Massachusetts Department of Revenue
Division of Local Services

Current Developments in Municipal Law

2008

Appellate Tax Board Decisions

Book 2A

Navjeet K. Bal, Commissioner
Robert G. Nunes, Deputy Commissioner

www.mass.gov/dls

Appellate Tax Board Decisions

Table of Contents

Book 2A **Page**

Appellate Tax Board Cases

Brookline Conservation Land Trust v. Board of Assessors of the Town of Brookline, ATB 2008-679, Docket Nos. 281854-56, 285517-19 (June 5, 2008) – *Charitable Exemption – Conservation Land* 1

John M. Cornish et al., Trustees of the South Street Nominee Trust v. Board of Assessors of the Town of Carlisle, ATB 2008-555, Docket No. F281320 (May 12, 2008) – *Chapter 61 Forest Classification Withdrawal Tax* 15

Forges Farm, Inc. v. Board of Assessors of the Town of Plymouth, ATB 2007-1197 Docket Nos. F283127-29 (October 18, 2007) –*Charitable Exemption - Undeveloped Parcel* 22

Henry F. Kabat and Margaret Mullins v. Board of Assessors of the Town of Cummington, ATB 2008-397, Docket No. F287312 (April 2, 2008) – *Trailer Used as Residence on Parcel Taxed as Real Estate* 29

King Crusher Inc. v. Commissioner of Revenue, ATB 2008-38, Docket No. C278113 (January 15, 2008) – *Manufacturing Classification* 35

Kings Daughters & Sons Home c/o Pond Home Retirement Center v. Board of Assessors of the Town of Wrentham, ATB 2007-1043, Docket No. F276527 (September 25, 2007) – *Charitable Exemption – Assisted Living Facility* 43

John P. & Barbara MacKay Ligor, Trustees v. Board of Assessors of the Town of Wellesley, ATB 2008-547, Docket No. F288375 (May 8, 2008) – *Dismissal of ATB Appeal – Failure to Allow Property Inspection after ATB Order* 53

Mary Ann Morse Healthcare Corp. v. Board of Assessors of the Town of Framingham, ATB 2008-1104, Docket Nos. F281323, F283633 (August 19, 2008) – *Charitable Exemption – Assisted Living Facility* 57

Northeast Generation Co. v. Board of Assessors of the Town of Northfield, **Northeast Generation Co. v. Board of Assessors of the Town of Erving**, ATB 2008-380, Docket Nos. F287573 & F287884 (April 1, 2008) – *Chapter 59 Section 2B – Taxation of Property in Connecticut River* 72

City of Quincy v. Commissioner of Revenue, ATB 2007-1244, Docket No. C282413 (November 14, 2007) – *State Owned Land Valuation Appeal* 81

RNK, Inc. v. Board of Assessors of the Town of Bedford, ATB 2008-893, Docket No. F281946 (July 16, 2008) – *Lease of Personal Property – Tax Assessed to Lessor – Standing of Lessee Under Obligation to Pay Tax to Appeal to the ATB* 87

David C. & Rodney A. Smith, Liebfried Realty Trust, et al v. Board of Assessors of the City of Fitchburg, ATB 2008-73, Docket Nos. F277870, F277872-902, F278050-53 (January 24, 2008) – *Chapter 59 Section 2B – Private Hangars at Public Airport* 94

Edward H. Stone v. Board of Assessors of the Town of Wakefield, ATB 2008-656, Docket No. F293551 (May 27, 2008) – *ATB Two Year Rule – Burden of Persuasion* 101

W. David Zitzkat and Linda Larue, Trustees, Zitzkat Nominee Trust v. Board of Assessors of the Town of Truro, ATB 2008-957, Docket No. F282934 (July 25, 2008) – *Revised Assessment – Failure to Revisit Prior Valuation Decision* 106

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

BROOKLINE CONSERVATION LAND TRUST	**v.**	**BOARD OF ASSESSORS OF THE TOWN OF BROOKLINE**
Docket Nos. 281854-56, 285517-19		Promulgated: June 5, 2008

ATB 2008-679

These are appeals filed under the formal procedure, pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65 from the refusal of appellee to abate real estate taxes assessed by the Town of Brookline to appellant under G.L. 59, §§ 11 and 38 for fiscal years 2005 and 2006 (the "fiscal years at issue").

Commissioner Rose heard these appeals. Chairman Hammond and Commissioners Scharaffa, Egan, and Mulhern joined him in the decisions for appellee.

These findings of fact and report are made pursuant to a request by appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.

David R. Baron, Esq. for appellant.
John J. Buchheit, Esq. for appellee.

FINDINGS OF FACT AND REPORT

On the basis of testimony and exhibits submitted during the hearing of these appeals, the Appellate Tax Board ("Board") made the following findings of fact.

On January 1, 2004 and January 1, 2005, the relevant assessment dates, Brookline Conservation Land Trust ("Trust" or "appellant") was the assessed owner of three parcels of real estate located in the Town of Brookline: 0 Walnut Street (the "Walnut Street parcel"); 0 Sargent Road (the "Sargent Road parcel"); and 0 Cottage Street (the "Cottage Street" parcel) (collectively, the "subject properties").

Appellant timely filed Forms 3 ABC and Forms PC with the Board of Assessors of the Town of Brookline ("assessors") on February 23, 2004 and February 28, 2005 for the fiscal years 2005 and 2006, respectively. The assessors assessed the subject properties and issued tax bills to appellant in accordance with G.L. c. 59, § 57C for fiscal years 2005 and 2006, respectively. Appellant timely paid the real estate taxes due on the subject properties and subsequently filed timely abatement applications for each of the subject properties on January 30, 2005 and

January 30, 2006 for fiscal years 2005 and 2006, respectively. Appellant's abatement applications are based on its contention that the subject properties are exempt from real estate tax pursuant to G.L. c. 59, § 5, Third, as property owned by a charitable organization and occupied for charitable purposes.

For fiscal year 2005, the abatement applications were deemed denied on May 1, 2005; for fiscal year 2006, the assessors denied the abatement applications on April 11, 2006. Appellant seasonably filed Petitions with the Board on July 21, 2005 and June 15, 2006 for fiscal years 2005 and 2006, respectively. On the basis of the foregoing, the Board found that it had jurisdiction to hear and decide these appeals. The Board consolidated the appeals pursuant to a joint motion by the parties.

Edward Lawrence testified on behalf of appellant. He had been a trustee since the formation of the Trust in 1977. Mr. Lawrence testified that the general purpose of the Trust is "to hold the land in its natural scenic or open condition." Mr. Lawrence introduced letters to show that the Trust is recognized by the Internal Revenue Service as an Internal Revenue Code ("Code") § 501(c)(3) charitable organization, and as a Code § 509(a)(1) supporting organization of the Town of Brookline and its Conservation Commission ("Brookline Conservation Commission"). According to the First Amendment to Declaration of Trust, the Trust was created for the following purposes:

> to engage and assist in and otherwise promote the preservation and conservation of natural resources for the Town of Brookline, including the Town's open areas of natural beauty or historic significance, water resources, marshland, wetlands and other areas appropriate for outdoor enjoyment; to acquire by purchase, gift, or other means, real estate and interests therein in the Town of Brookline, to disseminate information and to educate the general public as to the need for and value in preserving real estate in its natural scenic or open condition and, to the extent consistent with the terms upon which property may be acquired, to make property of the Trust available for its enjoyment.

Mr. Lawrence testified that, according to a survey of Brookline residents conducted by the Brookline Parks Department, the citizenry opined that the most important goal for the Town should be "open space acquisition and preservation." Appellant contended that "open space" was understood by the citizenry as being separate from parks or walking and hiking trails, because

on the survey, these other facilities were listed and ranked separately from "open space acquisition and preservation."

When asked what actions appellant had taken to inform the residents of Brookline of its functions with respect to conserving open space, Mr. Lawrence explained that appellant had held "several meetings with members of the neighborhood" to describe the activities of the Brookline Conservation Commission and appellant. Through Mr. Lawrence, appellant introduced a flyer which described the purpose of appellant and the benefits of its work,[1] how it would be financed, the deductibility of contributions to appellant, and how someone could make a contribution to it. When asked how the flyer was distributed, Mr. Lawrence explained that it was distributed "to various groups that were invited to learn more about it by the Conservation Commission and by the Land Trust together, and by other organizations in the Town." Through Mr. Lawrence, appellant also introduced into evidence three invitations to "open houses" held jointly by the Brookline Conservation Commission and appellant, as well as "follow-up" correspondence distributed after one of the events. These four letters were sent between 1983 and 1985; no letters sent subsequent to 1985 were mentioned in testimony or introduced into evidence. When asked to whom these invitations were sent, Mr. Lawrence testified that the recipients were, again, "friends' groups," such as garden clubs and other conservation groups in Brookline.

1. The subject properties.

None of the subject properties is encumbered by conservation easements or other restrictions. According to Linda MacDonald, the assistant assessor, each of the parcels is assessed as "undevelopable" land, because they each lack frontage and are essentially "land-locked." A separate description of each parcel follows.

a. The Walnut Street parcel

Appellant acquired the Walnut Street parcel by a deed dated April 16, 1981. This parcel abuts the historic Brookline Town Green, where soldiers mustered before the battles of Lexington and Concord during the Revolutionary War. Mr. Lawrence testified that the Walnut Street parcel contains trees originally planted by Frederick Law Olmsted. The transferor of this parcel, Marion Parson Alden, lived at 37 Warren Street, Brookline, which Mr. Lawrence explained is across the street

---

[1] In general, the flyer touted that "[a] private land trust can carry out certain conservation transactions with greater facility than a government body" because it could, for example, acquire real estate without having to wait for Town Meeting approval; raise money; and offer donors of land or money a wide range of tax deductible benefits.

from the Walnut Street parcel. Ms. Alden was not a current or former trustee of appellant. Mr. Lawrence testified that Ms. Alden originally acquired the Walnut Street parcel in order to prevent it from being developed.

Mr. Lawrence offered into evidence a letter addressed to him as trustee from Mr. Paul R. Willis, the Conservation Director for the Brookline Conservation Commission, dated October 31, 1980, in which Mr. Willis asked appellant to become the interim owner of the Walnut Street parcel while the Brookline Conservation Commission raised money to purchase the property. Mr. Lawrence testified that the funds for appellant's purchase of the Walnut Street parcel came from "contributions from the neighborhood to preserve it," and that appellant was preserving it in its natural condition.

When asked how appellant informed the public that the Walnut Street parcel is "available to walk upon," Mr. Lawrence testified that the Conservation Commission is showing the property on its map "as being open space owned by the Brookline Conservation Land Trust," and that appellant called the neighbors to participate in an annual clean-up of the parcel. Finally, appellant held meetings in trustees' homes to discuss appellant's various parcels of land.

Through Ms. MacDonald, appellee offered into evidence several pictures of the Walnut Street parcel which showed that the property is surrounded by a stone wall. Ms. MacDonald testified that the wall is about three feet high, with an additional wire fence with steel poles above the wall, which creates a total barricade approximately six feet in height. Ms. MacDonald testified that there are two wooden gates, which appear very old and "unused," and that she had entered the Walnut Street parcel by "sliding through" one of the gates that had been left slightly ajar. Mr. Lawrence on direct examination also confirmed that the Walnut Street parcel is surrounded by a stone wall "that I believe is running all around the property, with the exception of two gates into [the parcel]." Ms. MacDonald also testified that there is no place to park a vehicle at the Walnut Street parcel, as the parcel is located at a "very dangerous intersection" and therefore "[i]t's not where you would walk."

Appellee also offered into evidenced a picture showing a swing set which had been erected on the Walnut Street parcel. Ms MacDonald testified that the swing set had been present when the picture was taken, in May of 2006, but was no longer present when she returned to the Walnut Street parcel on November 13, 2006, the day before the hearing. In Ms. MacDonald's opinion, the primary beneficiaries of the Walnut Street parcel are the

immediate abutters, "especially this person at 30 Warren whose back yard opens up to it."

On cross-examination, Mr. Lawrence was asked whether he had ever had discussions with the neighbors surrounding the subject properties about placing signs on the properties to inform the public that they were open to the public and inviting the public to enter the properties. Mr. Lawrence replied that, on one occasion, he had a discussion with members of the neighborhood around the Walnut Street parcel, during which he made the neighbors "aware" that the parcel is owned by appellant "and that we did welcome people to come on it." He testified that "[p]eople understood, after we talked to them and educated them," that the property is available to the public, "and it was a general consensus that if we felt we ought to put up a sign, we should." Ms. MacDonald testified that a sign had once been present near the gate where she had entered the property, "that said it was conservation land, and you could walk there, but you should be quiet or something to that effect," but by November 13, 2006, the sign had been removed and "all the gates were closed."

b. The Sargent Road parcel.

Appellant acquired the Sargent Road parcel in 1996. Mr. Lawrence testified that the parcel was acquired by gift from Gertrude Donald, who, Mr. Lawrence testified, lived immediately next to the parcel. Mr. Lawrence also testified that Ms. Donald was not a trustee of appellant, and no trustees owned any land abutting this parcel.

Mr. Lawrence described as the desirable feature of this parcel its presence within a largely residential area of Brookline and the fact that, if not acquired by appellant, "it was clearly going to be developed for a house lot." He explained that the Brookline Conservation Commission wished to prevent the development of additional parcels within Brookline. The Sargent Road parcel also has historical significance as a portion of the former Charles Sprague Sargent Estate.[2] The Sargent Road parcel is located along the edge of an exclusive area of Brookline known as Sargent Estates, a private, gated community. The parcel is located at the corner of Sargent Beechwood and Chestnut Place, private roadways. According to Mr. Lawrence, Sargent Beechwood is not part of Sargent Estates and is "used daily by people walking their dogs and so forth."

Mr. Lawrence testified that the Sargent Road parcel is available for the public to use, and that in fact some members of the public have been observed using the property,

---

[2] Mr. Sargent was a colleague of Frederick Law Olmsted and the former curator of the Arnold Arboretum.

particularly for bird-watching. He also testified that the parcel is visible from a nearby apartment complex that is not within Sargent Estates.

Ms. MacDonald testified that Sargent Estates is "one of the most prestigious areas of Brookline." It is surrounded by private, gated ways, and "it has very, very expensive homes." Through Ms. MacDonald, appellee offered into evidence several pictures depicting various "private way" and "no trespassing" signs, along with a chain at Sargent Beechwood, indicating that both Chestnut Place and Sargent Beechwood, the access roads to the Sargent Road parcel, are private roads that the public is not invited to travel.

Moreover, Ms. MacDonald testified that on more than one visit to the Sargent Road parcel itself, she was "challenged" as to why she was there. Ms. MacDonald testified that "there is no clear view of this parcel from any of the main streets." It was Ms. MacDonald's opinion that it is the immediate abutters who primarily benefit from the Sargent Road parcel, because they are the only members of the public who would have occasion to view and use the parcel.

c. The Cottage Street parcel.

Appellant acquired the Cottage Street parcel in 1998. Mr. Lawrence testified that the parcel was acquired by gift from Clarita Bright, who lived immediately next to the parcel. Mr. Lawrence also testified that Ms. Bright was not a trustee of appellant, and no trustee of appellant owned any land abutting this parcel. Mr. Lawrence testified that the desirable feature of this parcel is that it is contiguous to other significant conservation lands in Brookline, particularly the Sargent Pond and a stream that feeds into Sargent Pond.[3] Lawrence testified that "there is no activity going on" in this parcel, and that "[i]t is a habitat for natural life, including deer and other animals such as that. It's fairly, quite frankly, quite wild, although there is an open portion of it that is maintained in the manner in which Mrs. Bright had it prior to the gift."

According to maps entered into evidence, the only means of entrance into the Cottage Street parcel from Cottage Street is through a driveway connected to a private residence at 126 Cottage Street. The deed for the Cottage Street parcel indicates that the owner of 126 Cottage Street holds an easement for the use of this driveway. Ms. MacDonald explained that while the map entered into evidence purports to show a way into the Cottage Street parcel, this way "only exists on paper. It's like a paper street. This person uses this as her driveway.

---

[3] Brookline Conservation Commissioner Roberta Schnoor testified that Sargent Pond was one of three natural wetlands still in existence in Brookline.

It's a private home." When asked if, in her opinion, someone from the public would be inclined to access the property by means of 126 Cottage Street, Ms. MacDonald replied, "[a]bsolutely not."

When Ms. MacDonald viewed the parcel, she gained access by entering and crossing through the private property of 144 Cottage Street, which was under construction at the time. She explained that a large wooden fence surrounds the Cottage Street parcel. The property is:

> pretty much behind this private property owned by these people, so you really couldn't get access. If this person wasn't having the home gutted and the workers didn't care that I walked through, there would be no way you could get in from this entrance. The only way you could get in here is if you went through the Sargent Estates and then you would have to go on their private road and then walk the pond.

Ms. MacDonald explained that Sargent Pond is privately owned by the Sargent Road Trust. Access along the Sargent Pond to the property is not easy:

> There is a lot of brush. The pond is beautiful, but in order to do it, maybe there is a path - I didn't see it . . . . It was meadowy, green . . . the greenery was about up to my knee, so it is very meadow-like, untamed, and it appears to be the backyards of these three people.

Sargent Pond has a conservation restriction placed on it, and it is assessed as taxable land. The trustees pay for the maintenance of the pond. As Ms. MacDonald explained, "[a]ll these large parcels have restrictions on them of things you can and cannot do, and it all stems from the Sargent Road Trust." Ms. MacDonald also testified that to walk along the Cottage Street parcel, it feels as if "[y]ou are walking on somone's property, and you go by and there is their back yard . . . . You are in someone's back yard." In fact, Ms. MacDonald testified that on one visit to the Cottage Street parcel, while she was working on a different appeal before the Board, Julie Cox, one of the trustees of the Sargent Road Trust, challenged her presence on the property: "She ran out from her house and asked us why we were there."

2. The Board's ultimate findings of fact.

The Board found that the subject properties were conveyed to appellant by neighbors who wished to prevent development in their neighborhood. Despite the fact that appellant was

recognized as a supporting organization of the Town, and that the preservation of open space may have been recognized by the Brookline Conservation Commission as an important goal for the citizens of the Town, the Board found that appellant is holding the subject properties for the primary benefit of the immediate neighborhood in which the three parcels are located. Contrary to appellant's contention, the subject properties do not appear to be open to the general public. The parcels are, in large part, barricaded with walls, fences, and chains, and "private" and "no trespassing" signs appear along the periphery of the subject properties. While portions of the property may not be completely barricaded, they are still not easily accessible by the public. Access to the Cottage Street parcel requires traversing over the driveway of a private parcel. Moreover, the fact that Ms. MacDonald's presence was challenged on more than one visit to the Sargent Road and Cottage Street parcels, and the appearance of a swing set on the Walnut Street parcel, indicates that the subject properties appear to the public to be, and are treated by the neighbors as, extensions of the backyards of the abutting neighbors in an exclusive area of Brookline, not conservation land that is open to the enjoyment of the general public.

While appellant suggested that the "no trespassing" and "private" signs actually refer to the surrounding private ways rather than the properties, the Board found the distinction to be negligible; regardless of what ground they are referring to, the prominent display of "no trespassing" and "private" signs, coupled with the various physical barriers to entry onto the property and other access difficulties, including having to cross over a private residence's driveway and having to enter at a dangerous intersection with no place to park a vehicle, create a sense of exclusion, rather than an invitation to enter the supposedly public subject properties. The fact that residents of a nearby apartment complex may be able to enjoy a view of one of the subject properties does not rise to the level of public enjoyment.

The Board also found that appellant failed to prove that it had made sufficient effort to inform the public that the subject properties are open to the public. Merely listing the subject properties on a map as conservation land owned by appellant is not an open invitation to the public to enter the properties. Moreover, the letters and invitations entered into evidence were sent only at the beginning of appellant's existence and were actually targeted to certain "friends" of the Brookline Conservation Commission rather than the public at large. The invitations to clean up the Walnut Street parcel and the meetings held at the private homes of the trustees also appeared

to be extended to the neighborhood, and were not intended to include the public at large.

Based on the foregoing, and to the extent it is a finding of fact, the Board found that appellant's ownership of the subject properties primarily benefits the abutting neighbors and not an indefinite number of people. Therefore, for the reasons explained more fully in the following Opinion, the Board found that appellant is not a charitable organization for purposes of G.L. c. 59, § 5, Third. Accordingly, the Board issued decisions for appellee in these appeals.

OPINION

All property, real and personal, situated within the Commonwealth is subject to local tax, unless expressly exempt. G.L. c. 59, § 2. General Laws c. 59, § 5 lists the classes of property which shall be exempt from taxation. Specifically, § 5, Third, exempts from taxation all "personal property of a ***charitable organization***, . . . and real estate owned by . . . and occupied by it or its officers for the purposes for which it is organized . . . ." G.L. c. 59, § 5, Third (emphasis added).

In the instant appeals, appellant is recognized as a charitable corporation pursuant to Code § 501(c)(3) and as a supporting organization pursuant to Code § 509 (a)(1). "However, an organization's Code Section 501(c)(3) status is not dispositive in determining whether its property qualifies for the Massachusetts property tax exemption." ***Jewish Geriatric Services, Inc. et al. v. Board of Assessors of Longmeadow***, Mass. ATB Findings of Fact and Reports 2002-337, 358-9, *aff'd*, 61 Mass. App. Ct. 73 (2004) (citing ***H-C Health Services v. Board of Assessors of South Hadley***, 42 Mass. App. Ct. 596, *rev. denied*, 425 Mass. 1104 (1997)). "The mere fact that the organization claiming exemption has been organized as a charitable corporation does not automatically mean that it is entitled to an exemption for its property. . . . Rather, the organization 'must prove that it is in fact so conducted that in actual operation it is a public charity.'" ***Western Massachusetts Lifecare Corp. v. Board of Assessors of Springfield***, 434 Mass. 96, 102 (2001) (quoting ***Jacob's Pillow Dance Festival, Inc. v. Assessors of Becket***, 320 Mass. 311, 313 (1946)). "The burden of establishing entitlement to the charitable exemption lies with the taxpayer." ***Western Massachusetts Lifecare***, 434 Mass. at 101 (citing ***New England Legal Foundation v. Boston***, 423 Mass. 602, 609 (1996)). "Any doubt must operate against the one claiming a tax exemption." ***Boston Symphony Orchestra v. Board of Assessors of Boston***, 294 Mass. 248, 257 (1936).

The Supreme Judicial Court has held that "the term 'charitable' includes more than almsgiving and assistance to the needy." ***Harvard Community Health Plan v. Assessors of Cambridge***, 384 Mass. 536, 543 (1981)). The definition accepted by Massachusetts courts and the Board is that charity is a

> gift, to be applied consistently with existing laws, ***for the benefit of an indefinite number of persons***, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.

Boston Symphony Orchestra, 294 Mass. at 254-55 (emphasis added). Thus, in determining whether an organization is in fact charitable for Massachusetts real estate tax purposes, Massachusetts courts and the Board must consider whether the organization's benefits are readily available to a sufficiently inclusive segment of the population. ***Jewish Geriatric Services***, Mass. ATB Findings of Fact and Reports at 2002-359.

