.370, 389.1005, 622.015, and 622.300.

commercial use, since the building for both uses rests on the land. Yet, the value of the property must include the value of the land and that value must, under § 137.016.4, be allocated to the residential and commercial classifications.

Appellant also makes several arguments implying that commercial purpose or activity should result in commercial classification. (Appellant's Substitute Brief at 29-31, 33-35.) In making those arguments, Appellant uses the term "commercial" in its ordinary sense and ignores the fact that it is a defined term. *See, Ste. Genevieve School Dist. R-II v. Bd. of Aldermen of the City of Ste. Genevieve*, 66 S.W.3d 6, 11-12 (Mo. banc 2002) (courts apply plain and ordinary meaning in absence of statutory definition). Under the definitions in § 137.016.1, numerous properties are classified differently from the plain and ordinary meanings of residential, agricultural and horticultural, and commercial. Vacant land in connection with an airport and land used as a golf course are classified as residential property, although no one lives there and they are used for commercial purposes. Apartment complexes, nursing homes, and manufactured home parks are classified as residential property, although they are used for commercial purposes. Farming is undoubtedly a commercial activity, especially as practiced by large corporate farms, but the real property used for farming is classified as agricultural and horticultural property, except that a homestead of up to five acres is classified as residential property. § 137.016.4. Except for the homestead, the same is true of greenhouse businesses. *Norwin G. Heimos Greenhouse, Inc. v. Director of Revenue*, 724 S.W.2d at 506, 509. And, land and improvements, exclusive of structures, on privately owned airports that qualify as reliever airports under the Nation Plan of Integrated Airports System are

classified as agricultural and horticultural property, although they are used for commercial purposes. Also, although forestry is a commercial activity, forests are classified either as agricultural and horticultural property or more favorably as forest croplands. § 254.090.

The courts repeatedly rejected the idea–that commercial purpose or activity should result in commercial classification–in the apartment classification cases under § 137.016.1(1), R.S. Mo. 1994 (repealed 1995). The most emphatic rejection was in *Alpha One Properties, Inc. v. State Tax Com'n,* 887 S.W.2d 390 (Mo. banc 1994). Section 137.016.1(1) defines residential property without regard to whether the property is used for a commercial activity. Appellant's arguments that commercial activity implies commercial classification is fallacious and nothing more than a distraction.[13]

In the course of his commercial activity arguments, Appellant cites *Brookside Estates v. State Tax Com'n,* 849 S.W.2d 29 (Mo. banc 1993). (Assessor's Substitute Brief at 34.) That case was decided under the previous classification statute, § 137.016.1(1), R.S. Mo. 1994 (repealed 1995), and is no longer good law. Under the current § 137.016.1(1), the property in *Brookside Estates* would be classified as residential property, since it is a manufactured home park. *Brookside Estates* does not advance Respondent's position in this case.

[13]Appellant's discussion of primary purpose and normal contemplation (Appellant's Substitute Brief at 36-37) is simply another articulation of the fallacy that commercial purpose or activity implies commercial classification.

Appellant argues that advertisements–to the effect that no lease or long-term lease is required–supports his conclusion that the property should be classified as commercial. (Appellant's Substitute Brief at 33, 36, 48.) There are two simple responses to that argument. First, the mention of a lease implies that the subject property has mixed residential and commercial uses. If the property were a simple hotel, as Appellant insists, there would be no need for advertising to assure potential residents that leases are not required. Moreover, only a contract is required for permanent resident status, not a lease. Leaving aside the issue of whether a lease is a contract, it is beyond dispute that many contracts are not leases. Because Respondent enters into contracts with permanent residents, the property should be classified partly as residential property.

Appellant argues that the allocation of classifications under § 137.016.4 should be limited to physical characteristics that are easy to ascertain. (Appellant's Substitute Brief at 32-33.) The statute at issue refutes that argument, since it provides for the determination of classification by sales tax status. § 137.016.1(1). That may create an administrative burden for Appellant, although requests to property owners (who would have an incentive to provide information) should yield sufficient information for him to perform his duty to classify real property of this nature. *See, Dist. of Columbia v. Willard Associates*, 655 A.2d 1237 (D.C. 1995) (commercial classification presumed from property owner's failure to submit information). In addition, the STC has the power to compel property owners to furnish information, § 138.370, and if the STC determines that assessors need assistance concerning the assessment of properties of this type, it can promulgate appropriate regulations or issue technical advice.

