

LANARKSHIRE VALUATION APPEAL PANEL

STATEMENT OF REASONS

RELATIVE TO APPEAL

by

MRS PATRICIA McGARRIGLE

in respect of

LICENSED RESTAURANT, THE WOODPECKER,  
36 NORTH VENNEL, LANARK ML11 7PT

This was a running roll appeal made under S3(4) of the Local Government (Scotland) Act 1975, with reference to S2(1)(f) of that Act, which so far as relevant to this appeal, provides as follows:

S2(1)...”the assessor for any valuation area shall, as respects that area, at any time while the valuation roll is in force, alter the roll- ...(f) to correct any error of measurement, survey or classification or any clerical or arithmetical error in any entry therein.”

S3(4A)(b) of that Act provides as follows:

“An appeal under subsection (4) above shall be made - ...(b) on the ground that there has been such an error in the entry as is referred to in section 2(1)(f) of this Act, at any time while the roll is in force.”

The appeal proceeded on the basis of an alleged error of measurement in the calculation of the net annual value for the 2010 Revaluation.

The Appellants were represented by Mr Peter Henry, and Mr Brian Gill, Advocate, appeared for the Assessor. The Assessor’s valuation was £30,000 and the Appellants were contending for a figure of £28,300.

In considering its approach to the matter, the Committee had regard particularly to:-

- the commentary contained in Armour on Valuation for Rating (5<sup>th</sup> Edition) (“Armour”), paragraphs 3-34 to 3-42 and 20-28 to 20-29A inclusive and to the cases and legislation referred to therein;

- the Scottish Assessors Association Revaluation 2010 Commercial Properties Committee Practice Note 17 Valuation of Licensed Premises, paragraph 2.0 Basis of Valuation, which provides inter alia:

“The subjects covered by the Practice Note should be valued by the application of the comparative principle, using the percentages of turnover contained in Appendix 1, which should be applied to the adjusted “hypothetical achievable turnover” which excludes VAT.

Licensed premises differ in their locational advantages, attractiveness and character and are affected by the trading policies of licensees, along with being subject to the vagaries of current popular trends (circuits).

It should be recognised by valuers that the essence of the valuation scheme is that it is based on the hypothetical achievable turnover. The scheme is designed to enable valuers to ascertain “the rent at which the lands and heritages might reasonably be expected to be let from year to year” on the statutory terms, by identifying a relationship between rents and turnovers which can then be used to arrive at Net Annual Value.

The figure of turnover adopted should represent the annual amount considered to be the hypothetical achievable level in the year to 1 April 2008, having regard to the physical nature of the property and its location as at 1 January 2010, on the assumption that the premises will be operated by a competent operator seeking to maximise profits. The statutory hypothesis assumes that the letting takes place in an open market, which includes prospective tenants who would recognise past and /or current good practices and operating techniques, and seek at least to replicate them.”

- the opinion of the then Lord Justice-Clerk (Gill) in *National Gallery Trs -v- Lothian Assessor* 2010 CSIH 94 at paras 31 and 32: S2(1)(f) applies to errors on matters of objectively ascertainable fact. Questions of opinion and law belong to a different conceptual world. If the ratepayer disagrees with the Assessor on a matter of opinion, his recourse is to appeal against the entry under S3(2) as soon as it is made. The same can be said in relation to an error of law. It would subvert the whole system of quinquennial valuations if S2(1)(f) provided a right of appeal on such grounds at any time while the roll was in force.
- the opinion of Lord Hardie in the same case: errors of measurement are confined to errors of fact.

The background to matters was not in dispute. The Assessor had for the purposes of the 2010 Revaluation issued licensed premises annual turnover questionnaires to the Appellant which had not been returned. The incumbent Assessor had decided that licensed premises with a history of continued failure to provide turnover figures should be valued on the basis of double the level of turnover adopted for the purposes of the 2010 Revaluation. On this basis, the turnover level adopted by the Assessor for the appeal subjects was £690,000, equating to £4,020/m<sup>2</sup> on a reduced area of 171.60m<sup>2</sup>, giving a net annual value of £60,000.

Following the issue of the 2010 Revaluation notice, the Appellant had apologised for the failure to return the questionnaires received, citing unforeseen circumstances and health issues, and had provided a completed return, being Assessor's Production 3. The valuation of the appeal subjects was subsequently revised by the Assessor under redress in terms of S3(2) of the 1975 Act to a net annual value of £30,000. No appeal was taken against the revised valuation, although a material change appeal subsequently lodged was dismissed for failure to appear. The present appeal was then lodged on 31 March 2013.

The Appellant's grounds of appeal were set out in an e-mail dated 27 December 2013, being Appellant's Production 3. These were that there is an error of measurement in that the Assessor had used the incorrect turnover figures in arriving at his valuation of £30,000. The Appellant's agent then provided an alternative valuation of £28,300 to which he spoke at the hearing, set out in Appellant's Production 11. The alleged errors of measurement were that the figures used by the Assessor for machine income were gross not net, possibly misled by the return in which gross figures had been given, and that the Assessor had taken turnover figures for the year after the datum year, which was contrary to the decision in *Suburban Taverns (Glasgow) Ltd -v- Assessor for Glasgow* [2008] CSIH 5.