In ***Wing's Neck Conservation Foundation, Inc. v. Board of Assessors of Bourne***, Mass. ATB Findings of Fact and Reports 2003-329, 341, *aff'd*, 61 Mass. App. Ct. 1112 (2004), the Board emphasized that "[e]ven where an organization's activities are of a noble cause, such as the preservation of open space, where the primary benefits inure to a limited class of private individuals, the organization will not qualify as charitable." ***Id***. (citing ***Massachusetts Medical Society v. Assessors of Boston***, 340 Mass. 327, 333 (1960) (ruling that although the public will derive a benefit from a more enlightened medical profession, "this indirect benefit is not sufficient to bring the society within the class traditionally recognized as charities")).

In the present appeals, the Board found that the subject properties, contrary to appellant's contention, are not open to the general public. The properties are, in large part, enclosed within gates, fences, walls, and chains. While portions of the property may not be completely barricaded, they are still not easily accessible. For example, the entry into the Cottage Street parcel requires passage along the driveway of the private residence at 126 Cottage. Further, as Ms. MacDonald testified, the subject properties appear as if they are "in someone's backyard." She testified to having been "challenged" as to her presence on the Sargent Road and Cottage Street parcels. Moreover, at one point in time, a swing set had been erected on the Walnut Street parcel. Other points of entry into the subject properties are either obstructed from view or along very

busy and dangerous intersections where visitors have no place to park their vehicles. Further indications of the exclusivity of the area are the "no trespassing" and "private" signs posted along the periphery of the subject properties.

Appellant contended that the "no trespassing" signs could be referring to the private ways encircling the properties rather than the subject properties themselves. Appellant also contended that the 126 Cottage Street merely has a driveway easement over the Cottage Street parcel and that entry onto the Cottage Street parcel is understood to be permitted, in light of the literature distributed from time to time by appellant informing the recipients that the subject properties are open to the public. However, the Board found that, regardless of what specific areas they are referring to, the prominent display of "no trespassing" and "private" signs, coupled with the various physical barriers to entry and other difficulties, including having to cross over a private residence's driveway and having to enter at a dangerous intersection with no place to park a vehicle, create a sense of unwelcome and exclusivity.

Maintaining the subject properties in such a closed, guarded manner is contrary to appellant's Declaration of Trust, which requires appellant to hold its properties so they will be "appropriate for outdoor enjoyment" and "to make property of the Trust available for [the public's] enjoyment." Moreover, "the absence of public access to land has consistently proven fatal to a landowner's claim of charitable exemption." ***Wing's Neck***, Mass. ATB Findings of Fact and Reports at 2003-343 (citing ***Animal Rescue League v. Assessors of Pembroke***, Mass. ATB Findings of Fact and Reports 2000-96, *aff'd*, 54 Mass. App. Ct. 1113 (2002) and ***Nature Preserve, Inc. v. Assessors of Pembroke***, Mass. ATB Findings of Fact and Reports 2000-796). While Mr. Lawrence testified to the presence of bird-watchers and dog-walkers, the absence of any signs indicating that the public is welcome onto the subject properties raises a strong inference that these individuals were most likely the recipients of appellant's literature, and thus the collection of "friends" invited by appellant and the Brookline Conservation Commission, not the public at large.

In ***Skating Club of Boston v. Assessors of Boston***, Mass. ATB Findings of Fact and Reports 2007-193, 210, appellant there "emphasize[d] its accessibility to and substantial use by the general public and its significant role in assisting individuals to learn to skate, including members of the Genesis Program."[4] However, the Board found stronger evidence supporting exclusivity rather than inclusion:

---

[4] The Genesis Program provides services to handicapped children.

> The Club's informational Pamphlet emphasizes the many benefits of membership. It states that the membership owns the Club and directs how the ice skating facilities are used, thereby implicitly promoting the Club's exclusivity. Further, it touts the social benefits associated with membership as well as skating related amenities. Moreover, the Pamphlet makes no mention of non-members' ability to use its facilities. Neither is there any indication that the Club advertises the availability of its facilities to the general public. Indeed, no evidence presented by the appellant provided insight as to how a member of the community-at-large would be apprised of the public's access to the Club.

Id. at 2007-216. The Board there ruled that the skating club's preference for members was "inconsistent with the nature of a charitable organization, the dominant purpose of which is for the public good and not merely to benefit its members." ***Id***. at 2007-217 (citing ***Massachusetts Medical Society***, 340 Mass. at 332).

In the instant appeals, appellant contends that the fact that a sign once existed inviting the public onto the subject properties indicates that they are available for public use. However, the Board found that the fact that such a sign did exist but was later removed instead reflects the neighborhood's strong resistance to the presence of the public on the subject properties, which was confirmed by Ms. MacDonald, who explained that her presence was challenged on her visits to the subject properties. Even if appellant never removed visitors from the subject properties, the facts that visitors' presence would be challenged, and that appellant did little to broadcast more than sporadically and to a sufficiently broad audience the availability of its land for public use, creates sufficient evidence for the Board to find that appellant holds the subject properties in a closed manner "inconsistent with the nature of a charitable organization." ***Id***. The Board thus found and ruled that the dominant use of the subject properties is for the benefit of the abutting neighbors, not for the community of Brookline at large, and certainly not for an indefinite number of persons.

Appellant contended that by offering areas in Brookline that are to be safe from development, it is offering a service to the Town and the residents of Brookline, who, according to a survey conducted by Brookline Parks Department, indicated their understanding of what "open space" was and their desire that "open space" conservation be a top priority for the Brookline

Conservation Commission. However, simply keeping land open and allowing its natural habitat to flourish is not sufficiently charitable. Appellant must demonstrate "an ***active appropriation*** to the immediate uses of the charitable cause for which the owner was organized. . . ." ***Board of Assessors of Boston v. The Vincent Club***, 351 Mass. 10, 14 (1966) (emphasis added) (quoting ***Babcock v. Leopold Morse Home for Infirm Hebrew & Orphanage***, 225 Mass. 418, 421 (1917)). Here, the evidence establishes that appellant holds the subject properties in a closed manner which primarily benefits the immediate abutters who enjoy the seclusion and protection against development in the neighborhood. Appellant failed to demonstrate any active appropriation of the subject properties to achieve a public benefit.

Appellant also argued that, by its very nature, conservation property must be maintained in its natural condition, and that creating groomed walking trails or other facilities would be contrary to the very definition of conservation. *See* ***Nature Preserve***, Mass. ATB Findings of Fact and Reports at 2000-807. However, under the facts of these appeals, which include the physical barricading of the subject properties, the existence of "no trespassing" and "private" signs along the periphery of the subject properties, and insufficient publication of the public's supposed invitation to enter the property, it appears that the dominant use of the property is for the benefit of abutting neighbors, and not consistent with appellant's Declaration of Trust "to make property of the Trust available for [the public's] enjoyment." *See also*, ***Marshfield Rod & Gun Club v. Assessors of Marshfield,*** Mass. ATB Findings of Fact and Reports 1998-1130, 1134 (Board denies exemption where appellant's activities were "available for the benefit of the members").

The Board in the present appeals found and ruled that, despite the possible, and seemingly occasional, presence of bird-watchers or dog-walkers, who were not shown to be members of the general public as opposed to the abutting neighbors or certain "friends" invited by appellant, the subject properties do not appear to be open and available to the general public. *Contrast* ***Trustees of Reservation v. Board of Assessors of Windsor***, Mass. ATB Findings of Fact and Reports 1991-225, 242 (finding that property upon which "[p]ublic cross-country ski trails traverse the grounds" was being actively appropriated to the organization's charitable cause). The Board thus found and ruled that appellant "operated primarily for the benefit of a limited class of persons," such that "the public at large benefit[s] only incidentally from [its] activities." ***Western Massachusetts Lifecare***, 434 Mass. at 104 (quoting ***Cummington***

School of the Arts v. Assessors of Cummington, 373 Mass. 597, 600 (1977).

Moreover, two distinct statutory schemes pertaining to the taxation of conservation land evidence a legislative intent that such land be treated as taxable, albeit at a reduced rate. First, G.L. c. 184, §§ 31 and 32 provide for the existence and enforcement of conservation restrictions held by "any governmental body or by a charitable corporation or trust," which may be placed on lands held "predominantly in their natural, scenic or open condition." Land subject to a conservation restriction pursuant to these sections is typically assessed at a discount to account for the encumbrance on development. *See, e.g.*, ***Parkinson v. Board of Assessors of Medfield***, 398 Mass. 112, 114 (1986) (stating that "it was the policy of the assessors to discount the value of property subject to a conservation restriction"). Second, G.L. c. 61B provides for the classification and taxation of "recreational land," which includes land "retained in substantially a natural, wild, or open condition," which would "allow to a significant extent the preservation of wildlife and other natural resources." G.L. c. 61B, § 1. Classified recreational land is also assessed at a lesser value: "in no event shall such valuation exceed twenty-five per cent of its fair cash value." G.L. c. 61B, § 2. Considering these provisions, the Board found and ruled that the Legislature has determined that, while conservation land should be afforded beneficial tax treatment, it nonetheless should be subject to tax and not exempt as charitable organization property under G.L. c. 59, § 5, Third.

Conclusion

The Board found and ruled that appellant failed to meet its burden of proving that it was a charitable organization for purposes of G.L. c. 59, § 5, Third, and therefore, failed to meet its burden of proving an entitlement to an exemption for the subject properties. Accordingly, the Board issued decisions for appellee in these appeals.

APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,
Attest: _____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

JOHN M. CORNISH et al., TRUSTEES OF THE SOUTH STREET NOMINEE TRUST	**v.**	**BOARD OF ASSESSORS OF THE TOWN OF CARLISLE**

Docket No. F281320

Promulgated:
May 12, 2008

ATB 2008-555

This is an appeal filed under the formal procedure, pursuant to G.L. c. 58A, § 7 and G.L. c. 61, § 3, from the refusal of appellee to abate withdrawal penalty taxes assessed by the Town of Carlisle to appellant under G.L. c. 61, § 7.

The parties agreed to forgo a hearing and submit this appeal on briefs pursuant to 831 CMR 1.31. Chairman Hammond and Commissioners Scharaffa, Egan, Rose, and Mulhern joined in the decision for appellant.

These findings of fact and report are made pursuant to a request by appellee under G.L. c. 58A, § 13 and 831 CMR 1.32.

David J. Martel, Esq. and *Rosemary Crowley*, Esq., for appellant.

Paul R. DeRensis, Esq. and *John R. Hucksam*, Jr., Esq., for appellee.

FINDINGS OF FACT AND REPORT

On the basis of uncontroverted facts contained in the submissions of the parties, the Appellate Tax Board ("Board") made the following findings of fact.

On April 1, 2005, the Trustees of the South Street Nominee Trust ("appellant" or "trustees") received a special warrant from the Board of Assessors of the Town of Carlisle ("appellee" or "assessors") assessing a withdrawal penalty tax on property identified as parcel 17-X, on Map 5 in the Town of Carlisle ("subject property"). The withdrawal penalty tax, in the amount of $83,603.40, was based on the difference between the tax paid under G.L. c. 61 and the tax that would have been paid under G.L. c. 59, for the fiscal years 1992 through 2000 ("withdrawal penalty period"). The withdrawal penalty taxes and interest assessed were as follows:

Fiscal Year	Tax
1992	$ 7,533.63
1993	$ 8,232.94
1994	$ 9,165.60
1995	$ 8,465.56
1996	$ 8,963.85
1997	$10,193.67
1998	$11,544.98
1999	$12,469.57
2000	$ 7,033.60
Total withdrawal penalty tax	**$83,603.40**

Dr. Albert E. Benfield, identified as the "indirect beneficiary" of the South Street Nominee Trust ("Trust"), owned the subject property during the withdrawal penalty period.[5] Appellant paid the withdrawal penalty tax in full on the date it was assessed, April 1, 2005. Appellant then timely filed an abatement application with the assessors on April 28, 2005. The assessors denied the application on July 6, 2005, and on July 13, 2005, appellant seasonably filed its Petition with the Board. On the basis of these facts, the Board ruled that it had jurisdiction over the subject appeal.

The subject property consisted of a 55-acre parcel of forest land in the Town of Carlisle.[6] Dr. Benfield owned the subject property from August 1, 1960 until December 29, 2000, when he conveyed title to the Carlisle Conservation Foundation ("Foundation") as a gift, retaining a non-transferable life estate in the subject property. From 1978 through 2002, the parcel was classified as forest land pursuant to G.L. c. 61, and had been certified as such by the State Forester in three consecutive forest management plans.[7] As a result, the land was taxed at the reduced rates provided by G.L. c. 61, § 3 during the withdrawal penalty period. From 2002 through 2005, the subject property remained in a forested, undeveloped state, but had no forest management plan in place. The assessors considered the Foundation to be a charitable organization and have thus treated the subject property as exempt from real estate tax under G.L. c. 59, § 5, Third. The Foundation did not file with the assessors an updated forest management plan or an application to recertify the subject property; it had little

[5] The Trust never held legal title to the subject property during the withdrawal penalty period. However, for purposes of the instant appeal, the Trustees have assumed that appellees assessed the withdrawal penalty tax to the Trust as proxy for Dr. Benfield.

[6] The subject property was a single parcel throughout the withdrawal penalty period but was subsequently divided into five distinct lots.

[7] The first forest management plan ran from January 1, 1978 to December 31, 1982, the second from January 1, 1983 to December 31, 1992, and the third from January 1, 1993 to December 31, 2002.

reason to do so since the assessors treated the subject property as tax exempt.

Based on the evidence submitted, and as will be explained further in the Opinion which follows, the Board found that Dr. Benfield's transfer of the subject property to the Foundation in 2000 in no way eliminated the subject property's forest land classification; instead, the subject property lost its forestry classification on December 31, 2002, when its forest management plan expired and the Foundation did not file a new plan. The Board thus found that the Foundation - not Dr. Benfield or the Trust - was the owner of the subject property at the time that the property no longer qualified as forest land and a withdrawal penalty tax could have been assessed under G.L. c. 61, § 7. Therefore, the withdrawal penalty tax assessment against appellant was improper. Accordingly, the Board issued a decision for appellant in this appeal.

OPINION

"When the owner of classified land withdraws such land or any part thereof from classification, or upon a final determination that said land should be withdrawn from classification, he shall pay to the city or town a withdrawal penalty tax . . . ." G.L. c. 61, § 7. The Board's jurisdiction over withdrawal penalty tax appeals stems from G.L. c. 61, § 3, which provides that "[a]ny person aggrieved by the refusal of the assessors to so abate a tax in whole or in part or by their failure to act upon such application by appeal to the appellate tax board within thirty days after the date of notice of decision of the assessors or within three months of the date of the application for abatement, whichever is later." *See also* ***ADDA Realty Trust v. Assessors of Berlin***, Mass. ATB Findings of Fact and Reports 2000-621, 634.

The fundamental issue raised by this appeal was whether Dr. Benfield owned the subject property for purposes of c. 61, § 7 at the time the land was withdrawn from classification. To resolve this issue, the Board analyzed when the subject property was actually withdrawn from forestry classification, and who held title to the subject property at that time.

1. The subject property did not lose its forestry classification until the last plan of forest management expired on December 31, 2002.

The assessors apparently determined that the subject property was removed from classification on the date that Dr. Benfield transferred it to the Foundation, December 29, 2000. However, while G.L. c. 61, § 8 expressly provides that

classified forest land "shall not be sold for, or converted to, residential, industrial or commercial use"[8] the statute is silent as to conveyances that do not convert classified forest land to residential, industrial or commercial use. There is nothing in the record to suggest that Dr. Benfield withdrew the subject property from G.L. c. 61 classification or sold the subject property for purposes prohibited by § 8.

Further, neither the assessors nor the State Forester had initiated formal proceedings as required by G.L. c. 61, § 2 to remove the subject property from G.L. c. 61 classification before the expiration of the forest management plan. G.L. c. 61, § 2.[9] *See also* ***Dandy Realty, LLC v. Board of Assessors of the Town of Cummington***, Mass. ATB Findings of Fact and Report 2006-853, 863-64 (ruling that § 7 requires a voluntary removal from classification by the owner or the initiation of formal withdrawal proceedings under § 2 as alternative "conditions precedent" to the assessment of a withdrawal penalty tax). Accordingly, the conveyance to the Foundation constituted neither a voluntary removal from classification nor the initiation of formal withdrawal proceedings under § 2.

Moreover, the parcels remained in their undeveloped, forested state through April 1, 2005, the date of the assessment of the withdrawal penalty tax, more than four years after the conveyance to the Foundation. There is no evidence in the record that the subject property was at any time used in a manner inconsistent with Chapter 61 forest land classification. The Board thus found and ruled that Dr. Benfield's conveyance did not terminate the subject property's forestry classification. In fact, the only circumstance on this record that could justify the assessors' removal of the subject property from forest land classification was the expiration of the forest management plan in 2002. G.L. c. 61, § 2 ("Land shall be removed from classification by the assessor unless, at least every ten years, the owner files with said assessor a new

---

[8] The statute requires the transferor to notify the city or town of the intent to transfer or convert the classified forest land for residential, industrial or commercial use, and give the town or city either a right of first refusal or an option to purchase the property. G.L. c. 61, § 8.

[9] "When in judgment of the assessors, land which is classified as forest land or which is the subject of an application for such classification is not being managed under a program, or is being used for purposes incompatible with forest production, or does not otherwise qualify under this chapter, the assessors may, on or before December first in any year file an appeal in writing mailed by certified mail to the state forester requesting a denial of application or, in the case of classified land, requesting removal of the land from such classification. . . . The state forester may initiate, on or before December first of any year, a proceeding to remove land from classification, sending notice of his action by certified mail to the assessors and the owner of such land."

certification by the state forester."). Neither Dr. Benfield nor the Trust owned the subject property when the forest management plan expired in 2002.

2. **Dr. Benfield, the life tenant at the time that the subject property lost its forestry classification, was not the "owner" of the property for purposes of G.L. c. 61, § 7.**

Section Seven of Chapter 61 states that "[w]hen **the owner** of classified land **withdraws** such land or any part thereof from classification, or upon a final determination that said land should be withdrawn from classification, he shall pay to the city or town a withdrawal penalty tax . . . ." (emphasis added).

Appellee contended that, because property taxes can be properly assessed to the holder of a life estate under G.L. c. 59, § 11,[10] then a withdrawal penalty tax could also be assessed to a life tenant. However, the assessors' reliance on the general provisions of G.L. c. 59 is misplaced, because the withdrawal penalty tax is assessed under the specific provision of G.L. c. 61, § 7. *See* ***W.D. Cowls, Inc. v. Board of Assessors of Shutesbury***, 34 Mass. App. Ct. 944, 946 (1993) (ruling that the filing deadlines in G.L. c. 61 supersede the general deadlines in G.L. c. 59 for purposes of the Board's jurisdiction over a forest land tax appeal). The legislature made the "owner" solely responsible for withdrawal penalty taxes under G.L. c. 61, § 7, and explicitly defined the "owner" as the "person or persons holding title to a parcel of forest land." G.L. c. 61, § 1. *See also* 304 CMR 8.02 (defining "owner" as "the person or persons holding an undivided fee interest in the subject parcel under a duly recorded deed").

On April 1, 2005, the date of the assessment of the withdrawal penalty tax, the Foundation was the "owner" of the subject property. The Foundation, not Dr. Benfield, held legal title to the subject property. *See, e.g.,* ***Aronian v. Asadoorian et al.***, 315 Mass. 274, 275 (1943) (distinguishing between "legal title in fee" and "merely a life estate"). For the entire period that Dr. Benfield held title to the subject property, it was classified as forest land, with a forest management plan in place. The last forest management plan did not expire until December 31, 2002, after Dr. Benfield's conveyance to the Foundation. At that time, the Foundation was the rightful owner

[10] Under G.L. c. 59, § 11, "whenever the commissioner deems it proper he may . . . authorize the assessment of taxes upon real estate to the person who is in possession . . . [the commissioner can also] authorize the assessment of taxes upon any present interest in real estate to the owner of such interest . . . ."

of the property, and thus it was the responsibility of the Foundation, not Dr. Benfield, to apply to recertify the subject property. G.L. c. 61, § 2 ("Land shall be removed from classification by the assessor unless, at least every ten years, the ***owner*** files with said assessor a new certification by the state forester.") (emphasis added); 304 CMR 8.05(1)("An ***owner*** shall submit to the State Forester a complete application [to renew the forestry classification] . . .")(emphasis added). Whether or not Dr. Benfield had exclusive possession of the subject property was irrelevant under the plain terms of § 2. The Board thus found and ruled that Dr. Benfield could not be assessed the withdrawal penalty tax pursuant to § 7. Accordingly, the Board ruled that the withdrawal penalty tax assessment at issue in this appeal was improper.

The Board notes that a separate ground, not available at the time it reached its decision for appellant in this appeal, supports its decision. Subsequent to the Board's decision in the instant appeal, the Appeals Court decided ***South Street Nominee Trust v. Assessors of Carlisle***, 70 Mass. App. Ct. 853 (2007), *rev. denied*, 450 Mass. 1109 (2008), which reversed the Board's ruling that a withdrawal penalty tax under G.L. c. 61, § 7 was due in the circumstances of that appeal. The Appeals Court disagreed with the Board's interpretation of St. 1981, c. 768, § 2, which provided that the withdrawal penalty tax at issue in ***South Street*** and the present appeal:

> shall not apply to land classified prior to the effective date of this act until the expiration of the term of the forest management plan governing such land or until one year after the withdrawal of such land from classification, whichever period is longer. Notwithstanding the provisions of any laws to the contrary, the owner of such land, prior to the end of said period, may elect to remove such land from classification without imposition of a withdrawal tax or may elect to apply for classification of such land under the provisions of section one . . . .

As in the present appeal, the property owner in ***South Street*** owned land that was classified as forest land under G.L. c. 61, when the 1981 amendment to G.L. c. 61 was enacted. The Appeals Court ruled that Section 2 of the 1981 amendment exempted the property from the post-1981 provisions of G.L. c. 61, including the withdrawal penalty tax provisions, because "'until one year after withdrawal of such land from classification' creates a right to a tax-exempt withdrawal of pre-1982 classified forest land which does not expire until

exercised." ***South Street***, 70 Mass. App. Ct at 857. Accordingly, the Appeals Court ruled that Section 2 of the 1981 amendment exempted all property from the withdrawal penalty tax provisions if, like the property at issue in this appeal, it had been classified prior to the post-1981 version of G.L. c. 61 and continuously recertified by the State Forester until withdrawal of the property from classification. ***Id***. at 858-59.

The subject property in the present appeal had been subject to a forest management plan continuously from 1978 through 2002. Therefore, the Appeals Court's ruling in ***South Street*** is dispositive of this appeal.

Conclusion

For all of the foregoing reasons, the assessment of the subject withdrawal penalty tax was improper. Accordingly, the Board decided this appeal for appellant.

APPELLATE TAX BOARD

By:_____

Thomas W. Hammond, Jr., Chairman

A true copy,
Attest:_____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

FORGES FARM, INC. **v.** **BOARD OF ASSESSORS OF THE TOWN OF PLYMOUTH**

Docket Nos.: F283127
F283128
F283129

Promulgated:
October 18, 2007

ATB 2007-1197

These are related appeals filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the appellee to grant exemptions and abate taxes on certain real estate in the Town of Plymouth, assessed to the appellant under G.L. c. 59, §§ 11 and 38 for fiscal year 2006.