Appellant engages in an irrelevant discussion of § 137.016.5. (Appellant's Substitute Brief at 35-36.) That provision applies only when a property is unused, used as a club,[14] or can not be classified under § 137.016.1. The first two of those tests clearly do not apply, nor does the third. As noted above, the subject property is improved by a structure which is used for residential living by human inhabitants. Therefore, the property must be classified as residential property, unless the exclusion for transient housing applies. § 137.016.1(1). Section 137.016.5 does not apply.

In the course of discussing § 137.016.5, Appellant makes several statements of alleged fact about the subject property's zoning classification, the surrounding area, and various business activities. (Appellant's Substitute Brief at 35-36.) Appellant declined to offer any evidence before the STC, and the facts alleged in those statements are not in the record. Accordingly, this Court should disregard them. *Crestwood Commons v. 66 Drive-In, Inc.*, 812 S.W.2d 903, 909 (Mo. App. 1991), *State ex rel. Kairuz v. Romines*, 806 S.W.2d 451, 453 (Mo. App. 1991). Appellant omits to mention something that *is* in the record–the fact that a residential condominium complex is a neighbor to the subject property. (L.F. at 416.) That testimony is uncontroverted. Contrary to Appellant's argument, the subject property is in a location suitable for residential property.

[14]In *Zimmerman v. Missouri Bluffs Joint Golf Venture*, 50 S.W.3d 907 (Mo. App. 2001), the Court of Appeals properly applied § 137.016.5 only to the two private golf clubs that were parties in that case. *Id*. at 913-14 & n.2.

Appellant argues that areas of exclusive use are necessary to apply § 137.016.4. In making that argument, Appellant is attempting to add something that is not in the statute. Also, Appellant's construction of that provision would result in an absurdity, because the second part of the first sentence in § 137.016.4 would take away what the first part of the sentence requires. Overlaying all of these arguments is the fallacy that commercial activity implies commercial classification. The STC correctly applied § 137.016.4 to classify the subject property, and this Court should affirm the STC's decision.

POINT III

(RESPONDS TO APPELLANT'S POINT III)

THE STATE TAX COMMISSION DID NOT ERR IN HOLDING THAT THE SUBJECT PROPERTY SHOULD BE CLASSIFIED 60 PERCENT AS RESIDENTIAL PROPERTY AND 40 PERCENT AS COMMERCIAL PROPERTY, BECAUSE THAT HOLDING IS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE ON THE RECORD, IN THAT THE EVIDENCE ACCURATELY MEASURES THE RESIDENTIAL AND COMMERCIAL USES OF THE SUBJECT PROPERTY. *Ulman v. Evans*, 247 S.W.2d 693 (Mo. 1952), *Drury Displays, Inc. v. City of Olivette*, 976 S.W.2d 634 (Mo. App. 1998).

The STC's finding of that the subject property is used 60 percent by permanent residents (L.F. at 425; Appendix at A7.) is based on three separate sets of data in the record–arrivals during 2000 (L.F. at 89-153, 221-24, 408), departures during 2000 (L.F. at 154-220, 225-29, 408), and the internal reports known as FLASH reports (L.F. at 379-90, 414). Each of those sets of data, independently of the others, is substantial

evidence supporting the STC's decision. In a deeply flawed attempt to discredit one of the three sets of data–the FLASH reports (Appellant's Substitute Brief at 38-45)–Appellant overlooks some of the evidence and misinterprets the evidence as a whole.[15] As a result, Appellant's analysis is misleading, and his conclusion is erroneous.