In the Return of Information form, the Appellant had been asked to provide turnover figures for the years ending 31/03/04 to 31/03/08. For some reason, the figures provided were for the years 2006 to 2009. Instead of adopting the turnover figure for the year to 31/03/08, it was common ground between the parties that this was not appropriate in the circumstances of the present case. The reason the committee were given for this was set out in an e-mail from the Appellant's agent to the Assessor dated 15 September 2013, being the Assessor's Production 7:

"I have assumed that the pub was fully closed for the 6 week refurbishment period, which started mid Jan 2008. Mr McGarrigle has explained that the public bar closed first; and all trading was done upstairs. Then the restaurant upstairs was closed, and all trading was done downstairs, before the fully refurbished pub opened."

Both the Appellant's agent and the Assessor therefore took the view that the best evidence of turnover related to different dates and offered their own professional opinion as to the figures to be used.

According to the Appellant's agent, Mr Henry, the turnover figures which ought to be used were those for the year to 31 March 2007. However in arriving at his valuation, based on a turnover figure of £323,860 as set out in Appellant's Production 11, he did not make use of the figures given in the return made by his client. Mr Henry explained that the Return had been done in a rushed manner. He instead used a different set of figures provided to him in an exchange of e-mails dated 12 September 2013, being Appellant's Production 10. This had a different split but also came to £380,575, the total shown in the Profit and Loss Account produced for the year ended 31 March 2007. That account formed Appellant's Production 8, but there was no professional certification on the page which had been produced. Mr Henry did not seek to vouch the amended split put forward other than to have Mr Gerry McGarrigle, who had sent the

e-mail and was present at the hearing, sign his e-mail. Mr McGarrigle had also provided Mr Henry with a note of the fruit machine rental in 2007, namely £5,980, and the cost of the licence, namely, £735, but again no vouching for the income or expenditure figures was provided to the committee, notwithstanding the importance of this to the Appellant's case.

The Assessor for his part took the view that in the circumstances, the turnover from the other years was to be preferred in providing a reliable guide to the hypothetical achievable turnover of the subjects, and he adopted an adjusted turnover of £344,000 which represented a midpoint between the 2006 and 2009 levels of adjusted turnover. He had then considered the resulting turnover rate of £2,000/m<sup>2</sup> in relation to the comparative analysis he had undertaken in Assessor's Production 5A of the other public houses in Lanark, and believed this level of turnover to be wholly appropriate, in particular, being consistent with the resultant turnover rate of £2,000/m<sup>2</sup> for the Crown, which was the closest by size to the appeal subjects. He referred to the direction given in Practice Note 17 that the figure of turnover adopted should represent the annual amount considered to be the hypothetical achievable turnover in the year to 1<sup>st</sup> April 2008 having regard to the physical nature of the property and its location as at 1 January 2010, on the assumption that the premises will be operated by a competent operator seeking to maximise profits.

The issue to be determined by the committee was whether there had been an error within the meaning of S2(1)(f) of the 1975 Act.

In an appeal before a committee of this Panel heard on 15 May 2013 relative to 36 Hamilton Road, Motherwell, pertaining to circumstances where the Assessor had not been provided with any information as to the actual turnover and had found it necessary to estimate the level of adopted turnover by considering the adopted turnover levels for all other licensed premises in Bothwell, the committee decided that even if the figures had been available, they were only one factor, albeit a significant factor, in determining the "hypothetical achievable turnover." Determining "the hypothetical achievable turnover" in terms of SAA Practice Note 17 required the application of the valuer's judgement to all of the relevant facts. On the authority of *National Gallery Trs -v- Lothian Assessor*, S2(1)(f) applied only to errors on matters of objectively ascertainable fact. If the ratepayer disagrees with the Assessor on a matter of opinion, his recourse is to appeal against the entry under S3(2) as soon as it is made. The same can be said in relation to an error of law.

In the present appeal, figures for turnover had been provided shortly after the valuation notice had been issued, but in the committee's view the same rationale applied. Moreover, because of the acknowledged difficulty with the 2008 figures, it was evident from the facts of this case that it was a matter of valuer's judgement which turnover figures should be used, each party taking a different view on this. This was not an error on a matter of objectively ascertainable fact, and the Appellant's remedy would have been to raise the matter in a revaluation appeal. It was not open to her to do so now by way of an error appeal. The issue of whether the machine income figures were gross or net was part of the issue relating to which were the correct turnover figures to be applied, and whilst the Appellant's

agent had argued that an error had taken place in this regard, no properly vouched figures had been provided to the committee. Similarly, it was not necessary for the committee to decide whether the Assessor had made an error in using the 2009 turnover figures in arriving at his valuation as this would also have been an error of law which would not have assisted the Appellant's case.

The Committee accordingly decided that the Appellant had not proved the existence of an error of measurement within the meaning of S2(1)(f) in the relevant entry in the valuation roll, and dismissed the appeal.

10 March 2014