Commissioner Egan heard these appeals and was joined by Chairman Hammond and Commissioners Scharaffa, Rose, and Mulhern in the decisions for the appellee.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.

Lothrop Withington III, Esq., for the appellant.
Catherine M. Salmon, Assessor, for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of the exhibits and testimony offered into evidence at the hearing of these appeals, the Appellate Tax Board ("Board") made the following findings of fact.

On January 1, 2005, the relevant assessment date for fiscal year 2006, Forges Farm, Inc. ("Forges") was the assessed owner of a parcel of real estate consisting of three contiguous lots -- two located off Russell Mills Road, and one located off Jordan Road -- in the Town of Plymouth, Massachusetts (collectively, the "subject property"). The Board of Assessors of the Town of Plymouth ("assessors") valued the subject property at $128,600 for fiscal year 2006,[11] and assessed a tax at the rate of $9.88

[11] The lot referenced in Docket No. F283127 ("lot A") was valued at $62,700; the lot referenced in Docket No. F283128 ("lot B") was valued at $31,100; and the lot referenced in Docket No. F283129 ("lot C") was valued at $34,800.

per thousand, in the amount of $1,289.63,[12] which Forges timely paid.[13]

Forges filed its Form 3 ABC for fiscal year 2006 on February 28, 2005. On January 18, 2006, Forges timely filed applications for abatement with the assessors. The assessors denied the applications on March 14, 2006, and on April 10, 2006, Forges seasonably filed its Petitions with the Board. On the basis of these facts, the Board found and ruled that it had jurisdiction over the subject appeals.

The three contiguous lots that comprise the subject property have a total area of 11.219 acres,[14] and frontage on Hayden Pond. There is no direct access to the subject property by road, since it is surrounded on all sides by lots belonging to other landowners. The subject property is primarily held in its natural state.[15]

Forges was formed in 2001 as a Massachusetts Chapter 180 non-profit corporation, and has been granted 501(c)(3) status by the Internal Revenue Service. According to its Articles of Organization, Forges was created to:

> participate in scientific research and educational activities related to conservation and the environment in and around the Town of Plymouth, Plymouth County, Massachusetts; to build commitment, involvement and financial support for the scientific research, conservation programs and educational activities of the Corporation, to act as a coordinating organization for agencies active in the fields of scientific research, conservation, and environmental protection and education, to acquire by purchase, gift, lease, restriction, easement, exchange, or otherwise such real or personal property, both tangible and intangible, of every kind, and to use such property in any manner deemed by the Corporation to be consistent with such purposes: to hold, operate, manage, develop, construct, mortgage, lease, sell, assign or otherwise acquire or dispose of such property; and to engage in such other activities as may be incidental thereto[.]

---

[12] The tax assessed includes Community Preservation Act charges.

[13] Because the tax due for the fiscal year for each parcel was less than $3,000, timely payment of the tax was not required to establish the Board's jurisdiction. *See* G.L. c. 59, § 64.

[14] Lot A is 6.56 acres, lot B is 1.019 acres, and lot C is 3.64 acres.

[15] The tax bill for lot B also includes a $1,700 valuation for buildings. Neither party offered evidence concerning any buildings on the subject property.

On July 9, 2003, Forges purchased lots A and C from William S. Brewster, and on October 16, 2003, Forges purchased lot B from Ralph Oehme.

Forges argued that the subject property should be exempt from taxation under G.L. c. 59, § 5, Third. Forges claimed that the land is held for conservation purposes; specifically, Forges alleged that it is holding the parcels to reduce use pressure on the Eel River watershed, which Forges believes is threatened by a nearby sewer treatment plant. In support of its claims, Forges offered: a copy of its Articles of Organization; copies of its Petitions; a copy of the Board's Findings of Fact and Report in ***Nature Preserve, Inc. v. Assessors of the Town of Pembroke***, Mass. ATB Findings of Fact and Reports 2000-796; and two maps of the subject property.

The assessors argued that the subject property was not exempt under G.L. c. 59, § 5, Third, because the use of the subject property did not benefit a large or indefinite class of beneficiaries, but benefited Forges and other surrounding landowners. In support of the subject assessments, the appellee offered into evidence: the Forges's Articles of Organization; correspondence between the assessors and Forges regarding its exemption claim; correspondence between the assessors and the Department of Revenue's Division of Local Services regarding the Forges's exemption claim; a document labeled "PRECEDENT" listing four prior cases where exempt status was denied to various conservation organizations; several maps showing the subject property; an owners list for all property in the Town of Plymouth; a series of photographs showing that there is no public access to the subject property; the necessary jurisdictional documents; property record cards; and Forges's applications for statutory exemption, both past and present.

The Board found that, by Forges' own admission in its March 14, 2005, correspondence with the assessors, the subject property was not accessible to the public. Rather, as the correspondence states, "[members of the public] would have to contact the officers of Forges Farm, Inc. in order to gain access." Although Forges claimed that it would allow access to those who contacted its officers, the land is not marked with any sort of sign indicating that access can be attained in this manner, and Forges has not made any other attempt to inform the public that the subject property is accessible. Further, Forges offered no evidence that it had ever been engaged in the charitable purposes listed in its Articles of Organization -- "scientific research and educational activities related to conservation and the environment" -- on the subject property. Forges offered no educational programs or classes, maintained no

trails, engaged in no research, and generally provided no public service of any kind on the subject property.

On this basis, to the extent it is a finding of fact, the Board found that Forges was not a charitable organization for purposes of G.L. c. 59, § 5, Third and did not occupy the subject property for its stated charitable purposes. Accordingly, the Board issued decisions for the appellee in these appeals.

OPINION

"All property, real and personal, situated within the commonwealth, . . . unless expressly exempt, shall be subject to taxation." G.L. c. 59, § 2. Section 5 of Chapter 59 specifies classes of property that "shall be exempt from taxation." The clause relevant to these appeals, § 5, Third, exempts from taxation all "real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized[.]"

"An exemption from taxation is recognized 'only where the property falls clearly and unmistakably within the express words of a legislative command,' and it is the taxpayer who bears the burden of proof on the claim of exemption." ***Lasell Village, Inc. v. Assessors of Newton***, 67 Mass. App. Ct. 414, 419 (2006)(quoting ***Boston Chamber of Commerce v. Assessors of Boston***, 315 Mass. 712, 716 (1944)). "Any doubt in the application of an exemption statute operates against the party claiming tax exemption." ***Mount Auburn Hospital v. Assessors of Watertown***, 55 Mass. App. Ct. 611, 616 (2002)(citing ***Boston Symphony Orchestra, Inc. v. Assessors of Boston***, 294 Mass. 248, 257 (1936)).

For purposes of the exemption under G.L. c. 59, § 5, Third, a "charity" has been traditionally defined as:

> a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.

Jackson v. Phillips, 96 Mass. (14 Allen) 539, 556 (1867). *Accord* ***Western Massachusetts Lifecare Corp. v. Assessors of Springfield***, 434 Mass. 96, 102 (2001); ***Brady v. Ceaty***, 349 Mass. 180, 181-82 (1965); ***Massachusetts Medical Society v. Assessors***

of Boston, 340 Mass. 327, 331 (1960); ***Boston Chamber of Commerce***, 315 Mass. at 716; ***Boston Symphony Orchestra v. Assessors of Boston,*** 294 Mass. at 254-55. While Massachusetts courts have recognized "the manifold new forms in which charity may find expression," it has also been long held that "the more remote the objects and methods become from the traditionally recognized objects and methods the more care must be taken to preserve sound principles and to avoid unwarranted exemptions from the burdens of government." ***Boston Chamber of Commerce***, 315 Mass. at 718.

The fact that Forges was formed as a Massachusetts Chapter 180 non-profit corporation, and has been granted 501(c)(3) status by the Internal Revenue Service, is not dispositive. An organization claiming an exemption under clause Third cannot succeed simply by proving that it was "organized as a charitable organization[,] [but] [r]ather . . . 'must prove that it is in fact so conducted that in actual operation it is a public charity.'" ***Western Massachusetts Lifecare***, 434 Mass. at 102 (quoting ***Jacob's Pillow Dance Festival, Inc. v. Assessors of Becket***, 320 Mass. 311, 313 (1946)).

Although Forges' Articles of Organization lists purposes appropriately classified as charitable,[16] namely to provide educational programs and conduct scientific research in the area of conservation, Forges failed to prove that it ever engaged in these activities, much less on the subject property. Forges provided no classes or seminars, printed no pamphlets of other educational materials, and conducted no scientific research. Rather, Forge's true purpose, as stated in its correspondence to the assessors dated March 14, 2006, was to hold the property as vacant, natural land. This fact alone bars exemption since a public charity is "'not entitled to tax exemption if the property is occupied by it for a purpose other than that for which it is organized.'" ***Lynn Hospital v. Board of Assessors of Lynn***, 383 Mass. 14, 18 (1981) (quoting ***Milton Hospital & Convalescent Home v. Assessors of Milton***, 360 Mass. 63, 69 (1971)).

Further, the dominant purpose of an organization claiming a charitable exemption must be for the public good, "and the work done for its members [must be] but the means adopted for this purpose." ***Massachusetts Medical Society***, 340 Mass. at 332. This requirement remains the case even where "[t]here can be no doubt that the work of the [organization] is most laudable" and the public clearly benefits from the work done by the organization for its members. ***Id***. at 332-33. Public access is

---

[16] An organization's Articles of Organization are an appropriate means by which to determine its charitable purposes. *See* ***Board of Assessors v. Vincent Club***, 351 Mass. 10, 12 (1966).

often a key factor in this analysis. This Board has consistently ruled that where public access is restricted, the subject property is being held primarily for the benefit of organization members, and not the public. *See, e.g.,* ***The Skating Club of Boston v. Assessors of Boston,*** Mass. ATB Findings of Fact and Reports 2007-193; ***Wing's Neck Conservation Foundation, Inc. v. Bourne***, Mass. ATB Findings of Fact and Reports 2003-329; ***Nature Preserve, Inc. v. Assessors of the Town of Pembroke***, Mass. ATB Findings of Fact and Reports 2000-796; ***Animal Rescue League v. Assessors of Boston***, Mass. ATB Findings of Fact and Reports 2000-96; ***Marshfield Rod & Gun Club, Inc. v. Assessors of Marshfield***, Mass. ATB Findings of Fact and Reports 1998-1130.

In the case at hand, there was no public access to the subject property. Private property surrounded the subject property on all sides, providing no method of access from any public way. Although Forges claims that the public was free to view the property, and could arrange such a viewing by contacting an officer of Forges, there were no signs or other means to convey this information to the public. Further, there was no evidence that any member of the public was ever granted access to the subject property.

Despite the case law cited above, Forges argued that the lack of public access to the subject property should not affect its eligibility for a charitable exemption. Forges maintained that allowing public access to the subject property would be contrary to its charitable purpose of conservation and that its officers only entered on the land twice per year to perform inspections. In contrast, the foregoing cases involved entities that were actively using the property on a regular basis.

However, as this Board has previously held, "simply keeping the land open . . . is not enough to satisfy the requirement of 'occupying' the property within the meaning of the statute." ***Nature Preserve, Inc. v. Assessors of Pembroke***, *supra* at 808 (*citing* ***Animal Rescue League v. Assessors of Boston***, *supra* at 102). Rather, there must be an "active appropriation to the immediate uses of the charitable cause for which the owner was organized." ***Board of Assessors of Boston v. The Vincent Club,*** 351 Mass. 10, 14, (1966)(*quoting* ***Babcock v. Leopold Morse Home for Infirm Hebrew & Orphanage,*** 225 Mass. 418, 421 (1917)).

Private owners who wish to conserve land in its natural state are afforded property tax relief under statutes other than G.L. c. 59, § 5, Third. For example, G.L. c. 61B provides that land retained in its natural state may be taxed at no more than 25% of its fair market value, if certain requirements are met. In addition, a taxpayer may also attain property tax relief by placing a conservation easement on land pursuant to G.L. c. 184,

§ 31. *See* ***Parkinson v. Board of Assessors***, 398 Mass. 112, 116 (1986). These statutory provisions, and not the charitable exemption under G.L. c. 59, § 5, Third, are the appropriate vehicles through which owners of conservation land may be relieved of their property tax burden. Further, these provisions evidence a legislative intent that owners of land kept in its open and natural state receive a significant tax benefit, but not a total exemption from tax.

On this basis, the Board found that Forges did not meet its burden of proving that it was a charitable organization that occupied the subject property to further its stated charitable purposes. Accordingly, the Board issued a decision for the appellee.

THE APPELLATE TAX BOARD

By: _____

Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____

Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

HENRY F. KABAT and MARGARET MULLINS	**v.**	**BOARD OF ASSESSORS OF THE TOWN OF CUMMINGTON**

Docket No. F287312

Promulgated:
April 2, 2008

ATB 2008-397

This is an appeal filed under the formal procedure, pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the appellee to abate taxes assessed on real estate located at 35 Powell Road in the Town of Cummington, owned by and assessed to the appellants under G.L. c. 59, §§ 11 and 38, for fiscal year 2006.

Commissioner Mulhern ("Presiding Commissioner") heard this appeal, and, in accordance with G.L. c. 58A, § 1A and 831 CMR 1.30, issued a single-member decision for the appellants.

These findings of fact and report are made pursuant to a request by the appellants under G.L. c. 58A, § 13 and 831 CMR 1.32.

Mark A. Tanner, Esq., for the appellants.
Karen Tonelli, assessor, for the appellee.

FINDINGS OF FACT AND REPORT

On January 1, 2005, the relevant assessment date for fiscal year 2006 ("fiscal year at issue"), Henry F. Kabat and Margaret Mullins ("appellants") were the assessed owners of a 28.50-acre parcel of real estate and structures located at 35 Powell Road in the Town of Cummington ("subject property"). The subject property is located in an area of Cummington that is zoned Rural/Residential and is a mix of open land and single-family dwellings.

The subject property is level to rolling in contour, with some wooded areas. It is situated near the intersection of Powell Road and West Cummington Road. Located on the subject property are a 35-by-8 foot trailer on a hitch, a storage garage, a pole barn, and a shed.

For the fiscal year at issue, the Cummington Board of Assessors ("assessors") valued the subject property at $120,400 broken down as follows: land value, $71,700; trailer value, $31,500; storage garage, $12,200; pole barn, $4,500; and the shed, $500. The assessors assessed a tax, at the rate of $11.64 per thousand, in the amount of $1,401.46, which the appellants

timely paid without incurring interest. Appellants timely filed an Application for Abatement with the assessors on February 9, 2006.[17] On April 4, 2006, the assessors denied the appellants' application and on June 29, 2006, the appellants seasonably appealed the denial to the Appellate Tax Board ("Board"). On the basis of these facts, the Presiding Commissioner found and ruled that the Board had jurisdiction over this appeal.

Appellants contended that the land, trailer, storage garage, pole barn and shed were overvalued.[18] They further contended that the trailer was a registered vehicle, not real estate, and as such was not subject to real estate taxation. Given the nature of the improvements, both parties treated the land portion of the subject property as a discrete unimproved parcel, as opposed to one of several components comprising an improved parcel. Under the circumstances present in this appeal, the Board found that this approach was appropriate.

In support of their claim that the land was overvalued, appellants introduced an appraisal report prepared by Cindy Higginbotham ("the appraiser") of Northampton Appraisal Services. According to the report, the appraiser performed her appraisal utilizing a sales-comparison approach. The appraiser compared three land sales: one in Cummington and two in the neighboring town of Ashfield. The sale prices ranged from $40,000 to $123,000 with acreage ranging from as small as 9 acres to as large as 114 acres. The sales occurred between December 2004 and August 2005. Based on these sales, the appraiser concluded that the value of the subject property's land was $65,000.

In support of their valuation of the land portion of the subject property, the assessors presented evidence, including deeds and maps, of Cummington land sales that occurred between January 6, 2005 and September 7, 2006. Three sales of note were: a 9.45-acre parcel of land on Pleasant and Trouble Streets, which sold on September 7, 2005 for $92,000; a 3.946-acre parcel of land on Harlow Road, which sold on July 5, 2006 for $87,000; and a 4.769-acre parcel of land on Cole Street which sold on September 7, 2006 for $66,500.

---

[17] The appellants' abatement application was received by the assessors on Tuesday, February 14, 2006, one day after the due date. However, pursuant to G.L. c. 59, § 59, the application is deemed to be filed on the date of the postmark affixed on the envelope in which the application was mailed to the assessors, in this case, February 9, 2006.

[18] Given the nature of the improvements, both parties treated the land portion of the subject property as a discrete, unimproved parcel, as opposed to one of several components comprising an improved parcel. Under the circumstances present in this appeal, the Board found that this approach was appropriate.

After considering all of the evidence, the Presiding Commissioner gave little weight to the sales approach offered by the appellants. Despite the existence of sales of proximate comparable lots, as evidenced by the assessors' analysis, the appellants relied on only three sales, two of which were outside the town. Accordingly, the Presiding Commissioner found that the appellants did not meet their burden of proving that the land was overvalued.

With regard to the assessors' classification of the trailer as real estate, appellants argued that because it was registered as a motor vehicle in the nearby city of Northhampton, the trailer was not subject to real estate taxation. They further claimed that the small size of the trailer and the fact that it was on a trailer hitch was further evidence that it was moveable, and, therefore, personal property. However, the Presiding Commissioner found that the trailer had been on the site for several years and had been utilized by appellants as temporary housing. Further, the Presiding Commissioner found and ruled, for the reasons detailed in the following Opinion, that the ability to move the trailer from the site did not mean that it could not be taxed as real estate. Therefore, the Presiding Commissioner found and ruled that the appellants failed to meet their burden of demonstrating that the trailer was not subject to real estate taxation.

As to the valuation of the trailer, appellants produced a title and sales slip indicating that they purchased the trailer in 1986 for $8,000. The appellants further argued that this type of trailer depreciates in value over time. Appellants offered into evidence listings of comparable used trailers, which indicated that a comparable trailer and hitch could be purchased for far less than the assessed value. The Presiding Commissioner found that the appellants were knowledgeable about and familiar with the value of their trailer and agreed with the appellants' contention that the trailer had depreciated in value since its purchase in 1986. Based on the above facts, the Presiding Commissioner found and ruled that the appellants met their burden of proving that the trailer was overvalued and that the fair cash value of the trailer as of January 1, 2005 was $5,000.

With respect to the valuation of the storage garage and pole barn, the appellants did not provide any evidence to support their claim of overvaluation. In contrast, to support their assessment of these structures and the shed, the assessors offered the town's cost manual, which contained values for similar buildings in similar conditions. Because appellants offered no evidence of the value of the storage garage and pole barn and the assessors' evidence supported the assessments

attributed to these structures, the Presiding Commissioner found and ruled that the appellants failed to meet their burden of proving that the storage garage and pole barn were overvalued.

However, as to the matter of the shed, the Presiding Commissioner examined several photographs of the structure offered into evidence. The photographs showed the shed in extreme disrepair and in a highly dilapidated condition. Based on these photographs, the Presiding Commissioner found and ruled that the shed contributed nothing to the value of the property and was effectively worthless. Accordingly, the Presiding Commissioner found and ruled the appellants met their burden of proving that the shed was overvalued by the entirety of its assessed $500 value.

On the basis of these facts, the Presiding Commissioner found and ruled that the appellants met their burden of proving that the subject property was overvalued in the amount of $27,000.[19]

OPINION

"All property, real and personal, situated within the commonwealth . . . shall be subject to taxation." G.L. c. 59, § 2. Pursuant to G.L. c. 59, § 2A, "[r]eal property for the purpose of taxation shall include all land within the commonwealth and ***all buildings and other things thereon or affixed thereto***, unless otherwise exempted from taxation under other provisions of the law" (emphasis added). The plain language of § 2A(a) "does not require the Structures to be affixed to the subject property for them to be classified as taxable real property." ***Hasco Associates v. Assessors of Wareham,*** Mass. ATB Finds of Fact and Report 2000-178, 183. "The use of "or" provides an alternative: the Structures could be "affixed" to the site, but they also could merely be 'thereon.'" ***Id***.

It is "well settled that land and buildings erected thereon or affixed thereto are properly taxed as a unit and this rule is not affected by private agreements or by the degree of physical attachment to the land." ***Ellis v. Assessors of Achushnet,*** 358 Mass. 473, 475 (1970) (ruling that mobile home properly taxable as real estate); *see also* ***Franklin v. Metcalfe***, 307 Mass. 386, 388-89 (ruling that lunch cart standing "on its own wheels on abutments which are four cement poles" is taxable as real estate even though the cart could be "removed at any time" from the land). Accordingly, the Board ruled here that the appellants'

[19] Due to a typographical error, the original Decision in this appeal showed an overvaluation of $27,400 and an abatement of $318.94. A revised Decision, issued contemporaneously with these findings of fact and report, shows the correct overvaluation of $27,000 and abatement in the amount of $314.28.

trailer located on their land was properly taxable as real estate.

Regarding the appellants' overvaluation claims, "[t]he burden of proof is upon the petitioner[s] to make out [their] right as [a] matter of law to [an] abatement of the tax.'" ***Schlaiker v. Assessors of Great Barrington***, 365 Mass. 243, 245 (1974) (quoting ***Judson Freight Forwarding Co. v. Commonwealth***, 242 Mass. 47, 55 (1922)). "[T]he [B]oard is entitled to 'presume that the valuation made by the assessors [is] valid unless the taxpayers . . . prov[e] the contrary.'" ***General Electric Co. v. Assessors of Lynn***, 393 Mass. 591, 598 (1984) (quoting ***Schlaiker***, 365 Mass. at 245).

In appeals before this Board, taxpayers "'may present persuasive evidence of overvaluation either by exposing flaws or errors in the assessors' method of valuation, or by introducing affirmative evidence of value which undermines the assessors' valuation.'" ***General Electric Co.,*** 393 Mass. at 600 (quoting ***Donlon v. Assessors of Holliston***, 389 Mass. 848, 855 (1983). When evaluating this evidence, "[the Board can] accept such portions of the evidence as appear to have the more convincing weight. The market value of the property [can] not be proved with mathematical certainty and must ultimately rest in the realm of opinion, estimate, and judgment . . . . The board [can] select the various elements of value as shown by the record and from them form . . . its own independent judgment." ***Assessors of Quincy v. Boston Consolidated Gas Company***, 309 Mass. 60, 72 (1941). *See also* ***North American Philips Lighting Corp. v. Assessors of Lynn***, 392 Mass. 296, 300 (1984); ***New Boston Garden***, 383 Mass. 456, 473 (1981); ***Jordan Marsh Co. v. Assessors of Malden***, 359 Mass. 106, 110 (1971).

In the present appeal, while the appellants' appraiser valued the land at less than the assessors, her sales comparison approach included only three sales, two of which were outside the town of Cummington. The Presiding Commissioner found that this analysis was insufficient to rebut the presumably valid assessment, especially in light of the sales data that the assessors provided in support of the subject valuation.