Appellant compares the monthly arrivals and departures of permanent residents with the FLASH reports for each month. For example, Appellant states that, in January 2000, 16 permanent residents arrived and four departed. (Appellant's Substitute Brief at 40.) In fact, according to the arrival and departure data, 18 permanent residents arrived and four departed in January. (L.F. at 89-92, 154-58, 161, 164.) Furthermore, Appellant's analysis ignores the fact that there were 10 additional permanent residents[16] who lived at the subject property for the entire month because they arrived before January 1 and departed after January 31. Also, Appellant calculates monthly "actual room nights" by

[15] In the course of his argument, Appellant calls the FLASH reports projections. (Appellant's Substitute Brief at 38-39.) That is contrary to Mr. Stabile's uncontroverted testimony at the hearing, in response to questions of Appellant's counsel concerning units "actually occupied" and the percentage of units "occupied for 30-plus days" as reflected in the FLASH reports. (L.F. at 33-36.)

[16] Ander (L.F. at 163), Bradf (L.F. at 159), Bradl (L.F. at 160), Doney (L.F. at 158), Drive (L.F. at 162), Fiste (L.F. at 170), Howar (L.F. at 176), Jacks (L.F. at 176), Thomp (L.F. at 181), and Vittr (L.F. at 163). (The departures list displays abbreviated names.)

multiplying the sum of arrivals and departures times the number of days in the month, which does not account for when each resident arrived or departed. All of Appellant's other monthly calculations are similarly inaccurate. In addition, Appellant does not compare permanent residents' use with transients' use and thus is dealing with only one factor in the allocation of residential and commercial classifications. Appellant's calculations have no value, and Appellant is in error when he concludes that the FLASH reports materially overstate the use of the subject property by permanent residents.[17] Furthermore, in the Court of Appeals Appellant presented the same inaccurate information (Appellant's Brief at 37-44), and Respondent made this same response. (Respondent's Brief at 33-34.) Appellant has done nothing to correct the inaccuracies, despite ample opportunity to do so.

Appellant asserts that the FLASH reports are unreliable. (Appellant's Substitute Brief at 45.) Underlying that assertion is Appellant's assumption that, to a material extent, people who register as permanent residents leave before they have occupied their units for at least 30 days. There is no evidence supporting Appellant's assumption.

[17]Based on all three measurements of use, the STC found that use of the subject property by permanent residents was 60 percent. According to the FLASH reports that use was 63.4 percent. (L.F. at 413-14.) Respondent submits that the FLASH reports do not overstate permanent resident use, but even if they do, substantial evidence supports the STC's decision.

Appellant argues that the STC's decision results in a violation of the constitution's uniformity clause, Mo. Const. Art X, § 3. (Appellant's Substitute Brief at 46-47.) The STC simply applied § 137.016, which refers specifically to § 144.020.1(6), to classify the subject property. The legislature's distinction between the two classifications of property has a rational basis on its face. If Appellant wished to argue seriously that the statute is invalid as applied, Appellant should have developed that argument in the circuit court (*see*, L.F. at 432-35) and appealed initially not to the Court of Appeals (L.F. at 441-42) but to this Court, which has exclusive appellate jurisdiction of such issues. Mo. Const. Art. V, § 3. Appellant's constitutional argument is frivolous.

In his attack on the evidence, Appellant is asking this Court to substitute its judgment as to factual matters for the STC's judgment, contrary to such cases as *Drury Displays, Inc. v. City of Olivette*, 976 S.W.2d at 635. The issue in this Court is not whether one piece of evidence is wrong. Rather, it is whether there is substantial evidence in the record to support the STC's decision. *Ulman v. Evans*, 247 S.W.2d at 694, 698. Under that standard, reviewing courts ignore any evidence contrary to the decision. *Sprint Communications Co., L.P. v. Director of Revenue*, 64 S.W.3d 832, 834 (Mo. banc), *cert. denied*, 536 U.S. 960 (2002). Appellant is wrong in arguing that the FLASH reports materially overstate permanent residents' use of the subject property, but even if he were right, there is substantial evidence supporting the STC decision in the form of the arrival and departure records and registration cards.

Appellant's arguments about the evidence would be more appropriately addressed to the STC, not to a reviewing court. His month-by-month analysis does not account for

residents who lived at the property for the entire month in question and neither arrived nor departed during that month, and it contains other errors. The STC and the Circuit Court rejected Appellant's arguments about the evidence. This Court should do so as well.