With regard to the trailer, however, the Presiding Commissioner found that the appellants produced reliable evidence of overvaluation, including: their payment of only $8,000 in 1986 for the trailer; credible testimony that the trailer is an asset which depreciates over time; and credible testimony concerning the value of comparable used trailers available on the market. Based on this evidence, the Presiding Commissioner found and ruled that the fair cash value of the trailer as of the relevant assessment date was $5,000, far less than the $31,500 assessment.

The Presiding Commissioner further found and ruled that the appellants did not meet their burden of proving that the storage garage and pole barn were overvalued, especially in light of the town manual, which supported the assessors' valuation. However, based on the photographs offered into evidence by the appellants, the Presiding Commissioner found and ruled that the shed, valued by the assessors at $500, was in such deplorable condition that it had no value and contributed nothing to the value of the subject property.

On this basis, the Presiding Commissioner found and ruled that the appellants met their burden of proving that the assessed value of the subject property for the fiscal year at issue exceeded its fair cash value by $27,000. Accordingly, the Presiding Commissioner issued a decision for the appellants in this appeal.

APPELLATE TAX BOARD

By: _____

Thomas J. Mulhern, Commissioner

A true copy,

Attest: _____

Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

KING CRUSHER INC. v. COMMISSIONER OF REVENUE

Docket No. C278113

Promulgated:
January 15, 2008

ATB 2008-38

This is an appeal under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 58 § 2 from the refusal of the appellee Commissioner of Revenue ("appellee" or "Commissioner") to classify the appellant as a manufacturing corporation for the tax year ending December 31, 2005

Chairman Hammond heard the appeal. Commissioners Scharaffa, Egan, Rose, and Mulhern joined him in the decision for the appellee.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.

Phillip Bonner, pro se, for the appellant.
Brett Goldberg, Esq., for the appellee.

FINDINGS OF FACT AND REPORT

Appellant King Crusher Inc. ("appellant") filed this appeal from the Commissioner's denial of its application for classification as a manufacturing corporation for the tax year 2005 ("tax year at issue"). Pursuant to 831 CMR 1.31, the parties filed a statement of agreed facts and submitted the case on briefs with no hearing. On the basis of the statement of agreed facts, the Appellate Tax Board ("Board") made the following findings of fact.

On August 3, 2004, appellant applied to the Commissioner for classification as a manufacturing corporation by filing Form 355Q, Statement Related to Manufacturing Activities. By letter dated September 3, 2004, the Commissioner denied appellant's application. On April 25, 2005, the Commissioner forwarded to the boards of assessors of all municipalities in the Commonwealth the list of corporations classified as manufacturing corporations as required under G.L. c. 58, § 2. The appellant was not classified as a manufacturing corporation on the Commissioner's April 25, 2005 list and, on May 2, 2005, appellant filed its appeal with this Board. On the basis of these facts, the Board found and ruled that it had jurisdiction over this appeal.

Appellant was organized as a Massachusetts corporation in 1978 with a principal place of business in Lancaster, Massachusetts. At all material times,[20] appellant operated a mobile automobile crushing business. In the conduct of its business, appellant purchased automobiles from salvage yards, brought its mobile equipment to the salvage yards where the automobiles were located, and then crushed the automobiles using a machine known as an "Al-jon Impact V Car Crusher" ("Impact V"). The crushed automobiles were then loaded on appellant's trailer and taken to an unaffiliated company which shredded and separated the metals ("shredding company").

In most cases, appellant's employees removed and discarded the vehicles' batteries, gas tanks, and tires prior to crushing. After appellant removed these items, appellant loaded the vehicle to be crushed on the crushing bed of the Impact V using a front-end loader equipped with forks instead of a bucket. The Impact V used a four-post guide system that distributed 150 tons of crushing force to the four corners of the crushing lid. Once the vehicle was placed on the crushing bed of the Impact V, the crushing lid was lowered and the vehicle was ultimately crushed to a height of eighteen inches. Once crushed, the vehicles were referred to as "flats."

This crushing process was repeated until there were four flats on the Impact V. The four flats were then removed by the front end loader and placed on appellant's trailer for transport to the shredding company.

Appellant sold and transported the flats to two shredding companies, WTE Recycling located in Greenfield Massachusetts and Prolerized New England Co., located in Everett, Massachusetts. The shredding companies were not affiliated with appellant. The shredding companies shredded the flats and used magnets to separate the ferrous from the non-ferrous metal. The shredding companies then bundled and shipped the ferrous metal to both U.S. and foreign purchasers to be melted and eventually molded into other products. In some cases, the shredding companies also bundled and sold the non-ferrous metals for processing into other products. Any remaining non-saleable material, known as "shred," was then discarded by the shredding companies.

Most of the vehicles processed by the shredding companies were crushed, either by entities like appellant or the shredding companies themselves, prior to shredding. However, the shredding process did not require the vehicles to be crushed prior to shredding. If a vehicle was not crushed prior to shredding, the shredding companies generally removed the gas

---

[20] Unless explicitly stated otherwise, all factual findings relate to the tax year at issue.

tank and the battery to avoid the possibility of explosions and to minimize damage to the shredding equipment. Removal of tires prior to shredding was not required, although the shredding companies preferred their removal to minimize the amount of material to be discarded at the end of the process. The parties further stipulated that the shredding companies also operated their own crushing equipment and crushed some vehicles as part of their operations.

The record indicates that the shredding companies paid approximately $50 more per ton for flats that had the batteries, gas tanks, and tires removed. The main reason for the higher sale price appears to be the reduction in processing required of the shredding companies and in the amount of material the shredding company had to discard on site.

On the basis of these facts, and for the reasons detailed in the following Opinion, the Board found and ruled that appellant's activities did not cause a sufficient degree of change and refinement to a source material to constitute "manufacturing." Moreover, the Board found and ruled on this record that appellant's activities did not constitute an essential and integral part of the manufacturing process. Accordingly, the Board issued a decision for the appellee in this appeal.

OPINION

The issue presented in this appeal is whether appellant is "engaged in manufacturing" for purposes of G.L. c. 63, § 38C and therefore entitled to classification as a manufacturing corporation under G.L. c. 58, § 2. The lack of a statutory definition of the term "manufacturing" has led to a plethora of litigation before the Board and reviewing courts, as the nuances of certain industries and businesses have been analyzed in light of precedent and comparison to similar industries. *See, e.g.,* ***William J. Sullivan v. Commissioner,*** 413 Mass. 576 (1992).

Although the lack of a statutory definition has resulted in a "chameleon-like" (***Southeast Sand & Gravel, Inc. v. Commissioner,*** 384 Mass. 794, 795 (1981)) and "flexible" (***Joseph T. Rossi Corp. v. State Tax Comm'n,*** 369 Mass. 178, 181 (1975)) definition of "manufacturing," the basic concept first articulated in ***Boston & Me. R.R. v. Billerica,*** 262 Mass. 439, 444-45 (1928) has remained constant: manufacturing requires "change wrought through the application of forces directed by the human mind, which results in the transformation of some preexisting substance or element into something different, with a new name, nature or use."

In ***Sullivan,*** the taxpayer purchased scrap metal -- consisting of pipe, boilers, plumbing fixtures, farm machinery,

industrial scrap chips, automobile parts, I-beams, air conditioners, refrigerators, washing machines, and stoves -- and processed the scrap into various-sized pieces or cubes of a particular type and grade of metal to meet its customers' specifications. ***Sullivan,*** 413 Mass. at 577-78. The taxpayer first separated and graded the waste metal it received by metallic content and then separated ferrous and non-ferrous metal, for the most part by using "electromagnetic separation." ***Id.*** at 577. It also used a wire-stripping machine to remove the insulating jacket from metal cable. ***Id.*** at 578.

Once isolated by content, size and grade, the metal was either compressed into a cube or otherwise prepared for sale to its steel mill or foundry customers. ***Id.*** Each customer specified the grade of scrap to be purchased using standard industry specifications regarding size and metallurgical content; non-conforming scrap was either downgraded and sold at a reduced price or rejected. ***Id.***

Although it acknowledged that the taxpayer's process "falls close to the line between manufacturing and nonmanufacturing activities," the court in ***Sullivan*** held that there was a sufficient degree of change and refinement in the source material to qualify as manufacturing. ***Id.*** at 581. In reaching this result, the court observed that an important consideration in determining whether an activity is manufacturing is the "multiplicity of processes" employed by the purported manufacturer. ***Id.*** at 580 (citing ***Assessors of Boston v. Commissioner of Corps. and Taxation,*** 323 Mass. 730, 748 (1949)).

In contrast to the taxpayer in ***Sullivan***, appellant did not perform the activities of separation, grading and processing of the scrap source material into a new product; rather, it simply crushed and transported the scrap material to unaffiliated shredding companies, which performed activities similar to those performed by the taxpayer in ***Sullivan.*** At most, appellant performed a small portion of what the taxpayer in ***Sullivan*** did by removing the unusable products like batteries, gas tanks and tires, and compressing the metal into a smaller size. The activities that effected the principal degree of change to the raw material in ***Sullivan*** - the initial separation and grading of the scrap, segregation of ferrous and non-ferrous metals, and preparation of cubes of metal that met the specifications of its customers - were not performed by appellant.

Moreover, although processes which themselves do not produce a finished product for sale are still deemed to be "manufacturing" if they constitute an "essential and integral" part of the manufacturing process (*see* ***Rossi,*** 369 Mass. at 181-82), "merely providing raw materials to a manufacturer" is not a "step" in the overall manufacturing process entitling the

provider of the raw material to manufacturing-corporation status. ***Tilcon-Warren Quarries Inc. v. Commissioner of Revenue,*** 392 Mass. 670, 674 (1984).

In ***Tilcon,*** the taxpayer quarried rock, generally by excavation and blasting, and transported the extracted rock to its processing plant. At the plant, the taxpayer produced crushed stone by crushing the rock into smaller stones of varying sizes for sale to customers for use in road paving, leaching fields and septic systems. ***Id.*** at 671. The taxpayer also produced sand by mixing the residue from its stone-crushing operation with water, separating the sand into eleven gradations in its "classifier chamber," and then blending the gradations into two basic sizes of sand for use in making asphalt and concrete. ***Id.***

On these facts, the court held that "extracting pieces of rock from the ground and crushing them into usable sizes does not compel the conclusion that the process fits within the natural and ordinary meaning of 'manufacturing.'" ***Id.*** at 672-73. Further, the court held that the taxpayer was not performing an essential and integral step in the manufacturing process, but that it "simply provides two of the raw materials, crushed stone and sand, needed for the manufacture of asphalt." ***Id.*** at 674.

Appellant's activities are even less transformative, and less essential and integral to the manufacturing process, than those found to fall short of manufacturing in ***Tilcon.*** Appellant's two-step process - which included the optional removal of batteries, gas tanks, and tires, and crushing vehicles into flats - is legally insufficient when analyzed in the context of the processes at issue in ***Tilcon,*** which resulted in a final product transformed from its raw material to a significantly greater degree than the flats at issue in this appeal. Despite the more elaborate processes and the greater degree of transformation to the source material in ***Tilcon*** than is present here, the court still ruled that simply reducing the size of raw material is not sufficient to constitute manufacturing. *See also* ***Alcan Aluminum Corporation v. Commissioner of Revenue,*** Mass. ATB Findings of Fact and Reports 1997-288 (ruling that cutting metal coils, flat sheets, bars, rods and angles to the sizes specified by customers does not constitute manufacturing).

Moreover, the evidence of record in this appeal clearly established that appellant's activities were not even necessary, much less essential or integral, to the manufacturing process: the crushing of vehicles into flats was not necessary to shredding; the shredding companies themselves crushed vehicles and removed batteries, gas tanks, and tires; and the shredding companies paid more for flats with batteries, gas tanks, and

tires removed, suggesting that flats with these items included could be sold.

Further, not "every process comprising the first step, or a step, in the transformation of some source material into a finished product qualifies as a process which is an essential and integral part of the total manufacturing process." ***Sullivan,*** 413 Mass. at 581. In order to constitute an essential and integral part of the manufacturing process, the "process under study must effect the kind of change and cause a correlative degree of refinement in the source material as exemplified in [***Assessors of Boston*** 323 Mass. at 736-37 (multi-step wool-scouring process involving de-burring, combing, chemical treatment, bleaching, drying and bagging)], ***Rossi,*** and now, Sullivan's scrap processing operation." ***Sullivan,*** 413 Mass. at 581. Accordingly, even if the Board were to rule that appellant's activities were, as a practical matter, a necessary part of the overall manufacturing process, the activities would not be "essential and integral" because there is an insufficient change and refinement to the source material.

Two other cases involving the cutting of raw materials to a smaller size, ***Rossi*** and ***Noreast Fresh,*** 50 Mass. App. Ct. 352 (2000), also provide no support for appellant's position. In ***Rossi,*** the taxpayer cut down trees, hauled the logs by truck to its saw mill, stripped the logs of bark, sawed and resawed the logs into lumber of various sizes, and packaged the lumber for shipment and sale. ***Rossi,*** 369 Mass. at 179. The taxpayer also sold bark, woodchips and sawdust that were produced in its sawmill operation. ***Id.***

The court held that the taxpayer's use of "specialized machinery and the application of human skill and knowledge" to convert the raw material of standing timber into cut lumber, a "product more refined and specialized in use than the raw material" constituted manufacturing. ***Id.*** at 182. In so ruling, the court emphasized that the taxpayer's "process of converting the logs into lumber is more than the mere extraction, ***packaging and transportation*** of a raw material." ***Id.*** at 182 (emphasis added).

In contrast, appellant here is essentially facilitating the transportation of raw material to the shredding companies. Appellant's mobile crushing and transportation equipment allow it to gather vehicles from various salvage yards and crush them into a compact "package," thereby facilitating transportation to, and processing by, the shredding companies. Such activity did not result in a "new product, different in character and more useful and marketable, than the raw material;" rather, it resulted in the mere packaging and transportation of the raw

material itself, which does not constitute "manufacturing" under ***Rossi. Id.***

Similarly, ***Noreast Fresh*** does not support a finding that appellant's operations constituted manufacturing. The taxpayer in ***Noreast Fresh*** produced, from raw vegetables grown by others, a variety of prepackaged and ready-to-eat salads, coleslaw, and vegetables such as spinach, celery hearts, carrot sticks and broccoli and cauliflower florets. ***Noreast Fresh,*** 50 Mass. App. Ct. at 353. Using a "highly mechanized production process," the taxpayer: removed unwanted parts of the vegetables by coring, peeling, or cutting; shredded or cut the vegetables into small, uniform pieces; plunged the vegetable pieces into a cold-water bath to which chlorine and citric acid had been added to kill bacteria; mixed the vegetable pieces with other vegetable pieces to make the various salads offered by the taxpayer; spun the pieces or salads in a centrifugal drier "flushed with nitrogen gas;" weighed the pieces or salads on a "computerized scale;" enclosed the pieces or salads in bags it fabricated from breathable plastic film designed to extend the product shelf-life; passed the packaged product through metal detectors; and packed the product in ice for shipping. ***Id.*** at 353-54.

Reviewing prior cases that considered the "output of various foodstuffs," the court viewed the change to the raw vegetables at issue to be "between the two poles" represented by those cases: "[w]hile not as transformative a process as making sausages from livestock or bread from flour, Noreast's efforts produce far more of a metamorphosis than appears in the restaurant cases." ***Id.*** at 355. The court concluded that Noreast's activities sufficiently transformed the raw materials to constitute manufacturing: "'we think the transformation wrought by [its] processes has, as a practical matter, resulted in a new article and a new use, even though the name of the raw material still is retained.'" ***Id.*** at 357 (quoting ***Assessors of Boston,*** 323 Mass. at 742).

In reaching this conclusion, the court specifically rejected the analogy to ***Tilcon,*** where the court rejected the taxpayer's claim that its quarrying and crushing of rock into smaller sized stones and sand was manufacturing. ***Noreast Fresh,*** 50 Mass. App. Ct. at 356-57. The court in ***Noreast Fresh*** dismissed the argument that, like the taxpayer in ***Tilcon,*** Noreast merely cut raw materials into smaller sizes and, like Tilcon's blending of various gradations of sand, merely mixed them, because "it ignores critical features of Noreast's procedures, such as the excision of parts of the raw materials unsuitable for use, the changes brought about through chemical sanitation, and the manufacturing of special packaging for the final product." ***Id.*** at 357.

In the present appeal, the "change wrought" by appellant was the mere crushing of vehicles into a smaller size. Appellant produced no special packaging and it caused no chemical or other change to occur to the vehicles other than compacting them into a size more easily transported to the shredding companies. Although appellant's optional removal of the batteries, gas-tanks, and tires is somewhat akin to Noreast's "excision of parts of the raw materials unsuitable for use" (***Id.***), the removal and crushing activities alone do not produce a sufficient transformation, under ***Noreast*** or any of the above cases, to constitute manufacturing.

Accordingly, the Board issued a decision for the appellee in this appeal.

The APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,
Attest: _____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

KINGS DAUGHTERS & SONS HOME c/o POND HOME RETIREMENT CENTER **v.** **BOARD OF ASSESSORS OF THE TOWN OF WRENTHAM**

Docket No. F276527

Promulgated:
September 25, 2007

ATB 2007-1043

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65 from the refusal of the appellee to abate taxes on certain real estate in the Town of Wrentham owned by and assessed to the appellant under G.L. c. 59, §§ 11 and 38 for fiscal year 2005.

Commissioner Rose heard the appeal and was joined by Commissioners Scharaffa and Egan in a decision for the appellee.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.

M. Robert Dushman, Esq., for the appellant.
Ellen M. Hutchinson, Esq., for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of testimony and exhibits entered into evidence at the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact. At all times relevant to this appeal, Kings Daughters and Sons Home for the Aged in Norfolk County, Inc. ("KDS" or "appellant") was a charitable corporation organized pursuant to G.L. c. 180. KDS operated a long-term residential care facility known as Pond Home at 289 East Street, Wrentham ("Pond Home" or "subject property").

KDS claimed that, as of the July 1, 2004 qualifying date for the fiscal year 2005 charitable exemption, it occupied the subject property in furtherance of its charitable purposes and that, therefore, the property was exempt from real estate tax. On February 24, 2004, prior to the March 1st deadline, appellant timely filed Form 3ABC and a copy of Form PC for fiscal year 2005 with the Board of Assessors of the Town of Wrentham (the "assessors").

Subsequently, the assessors reversed their long-standing treatment of the subject property as tax exempt, based on their determination that KDS had failed to demonstrate to the

assessors that the subject property was being occupied in furtherance of its charitable purposes.

On June 30, 2004, the assessors mailed to KDS a fiscal year 2005 tax bill for the subject property. On September 24, 2004, within three months of receipt of the tax bill and in accordance with G.L. c. 59, § 5B, KDS filed its appeal with the Board. Based on these facts, the Board found that it had jurisdiction over the subject appeal.

In support of its claim that the subject property is entitled to the charitable exemption from property tax, the appellant presented four witnesses: Duane Tibbett, Treasurer of the KDS Board of Trustees; Michael Lerner, Director of Real Estate Development for Rogerson Communities; Rebecca Annis, Administrator for Pond Home; and, Michele Visconti, a Ph.D. who does research and consulting for long-term care facilities.

KDS is a Massachusetts corporation organized as a not-for-profit charitable corporation under G.L. c. 180. Pursuant to the restated Articles of Organization, executed July 23, 1998, KDS was organized to:

> establish and maintain a Home, presently known as "Pond Home", in Norfolk County, Massachusetts, for the care and comfortable support of such aged and deserving persons as may be admitted to the Home in accordance with its Admission Policy.

In pursuit of this purpose, KDS established Pond Home, a "Level IV retirement home with a discrete Level III Nursing Section for those requiring extra care." Pond Home is not an assisted living facility but rather a long-term, residential care facility licensed and governed by the Massachusetts Department of Public Health ("DPH").

DPH guidelines and regulations require that level III patients receive 1.4 hours of nursing care per day. Of that, only 0.40 hours must be provided by a licensed nursing professional such as a registered nurse ("RN") or a licensed practical nurse ("LPN"). For level IV patients, there is no daily nursing requirement. DPH guidelines require only that a licensed nurse provide four hours per month of consulting services.

Situated in a two-and-a-half story renovated colonial-style dwelling, Pond Home, as described by Mr. Tibbetts, is a "comfortable secure environment, [with] meals [and] the opportunity for a lot of interaction among the residents." Published literature describes Pond Home as "gracious retirement living" for elders who "may" require some assistance. Residents, however, are encouraged to "maintain the highest level of independent functioning."

There are twenty-six private rooms with private bath, and four two-room suites with private bath, two of which are licensed to be used as doubles but are currently occupied by only one resident. Residents are encouraged to bring their own furniture and as many of their personal effects as they would like. Pond Home will provide furnishings if the resident so requires. In addition, Pond Home has thirteen nursing-section beds for residents who require some nursing care. Pond Home provides the nursing section rooms with an electric hospital bed and a small recliner. Residents, however, are still encouraged to bring as many of their personal belongings as possible. Pursuant to DPH requirements, the residential care unit and the nursing care unit are on separate floors.

Residents receive three meals daily, plus snacks, personal care services, medication management, weekly housekeeping and laundry services, recreational activities, scheduled transportation, hairdressing, and mail pick-up and delivery. Additional services are provided under the enhanced care programs which residents may opt for at an additional charge. The cost of the three enhanced care plans, known as Plans A, B and C, for fiscal year 2005, was an additional $250, $500 and $750, per month, respectively.

Potential residents must be "sixty-five years of age or older." Ms. Annis testified that the average age of a Pond Home resident is eighty-nine. Individuals must also be in "reasonably good health and must possess the physical, emotional and mental capacity for residential living." Additionally, potential residents must have sufficient assets, as determined by Pond Home, to meet the terms of residency. Interested persons are required to complete an admissions application which provides Pond Home with certain personal information including, but not limited to, a description of the individual's: medical condition, assets, including real estate and bank accounts; monthly income and expenses; annual expenses; and, the current value of any life insurance policy.

This information is then reviewed by the treasurer to "determine financial eligibility." Mr. Tibbetts testified that, as a rule of thumb, the financial data is examined to see if a prospective resident has sufficient assets and annual income to cover the one-time administrative fee of $2,000, plus his/her monthly room and personal expenses for a period of five years. For calendar year 2004, room rates ranged from $2,880 to $4,618, monthly, for the level IV beds, and $168 to $215, daily, for the level III nursing beds.

Using the least expensive level IV room rate of $2,880 per month, or $34,560 annually, and the personal allowance of $500 per month, or $6,000 annually, plus the $2,000 administrative

fee, an individual requesting level IV residence at Pond Home would require assets totaling $204,800 ((34,560*5)+(6,000*5)+2,000). An individual seeking level IV residence in the most expensive room, $4,618 per month, would require minimum assets in excess of $300,000 ((55,416*5)+(6,000*5)+2,000). Similarly, applying the least expensive level III rate of $168 per day, or $61,320 yearly, a prospective resident in the "nursing section" must have assets totaling approximately $338,000 ((61,320*5)+(6,000*5)+2,000). For the most expensive level III room, $215 per day, or $78,475 yearly, a prospective resident would require assets in excess of $424,375 ((78,475*5)+(6,000*5)+2,000).[21]

Individuals that did not have sufficient assets to satisfy the five-year projection were required to have a sponsor guarantee full payment of all fees and monthly charges. Pond Home is a private facility that does not accept Medicaid. The facility may, however, provide concessions to residents who are unable to make full payment. During calendar year 2004, the total amount of subsidy provided by Pond Home was $73,000, to a total of three residents. According to Ms. Annis, the 2004 concessions amounted to approximately four percent of net income. She also testified that during the period 2002 through 2004, concessions decreased by more than twenty-five percent.

In an attempt to show that Pond Home was affordable to a large segment of the population, appellant offered the testimony of Michele Visconti, a Ph.D. in health and aging policy, whose primary employment is as a consultant performing long-term care research as it pertains to the affordability of such facilities. The appellant offered Ms. Visconti's analyses to prove that Pond Home was affordable to a class of persons drawn from a large segment of the population. For her analyses, Ms. Visconti reviewed data from communities in and around the Wrentham area, including, Bellingham, Foxborough, Franklin, Norfolk, North Attleboro, Plainville, Walpole and Wrentham.

The foundational assumption for Ms. Visconti's analyses was that the elder person resided in and owned his or her own home, and that the home was to be sold. Next, Ms. Visconti assumed that the home was sold at eighty-percent of the assessed value, from which she deducted sales costs including real estate commissions, capital gains tax, and repairs and "other", of fifteen percent to determine the net proceeds. Ms. Visconti also reviewed the 2000 Census figures for "Median Household Income for Greater Than 75." Based on these income figures, and

[21] Mr. Tibbetts acknowledged that these figures do not take into consideration the annual room rate increase of three percent on average.

her generated home sale proceeds figure, Ms. Visconti determined that Pond Home was affordable to the average person.

The Board found, however, that Ms. Visconti failed to sufficiently explain her assumptions. Ms. Visconti's primary assumption was that a prospective resident would sell his or her home. Her supporting data, however, showed that, on average, more than fifty percent of the 75 and older population in the surrounding communities did not own their own home. The Board further found that Ms. Visconti failed to offer supporting evidence for her assumption that an individual's home would be sold at eighty-percent of the assessed value and that total sales costs would equal fifteen percent. Accordingly, the Board found that Ms. Visconti's analysis did not support the conclusion that Pond Home was affordable to the average person in the community.

Based on all of the evidence presented in this appeal, the Board found that the subject property was not operated as a charitable endeavor because it offered services to a limited segment of the population and it did not relieve or lessen any governmental burden. The Board further found that potential residents must be in reasonably good health and must possess the physical, emotional and mental capacity for residential living. Therefore, the Board found the Pond Home residents were able to live independently and that in the absence of Pond Home the residents would not require publicly-assisted housing or hospitalization.

Moreover, the Board found that prospective residents must submit proof that they had sufficient assets and/or annual income to pay the monthly room fees, plus a personal expense allowance, for a period of five years. The Board found that this totaled, at a minimum, more than $200,000 for the level IV beds, and approximately $330,000 for the level III beds, for calendar year 2004. The Board further found that Pond Home did not accept Medicaid and provided only minimal financial assistance, less than four percent of net income. Consequently, the Board found that Pond Home did not benefit a significantly broad segment of the population.

Accordingly, the Board issued a decision for the appellee in this appeal.

OPINION

G.L. c. 59, § 5, Third, ("Clause Third") provides an exemption for:

> real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized or by another charitable organization or organizations or its or their officers for

> the purpose of such other charitable organization or organizations.

That same clause further provides that a charitable organization:

> shall not be exempt for any year in which it omits to bring in to the assessors the list, statements and affidavit required by section twenty-nine and a true copy of the report for such year required by section eight F of chapter twelve to be filed with the division of public charities in the department of the attorney general. ***Id.***

A charitable organization seeking an exemption under Clause Third must first comply with the foregoing requirement of timely filing with the assessors the documentation required under G.L. c. 59, § 29 ("Form 3ABC") and G.L. c. 12, § 8F ("Form PC"). *See* ***Children's Hospital Medical Center v. Assessors of Boston,*** 388 Mass. 832, 837 (1983) (timely filing of Form 3ABC and copy of Form PC are jurisdictional prerequisites to action by the assessors and review by Board). The assessors conceded, and the Board found that the appellant in this appeal timely filed its Form 3ABC and a copy of Form PC for fiscal year 2005.

Where, as here, a tax bill is issued which treats as taxable real estate which the appellant claims is exempt under Clause Third, the appellant has two choices: it may apply to the assessors for an abatement under G.L. c. 59, § 59 or it may appeal directly to the Board under G.L. c. 59, § 5B. *See* ***Trustees of Reservations v. Assessors of Windsor,*** Mass. ATB Findings of Fact and Reports 1991 - 22, 25.

Pursuant to § 5B, any person who is aggrieved by a "determination" of a board of assessors as to the eligibility or noneligibility of a corporation or trust for the exemption under Clause Third may appeal directly to this Board within three months of the assessors' determination. A timely filed Form 3ABC puts the assessors on notice of a charitable organization's claim for exemption and the tax bill issued thereafter constitutes a "determination" concerning the charity's exemption claim. *See* ***Trustees of Reservations,*** Mass. ATB Findings of Fact and Reports 1991 at 28-29. The fiscal year 2005 tax bill was mailed on June 30, 2004 and, therefore, appellant's § 5B appeal to this Board was due on September 30, 2004. Accordingly, its September 24, 2004 appeal was timely filed under §5B.

"A corporation claiming that its property is exempt under § 5, Third, has the burden of proving that it comes within the exemption, and that it is in fact operated as a public charity." ***Town of Norwood v. Norwood Civic Association***, 340 Mass. 518, 525 (1960) (citing ***American Inst. For Economic Research v. Assessors***

of Great Barrington, 324 Mass. 509, 512-14 (1949)). "The mere fact that the organization claiming exemption has been organized as a charitable corporation does not automatically mean that it is entitled to an exemption for its property. . . . Rather, the organization 'must prove that it is in fact so conducted that in actual operation it is a public charity.'" ***Western Massachusetts Lifecare Corp. v. Board of Assessors of Springfield***, 434 Mass. 96, 102 (2001) (quoting ***Jacob's Pillow Dance Festival, Inc. v. Assessors of Becket***, 320 Mass. 311, 313 (1946)).

The organization bears the burden of proving that its occupation of the property is in furtherance of the charitable purposes for which it was organized. *See* ***Board of Assessors of Hamilton v. Iron Rail Fund of Girls Club of America, Inc.,*** 367 Mass. 301, 306 (1975). The Supreme Judicial Court has ruled that the term "occupied" in the clause Third exemption:

> means something more than that which results from simple ownership and possession. It signifies an active appropriation to the immediate uses of the charitable cause for which the owner was organized. The extent of the use, although entitled to consideration, is not decisive. But the nature of the occupation must be such as to contribute immediately to the promotion of the charity and physically to participate in the forwarding of its beneficient objects.

Babcock v. Leopold Morse Home for Infirm Hebrews & Orphanage, 225 Mass. 418, 421 (1917) (other citations omitted).

In determining whether an organization is in fact occupying property in furtherance of its charitable purpose, a court must consider whether the organization's benefits are readily available to a sufficiently inclusive segment of the population. Charging a fee for services will not necessarily preclude charitable exemption, but "the organization's services must still be accessible to a sufficiently large and indefinite class of beneficiaries in order to be treated as a charitable organization." ***Western Massachusetts Lifecare***, 434 Mass. at 105. It is necessary that "the persons who are to benefit are of a sufficiently large or indefinite class so that the community is benefited by its operations." ***Harvard Community Health Plan, Inc. v. Assessors of Cambridge***, 384 Mass. 536, 543 (1981) (citing ***Children's Hospital Medical Center v. Board of Assessors of Boston***, 353 Mass. 35, 44 (1967), ***Assessors of Boston v. Garland School of Home Making***, 296 Mass. 378, 388-89 (1937), and 4 A. Scott, ***Trusts*** at 2897-2898 (3d ed. 1967)).

Courts and this Board have consistently ruled that a facility serving the elderly must be affordable to limited-

income elders to qualify for the charitable exemption under clause Third. For example, in affirming the Board's ruling that a nursing home was charitable, the Appeals Court in ***H-C Health Services*** specifically noted that "[t]he population at the nursing home [was] predominantly Medicaid patients." ***H-C Health Services***, 42 Mass. App. Ct. at 597. In finding another nursing home to be charitable, the Board in ***William B. Rice Eventide Home v. Board of Assessors of Quincy***, Mass. ATB Findings of Fact and Reports 2006 - 457, 481, reversed on other grounds No. 06-P-1440 (August 27, 2007), emphasized that approximately two-thirds of the residents were Medicaid patients and that the taxpayer operated at a substantial deficit for the years at issue. *See also,* ***Fairview Extended Care Services v. Board of Assessors of Danvers,*** Mass. ATB Findings of Fact and Reports 1997 - 800, 805 (finding that taxpayer qualified for charitable exemption where residents were predominantly Medicaid patients, representing 65%-70% of the population).

Conversely, in affirming the Board's denial of a charitable exemption to an elderly retirement community corporation, the Supreme Judicial Court in ***Western Massachusetts Lifecare*** focused on the stringent selection requirements which limited the availability of the organization's services to a select portion of the community's elderly population:

> The benefits of Reeds Landing are limited to those who pass its stringent health and financial requirements, requirements that make most of the elderly population ineligible for admission. The class of elderly persons who can pay an entrance fee of $100,000 to $300,000 and have, from their remaining assets, monthly income of $2,000 to $7,000 is a limited one, not a class that has been "drawn from a large segment of society or all walks of life."

434 Mass. at 104 (quoting ***New England Legal Foundation v. City of Boston***, 423 Mass. 602, 612 (1996)).

In ***Jewish Geriatric Services v. Board of Assessors of the Town of Longmeadow,*** Mass. ATB Findings of Fact and Reports 2002 - 337, 366, *aff'd*, 61 Mass. App. Ct. 73 (2004) the taxpayers sought to distinguish their facility from that at issue in ***Western Mass Lifecare*** based on its view that it lacked the high entrance fee charged at Reeds Landing and also the requirement that prospective residents prove that they had sufficient assets and income to pay. ***Jewish Geriatric,*** 61 Mass. App. Ct. at 79. The Board and the Appeals Court, however, were not persuaded by the taxpayer's attempt to distinguish the facilities. The court noted that Jewish Geriatric's "monthly fees of $1,890 to $5,280 [were] comparable to, if not higher than" those at Reeds Landing. ***Id***. Moreover, "the slim showing of actual subsidies

being awarded demonstrated that the screening processes successfully narrowed the pool of applicants to an impermissibly small portion of the elderly community." ***Id.*** *See also*, ***John Bertram House of Swampscott, Inc. v. Board of Assessors of the Town of Swampscott***, Mass. ATB Findings of Fact and Reports 2006 - 306, 326 ("Where [] the selection requirements and the monthly fees charged to residents are so restrictive that they limited the class of beneficiaries, the Board and the Court have found that the organization claiming exemption does not in fact operate as a public charity."); ***Kings Daughters & Sons Home, et al. v. Board of Assessors of the Town of Wrentham***, Mass. ATB Findings of Fact and Reports 2002 - 427, 456-457 ("***Kings Daughters I***")[22] (Where potential residents were required to be of good health and have significant assets and income to qualify for admittance, Board found and ruled that taxpayer did not serve a significantly large segment of the population and, therefore, did not operate as a public charity.).

Additionally, a charitable organization must "'lessen[] any burden government would be under any obligation to assume.'" ***Western Massachusetts Lifecare***, 434 Mass. at 105 (quoting ***Boston Chamber of Commerce v. Assessors of Boston***, 315 Mass. 712, 717 (1944)). Relieving the government from some obligation is "frequently put forward as the fundamental reason for exempting charities from taxation." ***Boston Chamber of Commerce v. Assessors of Boston,*** 315 Mass. 712, 717 (1944).

Private organizations can operate in furtherance of a charitable purpose when they "perform activities which advance the public good, thereby relieving the burdens of government to do so." ***Sturdy Memorial Foundation v. Board of Assessors of the Town of North Attleborough***, Mass. ATB Findings of Fact and Reports 2002 - 203, 218, *aff'd*, 60 Mass. App. Ct. 573 (2004) (citing ***Molly Varnum Chapter DAR v. City of Lowell***, 204 Mass. 487 (1909)). "However, to the extent that a[n] [] organization is conducting a business for profit, it is not relieving government of a burden and, accordingly, its business is not charitable." ***Sturdy Memorial Foundation***, Mass. ATB Findings of Fact and Reports 2002 at 218 (citing ***Hairenik Association, Inc. v. City of Boston***, 313 Mass. 274, 279 (1943)).

Furthermore, the appellant presented no evidence to show that it serviced a segment of the population that otherwise would have required a government-provided alternative means of care. *See* ***Western Massachusetts Lifecare***, 434 Mass. at 106 (denying exemption to a continuing care retirement community whose residents "enjoy[ed] sufficient good health to live

---

[22] ***Kings Daughters I*** involved a parcel of property in Wrentham, also owned by KDS, which was improved with sixty-six independent living units known as The Community at Pond Meadow.

independently"). *Contra* ***Fairview***, Mass. ATB Findings of Fact and Reports 1997 at 810 (finding that the use of property as a nursing home alleviated a burden of government). The Board thus found and ruled that Pond Home did not provide any benefits that relieved the government of the burden of providing alternative nursing care or more expensive publicly-assisted hospital care to the Pond Home residents.

In this appeal, the Board found and ruled that the appellant failed to meet its burden of proving that Pond Home benefited a sufficiently inclusive section of the elderly community. The Board found that Pond Home's requirement that prospective residents provide proof that they have sufficient assets and/or annual income to pay the monthly room fees, plus a personal expense allowance, for a period of five years, which the Board found totaled more than $200,000, operated to limit its class of potential beneficiaries to an impermissibly limited class of elderly residents. The Board further found that the appellant failed to prove that Pond Home serviced a segment of the population that otherwise would have required government-subsidized nursing home care. Therefore, the Board found that the appellant did not operate to relieve or lessen any governmental burden.

Accordingly, the Board ruled that this appeal is similar to the long line of cases including ***Western Massachusetts Lifecare, Jewish Geriatric***, ***Kings Daughters & Sons I*** and ***Bertram House***, involving high-priced continuing care and assisted-living communities housing physically and financially independent elderly residents who would not have depended upon government assistance for their care.

On the basis of all these facts, the Board found and ruled that KDS was not entitled to an exemption for the subject property for fiscal year 2005. Accordingly, the Board issued a decision for the appellee.

APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,
Attest: _____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

JOHN P. & BARBARA MacKAY LIGOR, TRUSTEES **v.** **BOARD OF ASSESSORS OF THE TOWN OF WELLESLEY**

Docket No. F288375

Promulgated:
May 8, 2008

ATB 2008-547

This is an appeal filed under the formal procedure, pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the appellee to abate taxes on certain real estate in the Town of Wellesley, owned by and assessed to appellants under G.L. c. 59, §§ 11 and 38, for fiscal year 2007.

Chairman Hammond heard the appellee's Motion to Dismiss for failure to comply with an Order of the Appellate Tax Board ("Board"). Commissioners Scharaffa, Egan, Rose, and Mulhern joined him in a decision for the appellee.

These findings of fact and report are made pursuant to a request by appellants under G.L. c. 58A, § 13 and 831 CMR 1.32.

John P. Ligor and Barbara MacKay Ligor, pro se, for appellants.
Donna McCabe, Chief Assessor, for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of the uncontroverted facts contained in the pleadings and other submissions of the parties, the Board made the following findings of fact.

On January 1, 2006, appellants were the assessed owners of a 0.321-acre parcel of real estate located at 1 Beach Road in the Town of Wellesley ("subject property"). The parcel is improved with a single-family, three-bedroom dwelling with a finished attic and basement. For fiscal year 2007, the Board of Assessors of the Town of Wellesley ("assessors" or "appellee") valued the subject property at $1,260,000 and assessed a tax thereon, at the rate of $8.86 per thousand, in the amount of $11,332.84. Appellants paid the tax due without incurring interest.

On January 11, 2007, appellants timely filed an Application for Abatement with the assessors. The assessors denied the application on April 10, 2007 and, on May 2, 2007, appellants seasonably filed an appeal with the Board. On the basis of these facts, the Board found and ruled that it had jurisdiction over the subject appeal.

On August 24, 2007, the assessors filed a Motion for an Order Authorizing Entry Upon Appellants' Land and for Inspection of Property ("Motion"), arguing that they had not inspected the subject property since its renovation in 2003.

In their Motion, the assessors outlined the attempts made, for fiscal year 2007, to gain access to the subject property. On January 25, 2007, after receiving appellants' fiscal year 2007 Application for Abatement, the assessors contacted appellants by letter to request an inspection of the subject property. By letter dated January 31, 2007, appellants refused. On August 2, 2007, the assessors sent a second letter to appellants requesting an inspection of the interior of the subject property. Appellants did not respond.

The assessors also noted in their Motion appellants' continuous refusal to allow them access to the interior of the subject property in prior years and also appellants' repeated failure to comply with prior Board Orders. In both fiscal years 2005 and 2006, the assessors attempted to inspect the subject property but were refused. In each year, subsequent to appellants' filing their appeal with the Board, the Board issued an Order to Allow Inspection. Appellants failed to comply and the Board therefore dismissed their fiscal year 2005 and 2006 appeals.

In the present appeal, the Board allowed the assessors' Motion and, by Order dated September 6, 2007, ordered appellants to allow an inspection of the subject property within 20 days. Appellants again refused to comply with a Board Order.

On October 1, 2007, the assessors filed a Motion to Dismiss due to appellants' refusal to comply with the Board's Order. Included with the assessors' Motion to Dismiss were two photographs of the subject property which highlighted their need for an interior inspection of the subject property. The first photograph showed the subject property as of the date of the assessors' last inspection prior to the issuance of building permits in 2001; the photograph depicted a small, single-story structure situated on an unkempt lot. The second photograph showed the subject property as of June, 2004 subsequent to substantial renovations; this photograph showed that the subject property was considerably larger, with three above-ground levels, decking on at least two levels facing the water, and a well-landscaped and manicured lawn.

Accordingly, by Order dated October 15, 2007, the Board allowed the appellee's Motion to Dismiss due to appellants' failure to comply with the Board's Order and issued a decision for the appellee in this appeal.

OPINION

Assessors have a statutory right to inspect property that is the subject of an Application for Abatement, G.L. c. 57, § 61A, and that is the subject of an appeal to the Board, G.L. c. 58A, § 8A. Section 8A provides in pertinent part:

> Before the hearing of a petition for the abatement of a tax upon real estate . . . the appellant shall permit the appellee personally or by attorneys, experts or other agents, to enter upon such real estate . . . and inspect such real estate. . . . In the event the appellant refuses to permit the appellee to inspect said property, the board may dismiss the appeal.

The assessors attempted to inspect the subject property on several occasions during the pendency of the abatement application and also after appellants filed their appeal with the Board. In all instances, appellants refused. Consequently, the assessors sought, and the Board entered, an Order to inspect the subject property. Appellants refused to comply.

Subsequently, the assessors filed a Motion to Dismiss for failure to comply with the Board's Order. Appellants filed an opposition in which they argued that dismissal under § 8A is not mandatory but within the Board's discretion. The Board generally has broad discretion when it comes to matters of discovery. See ***Board of Assessors of Provincetown v. Vara Sorrentino Realty Trust,*** 369 Mass. 692, 694 (1976). In the present appeal, the Board determined, as it did in ***Giurleo v. Assessors of Raynham,*** Mass. ATB Findings of Fact and Reports 2006-449, *aff'd*, 69 Mass. App. Ct. 1102 (2007) ("***Giurleo I***"), that dismissal under c. 58A § 8A is appropriate in light of appellants' disregard of a Board Order to allow an inspection.

In ***Giurleo I***, the taxpayer refused to allow the assessors to inspect the interior of his property, and refused to comply with multiple Orders of the Board requiring such an inspection. ***Id.*** at 2006-449. The Board determined that the assessors were entitled to an inspection of the property at issue and that it was within its discretion to dismiss the taxpayer's appeal for failure to comply with the Board's Order. ***Id.*** at 2006-455 (*quoting* ***Vara Sorrentino,*** 369 Mass. at 694 "In the matter of 'discovery' much must be left to the judgment and discretion of the Appellate Tax Board."); ***U.A. Columbia Cablevision of Massachusetts, Inc. v. Board of Assessors of the City of Taunton***, Mass. ATB Findings of Fact and Reports 1987-468, 474-75, *aff'd* 26 Mass. App. Ct. 1104 (1998) (dismissal of an appeal is "well within the Board's discretion" when a party does not

comply with a statutory provision, and the explicit direction of the Board). *See also* ***Giurleo v. Assessors of Raynham,*** Mass. ATB Findings of Fact and Reports 2007-615, 618 ("***Giurleo II***") ("blatant disregard of the Board's Orders is grounds for dismissal of this appeal.")

In the present appeal, appellants refused to allow the assessors to inspect the interior of the subject property and refused to comply with the Board's Order requiring such an inspection. Appellants knew of the consequences for non-compliance with a Board Order; their fiscal year 2005 and fiscal year 2006 appeals were also dismissed for failure to comply with a Board Order requiring an inspection. Rather than avoiding dismissal of their 2007 appeal by allowing the assessors to inspect the subject property, appellants once again chose to blatantly disregard a Board Order.

Further, the assessors' need for an interior inspection of the subject property was highlighted by the photographs accompanying their Motion to Dismiss. The subject property had undergone a substantial transformation since the assessors' last inspection, necessitating an inspection to properly evaluate and assess the improvements to the subject property. "The severity of the . . . remedy for non-compliance, loss of appellate rights, is commensurate with the importance of [the] information in the valuation and taxation process." ***Marketplace Center II Limited Partnership v. Assessors of Boston***, Mass. ATB Findings of Fact and Reports 2000-258, 276, *aff'd* 54 Mass. App. Ct. 1107 (2002).

As a result of appellants' blatant disregard for the Board's Order, and their failure to present a reasonable excuse for their failure to comply, the Board granted the appellee's Motion to Dismiss.

Accordingly, the Board entered a decision for the appellee in this appeal.

APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,
Attest: _____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

MARY ANN MORSE HEALTHCARE CORP.	**v.**	**BOARD OF ASSESSORS OF THE TOWN OF FRAMINGHAM**

Docket Nos. F281323, F283633

Promulgated: August 19, 2008

ATB 2008-1104

These are appeals under the formal procedure pursuant to G.L. c. 59, § 64 and 65, from the refusal of the Board of Assessors of the Town of Framingham ("appellee" or "assessors") to abate taxes on certain real estate located in the Town of Framingham owned by and assessed to Mary Ann Morse Healthcare Co. ("appellant") under G.L. c. 59, § 38, for fiscal years 2005 and 2006 ("tax years at issue").

Commissioner Rose heard these appeals. Commissioners Scharaffa and Egan joined him in decisions for the appellee.

These findings of fact and report are made at the request of the appellant pursuant to G.L. c. 58A, § 13 and 831 CMR § 1.32.

George A. Balko, III, Esq., *Donna M. Truex,* Esq. and *Joshua Lee Smith*, Esq. for the appellant.

James F. Sullivan, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of the testimony and exhibits entered into evidence at the hearing of these appeals, the Appellate Tax Board ("Board") made the following findings of fact.