POINT IV

THE STATE TAX COMMISSION DID NOT ERR IN HOLDING THAT THE SUBJECT PROPERTY SHOULD BE CLASSIFIED 60 PERCENT AS RESIDENTIAL PROPERTY AND 40 PERCENT AS COMMERCIAL PROPERTY, BECAUSE APPELLANT DID NOT CARRY HIS BURDEN OF PROOF BEFORE THE STATE TAX COMMISSION, IN THAT APPELLANT INTRODUCED NO EVIDENCE AND THE EVIDENCE IN THE RECORD ACCURATELY MEASURES THE RESIDENTIAL AND COMMERCIAL USES OF THE SUBJECT PROPERTY. *Rothschild v. State Tax Com'n*, 762 S.W.2d 35 (Mo. banc 1989), *Pessin v. State Tax Com'n*, 875 S.W.2d 143 (Mo. App. 1994), § 137.115, R.S. Mo. 2000.

Because valuations in St. Charles County are presumed to have been made by computer, computer-assisted method, or computer program, § 137.115.1 requires Appellant to prove the valuation of residential property "by clear, convincing and cogent evidence."[18] "Valuation" means assessed valuation and therefore encompasses classification.

[18]Respondent's reliance on § 137.115.1 does not beg the question of classification. Because the property at issue here is presumptively residential–that is, residential

The pertinent portion of § 137.115.1 reads as follows:

> In the event a *valuation* of subclass (1) real property within any county of the first classification with a charter form of government, or within a city not within a county, is made by a computer, computer-assisted method or a computer program, the burden of proof, supported by clear, convincing and cogent evidence to sustain such *valuation*, shall be on the assessor *at any hearing or appeal*. In any such county, unless the assessor proves otherwise, there shall be a presumption that the *assessment* was made by a computer, computer-assisted method or a computer program.

(Emphasis added.) Clearly, the antecedent to the word "assessment" in the second sentence is the word "valuation" in the first sentence. *Rothschild v. State Tax Com'n*, 762 S.W.2d 35, 37 (Mo. banc 1989). Just as clearly, "assessment," particularly in the context of Chapter 137, means "assessed valuation," not "true value in money." Therefore, "valuation" in § 137.115.1 means "assessed valuation." And, it follows necessarily that Appellant had the burden of proof to sustain his assessed valuation by clear, convincing, and cogent evidence.

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property unless the transient housing exclusion applies–§ 137.115.1 should apply. In addition, because of the interrelationship of classification and value–*Pessin v. State Tax Com'n*, 875 S.W.2d 143, 146 (Mo. App. 1994)–a nonfrivolous claim of residential classification should trigger the provisions of § 137.115.1.

Although the STC did not rely on the burden of proof provision of §137.115.1 (L.F. at 426; Appendix at A8), it is clear from the record that Appellant did not carry his burden of proof, since he offered no evidence. Therefore, this Court should affirm the STC's decision.

CONCLUSION

The State Tax Commission's decision is supported by substantial evidence on the record and correctly applies the law. The Circuit Court properly affirmed the State Tax Commission's decision. Accordingly, this Court should affirm the decision of the State Tax Commission and the judgment of the Circuit Court.

Respectfully submitted,

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CERTIFICATES

The undersigned certifies that:

1. One complete copy of the foregoing Respondent's Substitute Brief and one floppy disk as required by Mo. Rule 84.06(g) were served on Charissa L. Mayes, Assistant County Counselor, Attorney for Appellant, 100 North Third Street, Suite 216, St. Charles, Missouri 63301, by first-class mail, postage prepaid, this 5th day of June, 2004.

2. The foregoing Respondent's Substitute Brief complies with the limitations contained in Mo. Rule 84.06(b).

3. In reliance on the word count of Microsoft Word 2002, the word-processing software used to prepare the brief, the number of words in the foregoing Respondent's Substitute Brief–excluding the cover, these certificates, signature blocks, and appendix–is 10,302.

4. The undersigned has scanned the floppy disk filed with the foregoing Respondent's Substitute Brief for viruses, using McAfee VirusScan (v4.5.1, virus definition 4.0.4363), and in reliance on that scan, that disk is virus-free.

_____

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