The appellant is the sole owner of the property located at 747 Water Street, Framingham, ("subject property"), which it operates as an assisted-living facility.

The appellant timely filed its Form 3ABC and Form PC for fiscal year 2005 with the assessors. The assessors timely issued to the appellant a fiscal year 2005 tax bill, valuing the property at $7,196,100, upon which a tax of $84,842.02 was due. The appellant timely paid this tax, without incurring interest. On February 1, 2005, the appellant timely filed an abatement application with the assessors. The assessors denied the abatement application on May 2, 2005.[23] The appellant timely

[23] Three months from the February 1, 2005 abatement application was Sunday, May 1, 2005. When the last day of a filing period falls on a Saturday, Sunday,

filed an appeal with the Board on July 13, 2005. Based on the foregoing, the Board found and ruled that it had jurisdiction over the fiscal year 2005 appeal.

The appellant timely filed its Form 3ABC and Form PC for fiscal year 2006 with the assessors. The assessors timely issued to the appellant a fiscal year 2006 tax bill, valuing the property at $11,671,300, upon which a tax of $132,352.54 was due. The appellant timely paid this tax, without incurring interest. The appellant timely filed an abatement application on January 30, 2006, which the assessors denied on March 27, 2006. The appellant seasonably filed its appeal with the Board on May 11, 2006. Based on the foregoing, the Board found that it had jurisdiction over the 2006 appeal.

The appellant is a Massachusetts non-profit entity organized under G.L. c. 180. It is exempt from federal income taxes under Internal Revenue Code § 501(c)(3). It has no shareholders or capital stock. No part of its income inures to the benefit of anyone associated with the appellant, nor is its income used for anything other than the appellant's charitable purposes. The appellant's Articles of Organization set forth its purposes as follows:

a. To establish, acquire, operate, and maintain nursing homes and long term care facilities within the Commonwealth of Massachusetts . . . and to provide such medical, educational, and charitable services as may be consistent with any license granted to the corporation by any governmental agency or as may be otherwise lawful.
b. To advance the knowledge and practice of medicine and nursing through research and education relating to the care, treatment, and healing of patients.
c. To improve public health in cooperation with federal, state, municipal, and other health departments and offices.

At all relevant times, the appellant operated an assisted-living facility at the subject property known as Heritage of Framingham ("Heritage"). Heritage consists of two buildings: one ("Building A") which contains common areas and 48 assisted-living apartments, and one ("Building B") which contains 40 assisted-living apartments intended for use by individuals with Alzheimer's disease, dementia, and memory impairment ("Homestead" apartments).

---

or holiday, the day for the performance of any act required by statute is extended by operation of law to the following business day. *See* G.L. c. 4, § 9. Accordingly, the last day for the assessors to act on the appellant's abatement application was May 2, 2005.

The appellant claims that all parts of Heritage which are used by the Homestead residents are exempt from taxation under G.L. c. 59 § 5, Third as property owned by a charitable organization. This portion comprises 71% of the subject property. It includes all of Building B (containing 40 Homestead apartments) and 17,100 square feet of Building A, comprising Heritage's common areas, including kitchen, dining, recreational, administrative, and laundry facilities.

Roger Peloquin, the President and CEO of the appellant, testified on behalf of the appellant. He testified that admission to Heritage is available by submitting a preliminary application, along with a $1,200 "community fee." Applicants are also required to submit to medical evaluations prior to execution of a Residency Agreement, and periodically through their stay at Heritage. Mr. Peloquin explained that the purpose of these medical evaluations is to ensure that the residents do not have needs which exceed the level of services which the appellant provides.

While an applicant is not required to produce evidence of finances at the time of application, the applicant must complete a "financial questionnaire," which includes questions about the applicant's income and assets and information about the cost of residency, and thus requires the applicant to represent an ability to pay monthly fees.

At the time of the hearing, monthly fees for Homestead apartments started at $4,100 (per person, double occupancy), and reached $5,920 for a "suite." Mr. Peloquin explained that these rates were at or near the market for similar facilities, and that Heritage had lost $3.8 million since it opened its doors in 1995. He estimated that the average stay at Heritage is between 18 and 30 months. According to these figures, an eighteen-month stay in the lowest-priced Homestead apartment, including the fee paid at application, would cost $75,000. Neither Heritage's monthly fees nor additional fees are covered by Medicaid.

Upon passing the medical evaluation, paying the community fee, and completing the financial questionnaire, the applicant is offered an apartment. A personal care plan is prepared for the resident. The applicant and the appellant also enter into a "Residency Agreement" which outlines the rights and obligations of the parties. Sections II.B and IX.D of the Residency Agreement provide that when a resident's medical condition deteriorates, the appellant reserves the right to terminate the Residency Agreement. Section II.C requires medical evaluations at least annually, and at any time following a hospitalization or upon the appellant's "determination that there has been a significant change in Resident's ability to function within the Community."

Pursuant to Section V.G of the Residency Agreement, the appellant reserves the right to enter an apartment without notice. Mr. Peloquin testified that, for safety purposes, Homestead apartments lack door locks. However, Section VI.B of the Residency Agreement provides that, except in cases of emergency and to carry out the services provided in contract, the appellant must give all residents 24-hours' notice before entering an apartment. Moreover, pursuant to Section IX.D.3(D), all residents of Heritage have rights under the landlord/tenant laws established under G.L. c. 186 and G.L. c. 239, including the safeguard that any eviction for nonpayment or otherwise must be pursued through a court proceeding in accordance with landlord-tenant laws. Furthermore, the Residency Agreement, at Section VIII, emphasizes that residents have a right to "[b]e treated with consideration and respect and with due recognition of personal dignity, individuality, and the need for privacy," which includes the right to private communications, the right to use and retain personal property and personal space, confidentiality of all records and communications, and the right to present grievances and recommendations to the appellant as well as to representatives of the Assisted Living Ombudsman program, the Elder Protective Services and the Disabled Persons Protection Commission established under Massachusetts law.

Section IV.C of the Residency Agreement requires residents to pay their last month's rent up front as a deposit, and they must increase the amount of this deposit to match any increase in monthly rental charges. Section X.A states that residents are responsible for maintaining their own health insurance and apartment insurance.

The Residency Agreement also outlines the services provided to residents. These services include three meals a day, light weekly housekeeping, recreational programs, some utilities, transportation to doctor's appointments, and 45 minutes per day of "personal care services," which include assistance with toileting, dressing, and grooming. Additional assistance is offered to residents of the Homestead apartments, including reminders and supervision for medications, activities, and recreational and socialization assistance. Some services, like hairstyling, visits from a physician, and transportation via medical escort, are provided at additional cost. The appellant is not a skilled nursing facility and is thus not equipped to provide triage or acute care services.

Section IV.F of the Residency Agreement allows the appellant to demand that residents obtain a third-party guarantor if the resident has failed to pay a monthly fee. Alternately, the same section allows the appellant to terminate the Residency Agreement for non-payment. Mr. Peloquin testified

that Heritage has never received an application from an individual whose financial questionnaire revealed insufficient assets to pay all applicable fees. As a result, Heritage has never had the opportunity to turn away an applicant for insufficient financial resources. Mr. Peloquin also testified that, notwithstanding Section IV.F of the Residency Agreement, he was unaware of any residents who were required to have a guarantor. He explained that on only one occasion had a resident become unable to pay during his stay. The appellant made arrangements for that resident to remain at Heritage until the resident became medically ineligible for residency.

Mr. Peloquin testified that Heritage's residents come from a broad geographic area, which he attributes to the appellant's advertising efforts and its participation in state-wide and national civic and charitable organizations. The appellant hosts BayPath Elder Services' annual meetings and is involved with the Massachusetts Alzheimer's Association through sponsorship of walks and concert fundraisers. However, Mr. Peloquin also testified that 8 of the 40 Homestead apartments were empty and "mothballed" at the time of the hearing. He explained that the vacancy was a result of low demand for the apartments. On cross-examination, Mr. Peloquin responded that the appellant did not consider offering any apartments for reduced fees in order to increase interest, because it was the appellant's belief that Homestead's prices were in keeping with the average prices in the geographic area for similar assisted-living facilities.

On the basis of the foregoing, and as will be explained further in the Opinion, the Board found that the appellant is not a charitable organization for purposes of the Massachusetts property tax exemption at G.L. c. 59, § 5, Third. Homestead provides services only to a limited segment of the population, namely, those financially able to afford, or those able to secure a third-party guarantor to pay, the $4,100 to $5,920 monthly rent, plus the refundable $1,200 "community fee" and last-month's rent. Medicaid payments are not accepted for the services provided by Homestead, so residents must maintain their own health insurance and/or pay for medical costs out-of-pocket. Although Mr. Peloquin testified that Heritage does not require applicants to verify their financial assets prior to residency, his testimony also revealed that no individual without means to pay has ever filled out a preliminary application. While Mr. Peloquin mentioned one resident who was not evicted when he became unable to afford his rent, the Board found that this one anecdotal example was insufficient evidence to meet the burden of proving that the appellant served a sufficiently broad segment of the elderly population. Moreover, despite its

vacancies, the appellant made no effort to market Homestead apartments to lower-income elders, and did not reduce its fees to fill vacant apartments.

Elders of limited financial means are the ones who would most likely require government-provided care. However, the elders living at Homestead are able to afford the fees, and are thus not the elders who would rely on government assistance to pay for their care. The appellant thus failed to prove that, but for Homestead, the government would have been charged with the burden of caring for Homestead residents. Accordingly, the Board found and ruled that the appellant failed to meet its burden of proving that Homestead lessened any burden of government.

Moreover, the Board found that while Heritage offers specialized services, its residents are nonetheless guaranteed full, legal tenancy. The Board found that, beyond health circumstances that govern the level of care that residents require, residents enjoy a protected right to privacy, and a right to tenancy protected by statutory eviction proceedings. The Board thus found that the individual Heritage residents rather than the appellant occupied the subject property.

Therefore, for the reasons further explained in the Opinion, the Board found that the appellant did not qualify as a charitable corporation for purposes of G.L. c. 59, § 5, Third, and thus the subject property did not qualify for exemption under that statute. Accordingly, the Board entered decisions for the appellee.

OPINION

General Laws c. 59 § 5, Third, ("Clause Third") provides an exemption for:

> Real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized or by another charitable organization or organizations or its or their officers for the purposes of such other charitable organization or organizations.

A taxpayer claiming exemption under G. L. c. 59, § 5, Third thus must demonstrate that the property fulfills three requirements: 1) the property must be owned by a charitable organization; 2) the property must be occupied by a charitable organization; and 3) the property must be used in order to further a charitable purpose. *See* ***Jewish Geriatric Services, Inc. v. Longmeadow.*** Mass. ATB Findings of Fact and Reports 2002-337, 351, *aff'd*, 61 Mass. App. Ct. 73 (2004) (citing ***Assessors of Hamilton v. Iron Rail Fund of Girls Club of America***, 367 Mass

301, 306 (1975)). "Any doubt must operate against the one claiming an exemption, because the burden of proof is upon the one claiming an exemption from taxation to show clearly and unequivocally that he comes within the terms . . . ." ***Boston Symphony Orchestra, Inc. v. Assessors of Boston***, 294 Mass. 248, 257 (1936). "It is well established that a party claiming exemption bears a grave burden of proving the claim." ***Kings' Daughters and Sons Home v. Board of Assessors of Wrentham***, Mass. ATB Findings of Fact and Reports 2002-427, 452 (citing ***Meadowbrooke Daycare Center, Inc. v. Assessors of Lowell***, 374 Mass. 509, 513 (1978)).

1. The appellant does not operate as a public charity for purposes of G.L. c. 59, § 5, Third.

"The provision of healthcare has been recognized as a traditional charitable purpose, *see* ***Harvard Community Health Plan v. Assessors of Cambridge,*** 384 Mass. 536, 543 (1981), as has the provision of nursing home care for the elderly, *see* ***H-C Health Services, Inc. v. South Hadley***, [42 Mass. App. Ct. 596, 599 (1997)]." ***Western Massachusetts Lifecare Corp. v. Assessors of Springfield***, 434 Mass. 96, 103 (2001). However, espousing a recognized charitable purpose does not, in itself, mean that an organization operates as a public charity. *See*, ***American Inst. For Economic Research v. Assessors of Great Barrington***, 324 Mass. 509, 513 (1949). The organization "must prove that it is in fact so conducted that in actual operation it is a public charity." ***Jacob's Pillow Dance Festival, Inc. v. Assessors of Becket***, 320 Mass. 311, 313 (1946).

The test for determining whether an organization is operating as a public charity is two-fold. First, "the persons who are to benefit must be 'of a sufficiently large or indefinite class so that the community is benefited by its operations.'" ***Western Massachusetts Lifecare***, 434 Mass. at 103-4 (quoting ***Harvard Community Health Plan***, 384 Mass. at 543). "An organization 'operated primarily for the benefit of a limited class of persons,' such that 'the public at large benefits only incidentally from [its] activities,' is not charitable." ***Western Massachusetts Lifecare***, 434 Mass. at 104 (quoting ***Cummington School of the Arts, Inc. v. Assessors of Cummington***, 373 Mass. 597, 600 (1977)). "While there is no 'precise number' of persons who must be served in order for an organization to claim charitable status, and 'at any given moment an organization may serve only a relatively small number of persons,' membership in the class served must be 'fluid' and must be 'drawn from a large segment of society or all walks of life.'" ***Western Massachusetts Lifecare,*** 434 Mass. at 104

(quoting ***New England Legal Foundation v. Assessors of Boston***, 423 Mass. 602, 612 (1996)). "[S]election requirements, financial or otherwise, that limit the potential beneficiaries of a purported charity will defeat the claim for exemption." ***Western Massachusetts Lifecare,*** 434 Mass. at 104.

The appellant contends that its facility draws a geographically diverse pool of residents, and thus its services are available to an indefinite class of beneficiaries. Yet the class of individuals able to benefit from the services provided by the appellant is limited by the appellant's fee structure. "The fact that an organization charges fees for its services does not preclude a determination that the organization is charitable." ***Western Massachusetts Lifecare***, 434 Mass. at 104. (citing ***Assessors of Boston v. Garland School of Home Making***, 296 Mass. 378, 389, (1937); ***New England Sanitarium v. Assessors of Stoneham***, 205 Mass. 335, 342, (1910)). However, when the fees charged effectively limit access to the services provided, an organization cannot be regarded as charitable. ***Western Massachusetts Lifecare***, 434 Mass. at 105; ***Boston Symphony Orchestra,*** 294 Mass. at 255-256; ***New England Sanitarium,*** 205 Mass. at 341.

The Supreme Judicial Court in ***Western Massachusetts Lifecare*** found that financial selection requirements and high fees charged by the taxpayer organization constituted a severe limitation on access to the taxpayer's services:

> The benefits of [the facility] are limited to those who pass its stringent health and financial requirements, requirements that make most of the elderly population ineligible for admission. The class of elderly persons who can pay an entrance fee of $100,000 to $300,000 and have, from their remaining assets, monthly income of $2,000 to $7,000 is a limited one, not a class that has been "drawn from a large segment of society or all walks of life."

Id. at 104 (quoting ***New England Legal Found.***, 423 Mass. at 612).

Moreover, a facility's acceptance of Medicaid indicates that the facility's benefits are available to a broad range of recipients, particularly low-income elders. *See, e.g.*, ***H-C Health Services***, 42 Mass. App. Ct. at 597 (in finding that an elderly facility qualified as a charitable organization, the Appeals Court noted that [t]he population at the nursing home [was] predominantly Medicaid patients."); *see also*, ***William B. Rice Eventide Home, Inc. v. Board of Assessors of the City of Quincy***, Mass. ATB Findings of Fact and Reports 2006-457, 481,

rev'd in part, on other grounds, 69 Mass. App. Ct. 867 (2007)[24] (in finding a nursing home to be a charitable organization, the Board noted that approximately two-thirds of the residents were Medicaid patients and that the taxpayer operated at a substantial deficit for the years at issue); ***Fairview,*** Mass. ATB Findings of Fact and Reports at 1997-805 (in finding that a nursing facility was entitled to an exemption, the Board noted that residents were predominantly Medicaid patients, representing 65%-70% of the population).

With respect to organizations serving the elderly, the Board has previously found that, where financial requirements, including high fees and the lack of Medicaid subsidies, bar access to the organization's services, the organization is not a public charity. *See, e.g.*, ***Kings Daughters and Sons,*** Mass. ATB Findings of Fact and Reports at 2007-1057 ("Courts and this Board have consistently ruled that a facility serving the elderly must be affordable to limited-income elders to qualify for the charitable exemption under clause Third."); ***Eventide***, Mass. ATB Findings of Fact and Reports at 2006-479 ("[A] facility serving the elderly must be affordable to limited income elders to be recognized as charitable."); ***Jewish Geriatric Services,*** Mass. ATB Findings of Fact and Reports at 2002-361 (Board denied exemption because "[t]he high cost of [the appellant facility] created a barrier to the provision of services to a wide variety of elderly prospective residents.").

In the instant appeal, the Board found that the fees charged by the appellant - the $1,200 application fee, last month's rent and monthly fees ranging from $4,100 to $5,290 for Homestead apartments - were on par with the fee schedule in ***Jewish Geriatric Services***, which the Board found to be beyond the reach of a sufficiently broad cross-section of the elderly population.[25] Given the fee schedule at Heritage, coupled with the fact that Medicaid is not available to cover the cost of these fees, the Board found and ruled that the selection

---

[24] ***Eventide*** involved consolidated appeals for fiscal years 2004 and 2005. The Appeals Court reversed and remanded the appeal for fiscal year 2004 on jurisdictional grounds. The Board had ruled that it lacked jurisdiction to hear the appeal for that fiscal year. The Board's ruling in favor of Eventide was for its fiscal year 2005 appeals.

[25] In ***Jewish Geriatrics***, the fees ranged from $63.00 to $85.00 per day for one room in a companion suite, $94.00 to $101.00 per day for a one-room private suite, and $105.00 to $140.00 per day for a two-room private suite. The rates were then increased by $23 per day for residents in the Assisted Living Plus program, or by $33 per day for residents of the Renaissance Neighborhood, which served elders suffering from memory impairments. ***Jewish Geriatrics***, Mass. ATB Findings of Fact and Reports at 2002-344. At this rate, elders in the Renaissance Neighborhood were paying between $2,976.00 to $5,363.00 per month (assuming 31 days in a month), as compared with Heritage's rates of $4,100 to $5,290 per month for Homestead apartments.

requirements of Heritage impermissibly restricts its pool of applicants, such that access to Homestead is not available to a sufficiently broad cross-section of the elderly population.

The appellant contended that it does not restrict access to Homestead apartments, because it does not require applicants to verify their finances on its financial questionnaire. The appellant also stressed that no resident has ever been evicted for non-payment, and that no resident has been required to obtain a cosigner or guarantor. However, Mr. Peloquin cited only one example of the appellant financially supporting a resident who had become unable to afford the fees during his stay. The Supreme Judicial Court has noted that the lack of financial assistance being offered to residents demonstrates the effectiveness of the facilities' screening process: "While [the facility] has a policy of not displacing a resident solely because the resident later becomes unable to pay the fees, the financial screening criteria are such that, to date, no resident has been unable to meet the monthly fees." ***Western Massachusetts Lifecare***, 434 Mass. at 99. Likewise, the fact that the appellant could produce only one anecdotal example of a resident becoming unable to pay the appellant's fees demonstrated to the Board that the appellant's stringent screening procedure all but guarantees that its residents will be able to pay for their stay at Homestead, which results in a population of elders that is not drawn from a sufficiently broad cross-section of the general elderly population. *See*, ***Jewish Geriatric Services***, Mass. ATB Findings of Fact and Reports at 2002-366 ("The slim showing of actual subsidies being awarded demonstrated that the screening processes successfully narrowed the pool of applicants to an impermissibly small portion of the elderly community.").

The appellant's fee structure and screening procedure significantly narrows the pool of potential Homestead residents. The Board thus found and ruled that the appellant did not meet its burden of proving that Homestead's benefits are available to a sufficiently broad segment of the population to qualify as a public charity.

The second component of the charitable test requires the organization to "perform activities which advance the public good, thereby relieving the burdens of government to do so." ***Sturdy Memorial Foundation v. Board of Assessors of the Town of North Attleborough***, Mass. ATB Findings of Fact and Reports 2002-203, 218, *aff'd*, 60 Mass. App. Ct. 573 (2004)(citing ***Molly Varnum Chapter DAR v. City of Lowell***, 204 Mass. 487 (1909)). "The fact that an organization provides some service that would, in its absence, have to be provided by the government, 'is frequently put forward as the fundamental reason for

exempting charities from taxation.'" ***Western Massachusetts Lifecare***, 434 Mass. at 105 (quoting ***Assessors of Quincy v. Cunningham Foundation,*** 305 Mass. 411, 418 (1940)).

In ***Eventide***, the taxpayer was operating a skilled nursing facility which served an elderly population, whose average age was 93; the facility accepted Medicaid and thus "had no selection requirements, financial or otherwise, that limited a potential resident's admission, so long as Eventide could meet their personal and medical needs." ***Eventide***, Mass. ATB Findings of Fact and Reports at 2006-483. The Board found that the facility "serviced a segment of the population that otherwise would have required a government-provided alternative means of care, including care provided by another skilled nursing facility or even by a hospital." ***Id.*** Moreover, the facility was successful in its treatment of this population: "In fact, as indicated by its rate of zero hospitalizations for 'preventable' conditions, the care provided by Eventide relieved government of the burden to provide costly hospital care." ***Id.*** (citing ***Fairview Extended Care Services, Inc. v. Board of Assessors of Danvers***, Mass. ATB Findings of Fact and Reports 1997-800, 810).

By contrast, where elder care facilities provide services which would not otherwise be within the realm of services provided by government, these facilities have not been recognized as charities. For example, in ***Western Massachusetts Lifecare***, "[t]he vast majority of its residents enjoy sufficient good health to live independently (a pre-requisite for admission to [an independent-living apartment]), all of its residents must have significant assets and income with which to meet [the taxpayer's] fee schedule, and all of its residents must maintain adequate health insurance"; therefore, the Supreme Judicial Court ruled that "[t]his is not a population that, but for the operation of [the taxpayer], would be requiring governmental assistance with housing or health care." ***Western Massachusetts Lifecare***, 434 Mass. at 106; *see also* ***Jewish Geriatric Services***, Mass. ATB Findings of Fact and Reports at 2002-369 ("The fact that Ruth's House did not accept any Medicaid supplements further revealed that Ruth's House provided a service for recipients who could afford the fees.").

The appellant provides care to a population which can afford an assisted-living facility, a non-Medicaid-subsidized, alternative means of care. Moreover, despite its vacancies, the appellant makes no effort to market Homestead apartments to lower-income elders, and does not reduce fees to fill vacant apartments. This appeal is thus akin to ***Western Massachusetts Lifecare*** and ***Jewish Geriatric Services***, cases which involved high-priced assisted-living communities which cared for

financially-independent elderly residents who would not have otherwise depended upon government assistance for their care. Therefore, as in those appeals, the Board here found and ruled that the care provided by the appellant did not relieve any burden of government.

The Board found and ruled that the appellant did not provide services to a sufficiently broad elderly population, and that it did not relieve any government burden. Accordingly, the Board found and ruled that the appellant was not a charitable organization for purposes of G.L. c. 59, § 5, Third.

2. The subject property is occupied by the individual tenants of Homestead, not by the appellant.

Assisted-living facilities are governed by G.L. c. 19D. Chapter 19D affords elderly residents of assisted living residences many of the rights and protections enjoyed by traditional tenants. The Board has previously found that:

> the Legislature clearly intended to emphasize the residential character of these establishments, and so in enacting G.L. c. 19D, it "further recognize[d] that assisted living residences should be operated and regulated as residential environments with supportive services and not as medical or nursing facilities." St. 1994, c. 354, § 1. Accordingly, the crux of G.L. c. 19D is to ensure that assisted living residences "compensate for the physical or cognitive impairment of the individual while maximizing the individual's dignity and independence."

Jewish Geriatric Services, Mass. ATB Findings of Fact and Reports at 2002-352 (quoting St. 1994, c. 354, § 1). To this effect, Chapter 19D affords elderly residents of assisted-living facilities many of the rights and protections enjoyed by tenants of traditional rental complexes. For example, § 16 requires each residency apartment to be equipped with basic amenities like lockable doors on the entry of each apartment, private bathrooms,[26] and a kitchenette "or access to cooking capacity" for every apartment.[27] G.L. c. 19D, § 16. "These requirements

---

[26] All assisted living residences constructed after the effective date of G.L. c. 19D must include a private full bathroom with a bathing facility in every apartment. All other residences must include at least a private half bathroom and at least one bathing facility for every three residents. G.L. c. 19D, § 16.

[27] The Secretary of Elder Affairs may waive the requirements for bathrooms and kitchenettes if the secretary determines that "public necessity and convenience require and to prevent undue economic hardship." However, in this event, the assisted living residence must "otherwise meet the purposes of assisted living to provide a home-like residential environment, which

underscore the legislature's concern that assisted living residences respect the privacy of elderly tenants and provide them a residential environment to the greatest extent possible, thereby 'maximizing the individual's dignity and independence.'" ***Jewish Geriatric Services***, Mass. ATB Findings of Fact and Reports at 2002-353 (quoting St. 1994, c. 354, § 3).

A key protection is provided under § 9: "To not be evicted from the assisted living residence except in accordance with the provisions of landlord tenant law as established by chapter one hundred and eighty-six or chapter two hundred and thirty-nine." G.L. c. 19D, § 9(18). "It is this legal protection against eviction that distinguished [the assisted-living] tenants from the residents of other properties that have been found to be occupied by charitable institutions instead of by the residents." ***Jewish Geriatric Services***, Mass. ATB Findings of Fact and Reports at 2002-354. The dormitory and boarding house residents in ***M.I.T. Student House, Inc. v. Assessors of Boston***, 350 Mass. 539, 540 (1966), and the nursing home residents in ***H-C Health Services, Inc. v. Assessors of South Hadley***, 42 Mass. App. Ct. 596 (1997), did not have rights and protections akin to traditional tenants, particularly the right for evictions to be pursued under landlord-tenant law; accordingly, the organization, not the individual residents, was considered the occupant of the property for purposes of G.L. c. 59, § 5, Third. *Cf.* ***Franklin Square House v. Boston***, 188 Mass. 409, 411 (1905) ("The occupation of the property ["a home for working girls at moderate cost"] is that of the corporation itself, and not of those to whom it affords a home, just as the occupation of a college dormitory or refectory is that of the institution of learning rather than that of its students").

The Board found that Homestead residents are more akin to the residents in ***Charlesbank Homes v. City of Boston***, 218 Mass. 14 (1914). The appellant in ***Charlesbank Homes*** was a charitable corporation whose charitable purpose was "to provide wholesome and sanitary homes for working people and people of small means at moderate cost." ***Id***. at 16. The Supreme Judicial Court found that the tenants "are not mere lodgers" but rather, they "have an interest in the respective apartments let to them" and accordingly "they are themselves the occupants thereof." ***Id***. Therefore, while it "[did] not doubt that the plaintiff [was] a charitable corporation" within the meaning of the applicable statute and that its purpose "to provide wholesome and sanitary homes for working people and people of small means at moderate cost" was noble, the Supreme Judicial Court nonetheless found

---

promotes privacy, dignity, choice, individuality and independence for its residents." G.L. c. 19D, § 16.

that the appellant did not meet the occupancy requirement under G.L. c. 59, § 5, Third, and accordingly, it denied the charitable exemption for the apartment house at issue. ***Id***.

In the instant appeal, the rights provided under G.L. c. 19D, particularly the right that evictions be pursued in accordance with landlord-tenant laws, secured for the residents of Homestead the legal status as tenants, like the renters in ***Charlesbank Homes***. While extenuating health circumstances require a presence of the appellant's staff within resident's apartments, residents nonetheless enjoy rights to privacy within their apartment. Moreover, residents are expected to carry their own apartment insurance and are entitled to have their recommendations and grievances addressed. Accordingly, the Board found and ruled that the individual residents of Homestead, not the appellant, occupied the subject property for purposes of G.L. c. 59, § 5, Third.[28]

The appellant contended that, despite the protection against eviction in accordance with landlord-tenant law enjoyed by residents of Homestead, the appellant occupies the subject property because the appellant's employees are present at all times to provide many services to residents, and the appellant reserves rights to the property, to the detriment of the residents, pursuant to the Residency Agreement. For example, pursuant to Section V.G, the appellant retains the right to enter Heritage apartments "without prior notice to carry out the scheduled services." The appellant argued that this provision limits the residents' rights to privacy in their apartments, and that privacy is even more limited in Homestead apartments, where, for safety purposes, there are no locks on the doors.

However, the Board has previously found that "[t]he presence of the appellant's employees does not equate with "occupancy" for purposes of G.L. c. 59, § 5, Third." ***Jewish Geriatric Services***, Mass. ATB Findings of Fact and Reports at 2002-356. Notwithstanding the presence of the appellant's employees, and the appellant's reservation of rights to enter Homestead apartments, practices implemented for the safety and care of the elderly residents with memory impairments, Homestead residents still enjoy many rights and protections of typical

---

[28] The implementation of the tenancy protections under G.L. c. 19D distinguishes this appeal from ***Island Elderly Housing, Inc. v. Board of Assessors of the Town of Tisbury***, Mass. ATB Findings of Fact and Reports 1997-119, where the Board found that the organization, not the individual tenants, occupied the subject property. ***Island Elderly*** pertained to fiscal years 1990 and 1991, prior to the passage of G.L. c. 19D. In fact, the housing in ***Island Elderly*** was not described as "assisted-living," and there was no evidence of the landlord-tenant rights and protections guaranteed to residents like those provided under G.L. c. 19D. ***Island Elderly*** is thus inapplicable to this appeal for purposes of the issue of occupancy.

tenants. While somewhat curtailed for residents of Homestead, the right to privacy is still secured for the residents through G.L. c. 19D, as reflected in the Residency Agreement at VI.B, which provides that, except in cases of emergency or to carry out the services provided by contract, the appellant must give 24-hours' notice before entering a Heritage apartment.

The appellant also argued that residents do not have a protected right to their apartments, because Sections II.B and IX.D reserve the appellant's right to terminate the Residency Agreement if a resident's condition deteriorates to a point that the residents requires more services than those offered by the appellant. However, the Board has previously found that, despite provisions relative to displacing a tenant whose health has deteriorated, which is dictated by the limited level of care offered by assisted-living facilities, assisted-living residents nevertheless enjoy many of the protections of traditional legal tenants, particularly the protection with respect to statutory eviction in accordance with landlord-tenant laws. *See* ***Kings Daughters and Sons***, Mass. ATB Findings of Fact and Reports at 2002-460 (despite the facility's right to terminate residency based upon a resident's deterioration of health, the Board found that "residents enjoy exclusive possession of a particular unit and have legal rights relating to eviction"). Therefore, the Board found and ruled that the individual residents, not the appellant, occupy the property for purposes of G.L. c. 59, § 5, Third. Accordingly, in conformity with ***Charlesbank Homes***, the Board found and ruled that the charitable exemption was not available to the appellant.

Conclusion

The Board found that the appellant's services are not available to a sufficiently-broad cross-section of the elderly population, and that the appellant does not relieve any burden of government through its operation of an assisted-living facility. Moreover, the Board found that the individual tenants, not the appellant, occupy the subject property. Therefore, the Board found that the subject property does not qualify for the exemption at G.L. c. 59, § 5, Third.

Accordingly, the Board issued decisions for the appellee in these appeals.

APPELLATE TAX BOARD

By: _____

Thomas W. Hammond, Jr., Chairman

A true copy:

Attest: _____

Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

NORTHEAST GENERATION CO. Docket No. F287573	**v.**	**BOARD OF ASSESSORS OF THE TOWN OF NORTHFIELD**
NORTHEAST GENERATION CO. Docket No. F287884	**v.**	**BOARD OF ASSESSORS OF THE TOWN OF ERVING**
ATB 2008-380		Promulgated: April 1, 2008

These are appeals filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the appellee Board of Assessors of the Town of Erving ("Erving") to abate taxes on certain real estate located in the Town of Erving assessed to the appellant Northeast Generation Co. ("Northeast" or "appellant") under G.L. c. 59, §§ 11 and 38, and from the refusal of the appellee Board of Assessors of the Town of Northfield ("Northfield") to abate taxes on certain real estate located under the Connecticut River where it flows through the Town of Northfield, assessed to the appellant under G.L. c. 59, § 2B. Both appeals are for fiscal year 2006.

Chairman Hammond heard these appeals and was joined by Commissioners Scharaffa, Egan and Rose in the decision for the appellant in docket number F287573, and was joined by Commissioners Scharaffa, Egan, Rose and Mulhern in the decision for the appellee in docket number F287884.

These findings of fact and report are made pursuant to a request by Northfield under G.L. c. 58A, § 13 and 831 CMR 1.32.

Robert A. Gelinas, Esq., and *Daniel J. Finnegan*, Esq., for the appellant.

Eugene L'Etoile, assessor, for the appellee Town of Northfield.

Donna L. MacNicol, Esq., for the appellee Town of Erving.

FINDINGS OF FACT AND REPORT

On the basis of a Statement of Agreed Facts, exhibits, and testimony offered during the hearing of these appeals, the Appellate Tax Board ("Board") made the following findings of fact.

During fiscal year 2006, (the "fiscal year at issue") the appellant, a for-profit corporation organized under the laws of Connecticut and now known as First Light Hydro Generating

Company, was the owner/operator of a pump storage plant known as the Northfield Mountain Hydroelectric Facility (the "facility"). A pump storage plant is designed to provide power during emergencies or peak energy usage periods, and to store energy during low usage times. It generates electricity by drawing water from a lower reservoir, which in this case is the Connecticut River (the "river"), through various shafts and tunnels into an upper reservoir, and then releasing water from the upper reservoir to flow through turbines in a powerhouse, and then back into the lower reservoir. The parties stipulated and the Board found that the river is a navigable waterway.[29] The Board found that the portion of the river which flows through Massachusetts is held in trust by the Commonwealth of Massachusetts for the benefit of its inhabitants, a fact to which the parties also stipulated.

The facility is located along the river in the Towns of Erving, Northfield, Montague and Gill. At issue in this case is the 687-acre parcel of land located beneath the river where the river runs through Northfield (the "subject property" or "riverbed").

John Howard, manager of the facility, was the sole witness for the appellant. The Board found Mr. Howard's testimony to be credible. Mr. Howard testified regarding the facility's operations, general activities along the river, and the limitations and requirements imposed upon the facility by the Federal Energy Regulatory Commission ("FERC"). FERC is an independent regulatory agency within the United States Department of Energy, which licenses private, municipal and state hydroelectric projects. According to Mr. Howard, the facility consists primarily of an upper reservoir,[30] lower reservoir, a power house with four turbines, an access tunnel,[31] and two water-carrying shafts.[32] The facility holds a portion of

---

[29] Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguishable by later actions or events which impede or destroy navigable capacity. 33 CFR § 329.4.

[30] The upper reservoir is a man-made structure, built on land owned by Northeast on which Northeast pays taxes. Northeast uses security measures to prevent people from accessing the upper reservoir.

[31] The access tunnel leads to the power house, which sits approximately 700 feet below the surface of Northfield Mountain.

[32] The shaft between the river and the power house is known as a "tailrace tunnel" and the shaft between the power house and the upper reservoir is known as a "penstock."

its land in a relatively undeveloped state, some of which is used to provide public recreation areas and access points to the river.[33] The facility also has deeded easements granting it the right to flood a portion of the shoreline. These easements generally run from the river up to the 50-year floodplain, plus three feet.[34]

The facility draws the water necessary for its operation from the river into the tailrace tunnel. By running the generators in reverse, the water is moved into the penstock, which carries it into the man-made upper reservoir atop Northfield Mountain, where the water is stored. During peak energy usage periods, the process is reversed, and the water travels back down Northfield Mountain, into the river. The force of the water rushing towards the river spins the turbines in the correct direction, generating power. The operation of the facility is utterly dependent on the use of the river, a fact underscored by Mr. Howard when he stated that without the river, the facility "would just be a big hole in the ground."

In 1968, Northeast was granted a license by FERC to construct the facility and to use the river's water for the generation of power. The license permits Northeast to change the river's elevation from an elevation of 185 feet above sea level, measured at Turners Falls Dam, to 176 feet above sea level, or 12,600 acre-feet of water, which is the amount that Northeast can store in its upper reservoir. In other words, Northeast is licensed to use only nine feet of the river's water. The license also requires Northeast to facilitate the public's use of the river, control erosion along the river's banks, and issue licenses to entities wishing to draw less than one million gallons of water per day from the river.[35] Mr. Howard's testimony and the Statement of Agreed Facts submitted by the parties highlighted the many recreational activities associated with the river, including boating, swimming, fishing, camping, and cross-country skiing. As required by its license from FERC, Northeast granted permits to numerous entities for recreational use of the river, including the Franklin County

---

[33] Northeast's license from FERC mandates that Northeast facilitate the public's use of the river.

[34] The 50-year floodplain is the highest level the river is expected to reach over the course of a given 50-year period. Northeast decided to attain easements at this level largely because it has a 50-year license with FERC to operate the facility. The additional three feet are a precautionary measure.

[35] An entity wishing to draw more than one million gallons a day from the river must obtain approval from FERC.

Boat Club and the Turners Falls Rod and Gun Club. Additionally, evidence was entered into the record of several non-recreational uses of the river, including withdrawals for irrigation by local commercial farms as well as for treatment of waste water by Northfield.

In 2005, Northfield and Erving hired Mainstream Associates ("Mainstream") to conduct an appraisal of the facility. Mainstream determined that the facility had a fair market value of $533,500,000. Of this, 86.2% was apportioned to Erving, and 12.8% to Northfield.[36] Northfield then asked Mainstream to reappraise the facility, taking the value of the 687 acres of riverbed located in Northfield into account. Mainstream complied and, although the total value of the property did not change, the portion of the facility's value attributed to Northfield rose to 13.6%, while the portion attributed to Erving fell to 85.39%. Northfield assessed the facility pursuant to the second appraisal, while Erving assessed the facility pursuant to the original appraisal.[37] As a result, approximately .08% of the appraised value of the facility was taxed by both Erving and Northfield. In these appeals, Northeast sought relief primarily from Northfield's assessment, but in the event that the Board were to issue a decision in favor of Northfield, Northeast sought an abatement of Erving's assessment for that portion of the facility's assessed value which was taxed by both towns.

On January 1, 2005, the relevant assessment date for the fiscal year at issue, Northeast was assessed by Northfield as the occupant or user of the subject property. Northfield valued the subject property at $4,321,000 for fiscal year 2006, and assessed a tax at the rate of $12.87 per thousand, in the amount of $55,611.27, which Northeast paid without incurring interest.

On April 25, 2006, Northeast timely filed its Application for Abatement with Northfield. Northfield denied the Application for Abatement on July 19, 2006, and on October 18, 2006, Northeast seasonably filed its Petition appealing Northfield's assessment with the Board.

On January 1, 2005, the relevant assessment date for the fiscal year at issue, Northeast was assessed by Erving as the owner of those portions of the facility located in Erving. Initially, Erving taxed the facility according to Mainstream's second appraisal, and the parcel affected by that appraisal was

---

[36] Gill and Montague were also assigned a small portion of the facility's value, in each case less than 1%.

[37] Initially, Erving also taxed the facility pursuant to the second appraisal. However, upon learning of Northeast's appeal, Erving sent the appellant a corrected tax bill following the original appraisal.

valued at $275,379,704. Subsequently, on June 20, 2006, Erving issued a corrected tax bill which taxed the facility according to Mainstream's original appraisal. The corrected tax bill valued the parcel affected by the appraisal at $279,494,904, and assessed a tax thereon at the rate of $11.21 per thousand, in the total amount of $3,133,137.87, which the appellant paid without incurring interest.

On September 19, 2006, Northeast timely filed its Application for Abatement with Erving. Erving denied the Application for Abatement on December 19, 2006, and on February 28, 2007, Northeast seasonably filed its Petition appealing Erving's assessment with the Board. On the basis of these facts, the Board found that it had jurisdiction to hear these appeals.

The appellant argued that Northfield does not have the authority to tax the land under a navigable waterway. The appellant also argued that even if the Board were to rule that Northfield does have the authority to assess such a tax, the facility does not own, occupy, lease or use the riverbed, but uses only the river's water. Northfield argued that it has the authority to tax the riverbed under G.L. c. 59, § 2B, and that by using the river's water the appellant is also, by necessity, using the riverbed. Northeast and Erving filed a joint post-trial brief, essentially asking that the Board uphold the amounts assessed pursuant to the original appraisal report.

The Board found that the river is a navigable waterway, subject to the control of the federal government and held in trust by the Commonwealth of Massachusetts. The Board also found that the facility used only the river's water, and did not own, lease, occupy or otherwise use the riverbed. On this basis, to the extent it is a finding of fact, the Board found that Northfield does not have the authority to assess a tax on the subject property under G.L. c. 59, § 2B. The Board therefore found that the amounts assessed according to the original appraisal report, reflected in this case in Erving's corrected tax bill, were correct. Accordingly, the Board issued a decision for the appellant in Docket Number F287573 and for the appellee in Docket Number F287884.

OPINION

Pursuant to G.L. c. 59, § 2B, towns are permitted to assess a tax on lands owned by the Commonwealth of Massachusetts if those lands are leased, occupied or used in connection with a for-profit business:

> real estate owned in fee or otherwise or held in trust for the benefit of the United States, the

> commonwealth, or a county, city or town, or any instrumentality thereof, if used in connection with a business conducted for profit . . . shall for the privilege of such use, lease or occupancy, be valued, classified, assessed and taxed annually as of January first to the user . . . in the same manner and to the same extent as if such user . . . were the owner thereof in fee[.]

The parties have stipulated and the Board has found that, as a navigable waterway, title to the river is held in trust by the Commonwealth of Massachusetts for the use of its inhabitants. This title is not limited to the waters of the river itself, but extends to the riverbed beneath. "The waters and the land under them beyond the line of private ownership are held by the State, both as owner of the fee and as the repository of sovereign power, with a perfect right of control in the interest of the public." ***McCarthy v. Town of Oak Bluffs,*** 419 Mass. 227, 234 (1994). The Commonwealth's title to the river is subject to one limitation, the right of the federal government to ensure freedom of interstate and foreign commerce.

> [T]he ownership of land under navigable waters is an incident of sovereignty. As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an "equal footing" with the established States. After a State enters the Union, title to the land is governed by state law. The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce.

Montana v. United States, 450 U.S. 544, 551 (1981)(internal citations omitted). Therefore, in order to be taxable under G.L. c. 59, § 2B, Northeast would need to "lease," "occupy" or "use" the riverbed in connection with its business. The Board found that it did not.

No evidence was submitted and no argument was made by any of the parties that Northeast was a lessee of the subject property, and therefore the Board found that it did not lease the subject property.

The term "occupy" is not defined within G.L. c. 59, § 2B. Because the statute itself did not define the term, the Board must consider "the natural import of words according to the ordinary and approved usage of the language when applied to the subject matter of the act." ***Boston & Me. R.R. v. Billerica***, 262 Mass. 439, 444 (1928). *See also* G.L. c. 4, § 6, Third. Black's Law Dictionary defines "occupy" thusly: "To take or enter upon possession of; to hold possession of; to hold or keep for use; to possess; to tenant; to do business in; to take or hold possession. Actual use, possession, and cultivation." BLACK'S LAW DICTIONARY (6th ed. 1990) 1079. The American Heritage College Dictionary provides the following definition of "occupy": "To fill up (time or space); to dwell or reside in; to hold or fill (an office or a position); to seize possession of and maintain control over by or as if by conquest; to engage, employ or busy (oneself)." THE AMERICAN HERITAGE COLLEGE DICTIONARY (3rd ed. 1997) 944. The Board found that Northeast did not take possession of, keep for use, reside in or in any other sense occupy the subject property. The evidence did not suggest that the facility or any structures relating thereto were embedded in even a portion of the riverbed, let alone all of the 687 acres at issue. Additionally, Northeast could not be said to "hold" or "possess" the riverbed. The public and other commercial users had access to the river. Northeast had no right to exclude others from the river or riverbed, and moreover, Northeast was actually required to facilitate the public's use of the river. Therefore, the Board found that Northeast did not "occupy" the subject property.

With regard to "use," the record is quite clear that Northeast used only the river's water, not the riverbed, in the conduct of its business. In fact, Northeast was permitted to use only nine feet of river water under its license from FERC. Northfield claimed that by using the river's water the facility was, by the laws of nature, also using the riverbed, but offered no support for this argument. The Board therefore found that Northeast did not "use" the subject property.

The record indicates that several commercial farms also took water from the river for irrigation purposes. There is no evidence that other commercial users of the river were assessed as users of any portion of the land beneath the river, and the evidence does not support such an inference, as Northeast was assessed upon the entirety of the subject property. The Supreme Judicial Court has noted that a "reason for such statutes as G.L. c. 59, § 3A,[38] is to overcome the inequities which result if

[38] G.L. c. 59, § 3A, is the predecessor to G.L. c. 59, § 2. Section 3A provided, in pertinent part, "[r]eal estate owned by… the commonwealth… if used or occupied for other than public purposes, shall be taxed to the

some businesses conducted for profit are exempt from real estate tax burdens because located on publicly owned land." ***Atlantic Refining Company v. Newton***, 342 Mass. 200, 204 (1961). To allow Northfield to tax the entire value of the subject property to Northeast while other businesses make use of the river tax-free would plainly subvert the intent of the statute.

The appropriate approach, as argued by the appellant, is to include the appellant's use of and proximity to the river in calculating the overall value of its real estate. It has long been held by Massachusetts courts "that water power is taxable only as incident to land . . . and not to the dam and pond by which it is created." ***Pingree v. County Commissioners of Berkshire,*** 102 Mass. 76, 78 (1869)(*citing* ***Boston Manufacturing Co. v. Newton***, 39 Mass. 22, 23 (1839)); ***Lowell v. Commissioners of Middlesex County***, 152 Mass. 372, 383 (1890); ***Essex Co. v. Lawrence***, 214 Mass. 79, 90 (1913); ***Assessors of Lawrence v. Arlington Mills***, 320 Mass. 272, 276 (1946) ("Rights in water power, used or capable of use in connection with a mill site, are taxable with it, not as distinct and independent items of property, but as increasing the value of the mill site.") The benefit the facility derives from its use of the river must be accounted for by increasing the total value of the facility, and not by assessing to Northeast the value of riverbed property which it does not own, use or possess. The Board notes that this benefit is not de minimis. According to the testimony of Mr. Howard, if the facility could not use the river's water, it would be essentially a "big hole in the ground" rather than a property with an assessed fair market value of over a half-billion dollars.

Northfield attempted to liken Northeast's use of the river as its lower reservoir to the use of its upper reservoir, which is a man-made structure situated on land owned by Northeast. Northfield argued that just as Northeast pays taxes on the land under its upper reservoir, it should pay taxes on the land beneath the river, but this argument fails for a number of reasons. First, the upper reservoir and the land beneath it are property owned and used exclusively by Northeast; Northeast alone has control of the upper reservoir and Northeast can and does prohibit others from accessing it. The land beneath the upper reservoir is not held in trust by the Commonwealth. Northfield has assessed the subject property under G.L. c. 59, § 2B, which applies only to land owned by or held in trust by the Commonwealth, cities or towns, and property taxed under other statutes is inapposite for comparison. Moreover there was no

---

lessee or lessees thereof… in the same manner and to the same extent as if the said lessee or lessees… were the owners thereof in fee…".

evidence that Northeast used only a portion of the water in its upper reservoir, while the evidence showed that Northeast was permitted to use only nine feet of water in the lower reservoir, and not the land beneath. For these reasons, the Board found that this argument lacked merit.

Northfield also argued that the public utility exemption under G.L. c. 59, § 2B was not available to Northeast because, following the deregulation of electric companies, Northeast was re-classified as a generation company. This argument is rendered moot by the Board's finding that Northeast was not subject to taxation of the subject property under G.L. c. 59, § 2B.

CONCLUSION

For the reasons discussed in the above Opinion, the Board found that Northfield improperly assessed a tax upon the appellant for the subject property. Accordingly, the Board issued a decision for the appellant in Docket number F287573, and ordered an abatement of $55,611.27 plus statutory interest, and for the appellee in Docket number F287884.

APPELLATE TAX BOARD

By: _____

Thomas W. Hammond, Jr., Chairman

A true copy,
Attest: _____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

CITY OF QUINCY **v.** **COMMISSIONER OF REVENUE**

Docket No. C282413

Promulgated:
November 14, 2007

ATB 2007-1244

This is an appeal under the formal procedure pursuant to G.L. c. 58, § 14 and c. 58A, § 7, from valuations made by the Commissioner of Revenue ("Commissioner"), under G.L. c. 58, §§ 13-17, of land located in the City of Quincy that is owned by the Commonwealth of Massachusetts ("Commonwealth") and is part of the Blue Hills Reservation. The purpose of the valuation was to determine the payment in lieu of taxes due to the City of Quincy by the Commonwealth under G.L. c. 58, § 13. The Commissioner's valuation was made as of January 1, 2005.

Commissioner Rose heard the appeal and was joined by Commissioners Scharaffa, Gorton, and Egan in a decision for the appellee. Chairman Hammond took no part in the deliberation or decision of this appeal.

These findings of fact and report are made pursuant to a request by the appellee under G.L. c. 58A, § 13 and 831 CMR 1.32.

Robert Quinn, Esq., for the appellant.

Thomas W. Hammond, Jr., Esq., *Mirielle T. Eastman,* Esq. and *Andrew P. O'Meara,* Esq. for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of a Statement of Agreed Facts and accompanying Exhibits, the Appellate Tax Board ("Board") made the following findings of fact.

In 1893, the Metropolitan Parks Commission acquired, on behalf of the Commonwealth, the majority of the land that makes up the Blue Hills Reservation in the City of Quincy. The Commonwealth, through a series of state agencies, has maintained ownership of the land. The Commonwealth has also, from time to time, added parcels to the Blue Hills Reservation. The Blue Hills Reservation currently consists of property in Quincy and the Towns of Milton, Braintree, Randolph and Canton ("Blue Hills Communities").

In accordance with G. L. c. 58, § 13, the Commissioner of Revenue ("Commissioner") is required to determine the fair cash

value of certain state owned land ("SOL") every four years. The Commissioner's valuation is used to determine the Commonwealth's payments in lieu of taxes to municipalities in which SOL is located. As a result of special legislation, Acts and Resolves of 2004, c. 352, § 23, the Commissioner was required to include the Blue Hills Reservation in SOL eligible for reimbursement, beginning with the valuation made as of January 1, 2005. It is this valuation which is the subject of the present appeal.

By notice dated September 27, 2004, the Commissioner's Bureau of Local Assessment ("BLA") notified the assessors' offices of the Blue Hills Communities, including the Assessors of Quincy ("Quincy"), that it needed certain data and documentation to determine the communities' eligibility for reimbursement. Specifically, the BLA requested the following information for the Blue Hills Reservation properties: 1) the current fiscal year property record cards for the properties; 2) deeds or Orders of Taking by which the Commonwealth acquired the properties; 3) a copy of the commitment book entries for the last year that the properties were taxed; and, 4) the assessors' maps marked with the location of the properties.

On October 18, 2004, the BLA sent a notice to Quincy and the assessors of the other Blue Hills Communities that reiterated the need for the information requested in the September 27, 2004 notice and informed the Blue Hills Communities that the deadline for data submission was April 1, 2005. Subsequently, the BLA extended the deadline for data submission to May 1, 2005.

By notice dated May 17, 2005, the BLA informed Quincy that it had not yet received any of the requested documentation concerning the Blue Hills Reservation property in Quincy. On June 1, 2005, the Commissioner notified Quincy of his proposed valuation for the Blue Hills Reservation property in Quincy as of January 1, 2005, which the Commissioner later revised by notice dated July 19, 2005. On August 9, 2005, Quincy timely filed an appeal from the Commissioner's July 19, 2005 determination pursuant to G.L. c. 58, § 14. Based on these facts, the Board found and ruled that it had jurisdiction over this appeal.

In accordance with the SOL program for 2005, the BLA determined the value of SOL in 293 communities across the Commonwealth, including Quincy. Pursuant to the Commissioner's guidelines, "land will be valued as vacant based on the requirements of local zoning laws of the municipality, predominant land use in the absence of zoning laws or on commonly accepted based lots in the community." See *Guidelines for Development of a Minimum Reassessment Program* (revised January 2005), p. 11. On the basis of local zoning requirements

or predominant land use, each SOL site was categorized and valued as follows: primary front lots (also referred to as "prime lots"), which are readily developable; rear/excess land, which is potentially developable; and undevelopable/wet land, which is unbuildable due to physical condition or governmental restrictions and land that is a "water body," such as lakes and ponds. ***Id.*** at p. 12. Primary lots are valued and reimbursed to the communities at a higher rate than land categorized as rear/excess land or undevelopable wetland.

According to Quincy's zoning by-laws, a majority of the SOL in Blue Hills Reservation was zoned "Open Space." Open Space zoning in Quincy is defined as "[t]hose areas dedicated or used for public or semipublic uses such as parks and recreation areas, cemeteries and open-space reservations." Specifically prohibited uses of Open Space land in Quincy include residential, institutional, educational, governmental, business or industrial uses. Therefore, the Commissioner determined that the Blue Hills Reservation SOL in Quincy was undevelopable and not entitled to primary lot classification.

At the same time, the Commissioner granted primary front-lot status to land zoned open space in several other communities. Quincy argued that there is no justifiable reason for the Commissioner to treat open space zoning in one community differently from open space zoning in another community. Accordingly, Quincy argued that the Commissioner's valuation methodology was arbitrary and capricious.

The fundamental flaw with Quincy's argument, however, is that it assumes that the zoning by-laws are the same in all communities. The Board found, however, that local zoning is not uniform among the Blue Hills Reservation communities. For example, in the towns of Braintree and Canton, the Commissioner granted primary front-lot status to SOL zoned "Open Space and Conservancy District" and "Parkland, Recreation, and Open Space," respectively. Review of the respective town's zoning by-laws showed that development, albeit limited, is allowed in these areas. In contrast, Quincy's by-laws specifically preclude any development on "open-space" zoned land. Therefore, the Board found that Quincy's argument was unsupported and flawed.

Quincy also argued that the Commissioner's methodology is arbitrary and capricious because it ignores the impact of constitutional and statutory provisions that regulate the use of its SOL. Pursuant to Article 97 of the Article of Amendments to the Massachusetts Constitution ("Article 97"), SOL acquired for use as parklands and open space may not be used for other purposes or disposed of unless authorized by the Legislature.

Therefore, Quincy argued that Blue Hills Reservation land in other municipalities should not have been afforded prime front-lot status. Quincy also noted that G.L. c. 40A, § 3, prohibits municipalities from regulating certain uses, including child-care facilities. Therefore, Quincy argued that when the provisions of Article 97 and G.L. c. 40A, § 3 are considered, Quincy's Open Space development restrictions are substantially similar to Open Space restrictions in other Blue Hills Reservation communities.

However, as the Commissioner argued, the SOL program is designed to provide an approximation of the value of SOL in 293 communities across the Commonwealth. It is designed to provide uniformity and consistency in the context of a mass appraisal approach to value. The Commissioner's valuation methodology valued land as if there were no state restrictions on, or regulation of, development and looked exclusively to local zoning regulations. This approach allowed communities to exercise discretion in local zoning matters and maximized potential reimbursement from the Commonwealth, while affording a workable standard by which the Commissioner could value SOL in all affected communities.

Based on the evidence presented in this appeal, the Board found that the Commissioner's methodology of basing valuation on each municipality's local zoning can be applied equally to each town with eligible SOL and will produce values reasonably approximate to fair cash value. Accordingly, the Board found and ruled that the Commissioner's valuation procedure was reasonably designed to achieve the purposes of G.L. c. 58, § 13 and was not arbitrary or capricious. The Board further found and ruled that the Commissioner properly implemented this method in valuing eligible SOL in Quincy at issue in this appeal. Accordingly, the Board found and ruled that Quincy failed to meet its burden of proving that the Commissioner's valuation of Quincy's SOL for the year at issue did not comply with § 13.

For these reasons, the Board issued a decision for the appellee in this appeal.

OPINION

Pursuant to G.L. c. 58, § 13, "the Commissioner shall . . . determine as of January first the fair cash value as hereinafter provided of all land in every town owned by the commonwealth" for payments in lieu of taxes in accordance with G.L. c. 58, §§ 13-17. In ***Board of Assessors of Sandwich v. Commissioner of Revenue***, 393 Mass. 580 (1984) ("***Sandwich I***"), the Supreme Judicial Court held that the Board's scope of review of the Commissioner's valuations under G.L. c. 58, § 13 is narrower than taxpayer appeals of property tax assessments. Unlike the

typical property tax appeal to this Board, where the Board "hears testimony from all parties and forms an independent judgment of value based on all the evidence received," the court held that under § 13, the Board "should perform a more traditional appellate function." ***Id.*** at 586. In ***Sandwich I***, the court held that the Board's role is restricted to "determin[ing] whether the method used by the Commissioner is reasonably designed to achieve the statute's objectives, and whether the method was properly implemented in the particular case." ***Id.*** at 588. Further, "[i]n determining whether the Commissioner complied with the statute, the board's task is not to substitute its own judgment as to the most appropriate method of valuation." ***Id.***

The objective of § 13, to reimburse municipalities with SOL for lost tax revenues, does not require the Commissioner to develop a methodology by which fair cash values are precisely determined; rather, § 13 is intended to "provide [] towns with only an approximate reimbursement of lost taxes." ***Id.*** Accordingly, § 13 provides that the Commissioner's determination of value "shall be in such detail as to lots, subdivisions or acreage as the Commissioner may deem necessary," underscoring that, under § 13, "'full and fair cash values can only be approximated.'" ***Id.*** at 587 (quoting ***Macioci v. Commissioner of Revenue***, 386 Mass. 752, 761 (1982)). Further, "in the context of a Statewide valuation program, in light of the limited resources of the Commissioner, it may be necessary to 'conced[e] perfection in result, in favor of a process which is orderly, expeditious, and reliable.'" ***Id.*** at 588 (quoting ***Newton v. Commissioner of Revenue***, 384 Mass. 115, 122 (1981)).

Because the court recognized that § 13 is meant to provide municipalities with an approximate reimbursement of lost taxes through an expeditious, albeit imperfect, procedure, the court specified that "the board should determine whether the Commissioner has adopted a procedure which (1) can be applied equally to each town where there are eligible State owned lands and (2) will produce values reasonably approximate to fair cash value." ***Sandwich I,*** 388 Mass. at 588. "If the procedure adopted by the Commissioner is not arbitrary or capricious, it should be upheld" by the Board. ***Id.*** If the procedure is upheld, the Board must then determine if the Commissioner properly applied his methodology to Quincy. ***Id.*** at 588-89.

The burden of proof is upon the appellant to show that the Commissioner's valuation methodology was arbitrary and capricious and/or that the Commissioner did not properly apply the methodology to the eligible state-owned land in Quincy. ***Commissioner of Revenue v. Board of Assessors of Sandwich,*** 405 Mass. 307, 312 (1989) ("***Sandwich II***"); *see* ***Sandwich I***, 393 Mass.

at 588; ***Schlaiker v. Board of Assessors of Great Barrington***, 365 Mass. 243, 245 (1974). The venerable and "fundamental rule as to burden of proof is, that whenever the existence of any fact is necessary in order that a party may make out [its] case . . . , the burden is on such party to show the existence of such fact." ***Willet v. Rich***, 142 Mass. 356, 357 (1886); ***Town of Boylston v. Commissioner of Revenue and others,*** Mass. ATB Findings of Fact 2004-278, 313.

On the basis of the evidence of record in this appeal, the Board ruled that Quincy failed to meet its burden. Pursuant to § 13, the Commissioner is required to value all SOL within the Commonwealth every four years. To accomplish this substantial task, the Commissioner has issued guidelines which clearly delineate how such land will be valued. The value classifications are based primarily on consistency in application, while still affording cities and towns the opportunity to classify land as they so choose. Pursuant to the Commissioner's guidelines, land is valued according to each community's zoning provisions. Because local zoning ordinances differ, property zoned as "Open Space" in Quincy is subject to different, in this case more stringent, development restrictions than property zoned "Open Space" in other communities. It is the restrictions contained in the community's zoning ordinance, and not the title of the particular zoning classification, that formed the basis of the Commissioner's valuation

Based on these findings of facts, the Board found and ruled that the Commissioner's valuation procedure could be applied equally to each town where there are eligible state-owned lands and that the procedure produced values reasonably approximate to fair cash value. Accordingly, the Board found and ruled that the Commissioner's valuation procedure was reasonable designed to achieve the purposes of § 13 and was not arbitrary or capricious. Further, the Board found and ruled that Quincy did not meet its burden of proving that the Commissioner failed to follow his own valuation methodology.

The Board, therefore, ruled that Quincy failed to meet its burden of proving that the Commissioner's valuation of Quincy's SOL, which is the subject of this appeal, did not comply with § 13.

On this basis, the Board decided this appeal for the appellee.

APPELLATE TAX BOARD

By:_____

James D. Rose, Commissioner

A true copy,
Attest:_____

Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

RNK, INC. **v.** **BOARD OF ASSESSORS OF THE TOWN OF BEDFORD**

Docket No. F281946

Promulgated:
July 16, 2008

ATB 2008-893

This is an appeal under the formal procedure, pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the appellee Board of Assessors of the Town of Bedford ("appellee" or "assessors") to abate taxes on certain personal property in the Town of Bedford owned by and assessed to Siemens Information & Communication Networks, Inc. under G.L. c. 59, §§ 2 and 18, for fiscal year 2005. This appeal is being prosecuted by RNK, Inc. ("appellant") as the lessee of the subject personal property.

Commissioner Gorton heard this appeal. With Commissioner Gorton materially participating in the deliberations of this appeal[39], Chairman Hammond and Commissioners Scharaffa, Egan, Rose and Mulhern joined in the decision to dismiss the appeal for lack of jurisdiction.

These findings of fact and report are made on the Appellate Tax Board's ("Board's") own motion under G.L. c. 58A, § 13 and 831 CMR 1.32 and are promulgated simultaneously with its decisions.

Leah Williams, Esq. and *Lynn Castano,* Esq., for the appellant.

Lela Rhodes, assessor, for the appellee.

FINDINGS OF FACT AND REPORT

On January 1, 2004, Siemens Information and Communication Networks, Inc. ("Siemens") was the assessed owner of personal

[39] On September 11, 2006, Commissioner Gorton was sworn as a temporary member of the Appellate Tax Board pursuant to G.L. c. 58A, § 1, his status as a member of the Board having terminated on that date with the appointment and qualification of his successor. *See* G.L. c. 30, § 8. This appointment was renewed for an additional year commencing September 11, 2007. Commissioner Gorton's material participation in the deliberation of these appeals included, *inter alia*, drafting and distributing proposed Findings and giving a detailed report on the evidence and his observations as to witness credibility. He also made oral presentations of his recommendations to the Board members.

property consisting of digital telecommunications equipment (the "subject personal property") situated in the Town of Bedford. On or about February 9, 2004, the Telecommunications Finance Group[40] of Siemens filed a Form of List for fiscal year 2005 with the assessors. The following information about the subject personal property appeared on the Form of List:

Property Details	Year New	Depreciation	Item Cost	Replacement Cost	Total Value
Phone Equipment	1999	50%	$1,502,556	$1,502,556	$ 751,280
Switching Equipment	1999	50%	$ 160,338	$ 160,338	$ 80,170
Switching Equipment	2000	50%	$1,111,107	$1,111,107	$ 777,770
Switching Equipment	2001	50%	$ 871,462	$ 871,462	$ 784,320
Grand Total					$2,393,540

For fiscal year 2005, the assessors assessed the subject personal property at a total value of $1,267,930. A tax was assessed to Siemens at the rate of $25.45 per $1000 in the total amount of $32,230.02.

Appellant timely paid the taxes due. On January 28, 2005, Siemens filed an Application for Abatement of the tax assessed on the subject personal property for fiscal year 2005. By a vote of the assessors on April 26, 2005, the application was denied. Appellant's Petition Under Formal Procedure was mailed to the Appellate Tax Board ("Board") through the United States Postal Service with a postmark bearing the date July 26, 2005, the last day allowed for appealing the denial of abatement.[41] RNK, Inc. filed the petition in its own name.[42]

A document was appended to the Petition Under Formal Procedure captioned "Lease Agreement," between the Telecommunications Finance Group of Siemens and appellant RNK, Inc. The Lease Agreement appeared to apply to the subject personal property. The Lease Agreement recited an effective date of "July 3, 2000." The term of the lease was specified in the Lease Agreement as 36 months from the "Commencement Date", which was described as the "2nd day of the month following the date on which Acceptance occurs at a site provided by Lessee." Lease Agreement at ¶4. Pursuant to ¶11(a) of the Lease Agreement, appellant was obligated to pay any personal property taxes due

[40] The title "Telecommunications Finance Group" is a d/b/a name for Siemens.

[41] July 26, 2005 "shall be deemed to be the date of delivery [where the petition] was mailed in the United States … first class postage prepaid … properly addressed to the … board…." G.L. c. 59, § 64.

[42] There was no claim that appellant filed the Petition Under Formal Procedure as an agent of Siemens.

and owing to the Town of Bedford with respect to the leased personal property.

Attached to the abatement application was a document captioned "Purchase and Sale Agreement," which appeared to relate to the subject personal property. The Purchase and Sale Agreement was accompanied by a cover letter from Siemens accountant Nikki Tuttle addressed to an attorney for appellant, dated August 31, 2004. The letter recited that the Lease Agreement "expires September 2, 2004." The Purchase and Sale Agreement bore what appeared to be the signature of Richard N. Koch, President of appellant, with a date of September 8, 2004; and the signature of Jeffrey D. Boggs, "Director, Credit, Leasing &A/R Services" for Siemens, with a date of December 10, 2004. Under the terms of the Purchase and Sale Agreement, appellant agreed to purchase telecommunications equipment from Siemens for a price of "$200,000 plus sales tax of $10,000 for a total amount due of $210,000…."

At the trial of this matter, appellant presented no witnesses, relying instead on an affidavit made by Neal Hart, a resident of Framingham and Vice President of Technical Operations for appellant since 1999. The affidavit purported to offer evidence that the subject personal property was overvalued.[43] No foundation was laid at the trial for the documents appended to the abatement application and the Petition Under Formal Procedure. There was no full description of the subject personal property in the evidence received at trial. Appellant failed to establish such important facts as the actual time period to which the Lease Agreement applied.

Testifying for the assessors, Lela Rhodes called into question appellant's standing to bring this appeal. She indicated that the assessment was based on the Form of List filed by Siemens. A depreciation factor was applied to the value estimates reflected in the Form of List to arrive at the assessed value of the subject personal property. Ms. Rhodes testified that Siemens owned the subject personal property as of January 1, 2004. She stated that appellant paid the taxes due. Ms. Rhodes also pointed out that the purchase of the subject personal property occurred roughly nine months after the valuation date. Ms. Rhodes observed that the sale occurred pursuant to a purchase option provided for in the Lease Agreement and was not an arms-length transaction.

On the basis of the foregoing, the Board, relying on the hearing officer as to matters of witness credibility, found and

---

[43] The affidavit constituted hearsay and the opinion of value contained therein received no weight. ***Azfali v. Assessors of Plymouth,*** Mass. ATB Findings of Fact and Reports 2008-508, 2008-517.

ruled that appellant was not a "person aggrieved by the refusal of assessors to abate a tax on personal property…" with standing to pursue the instant appeal. *See* G.L. c. 59, § 64. Siemens, the assessed owner of the subject personal property, was the party aggrieved by the denial of abatement, but did not timely file a Petition Under Formal Procedure to seek review in this Board. This appeal was accordingly dismissed for lack of jurisdiction.

OPINION

The authority of the Board to hear and decide appeals relating to the assessment of taxes on property is wholly a function of statute law. *See* ***Stilson v. Assessors of Gloucester,*** 385 Mass. 724, 732 (1982). As the Supreme Judicial Court explained in ***Commissioner of Revenue v. Marr Scaffolding Co.,*** 414 Mass. 489, 493 (1993), "[a]n administrative agency has no inherent or common law authority to do anything. An administrative board may act only to the extent that it has express or implied statutory authority to do so." Accordingly, "[t]he case law is abundant in stern pronouncements requiring strict adherence by the taxpayer to the timelines and other procedural commands of the taxing statutes." ***Tambrands, Inc. v. Commissioner of Revenue,*** 46 Mass. App. Ct. 522, 525 (1999).

To review the decisions of municipal boards of assessors denying the abatement of taxes, the Board derives its authority from G.L. c. 59, §§ 64 and 65. The statute provides, in relevant part, as follows:

> A person aggrieved by the refusal of assessors to abate a tax on personal property at least one-half of which has been paid … may, within three months after the date of the assessors' decision on an application for abatement … appeal therefrom by filing a complaint with … the board authorized to hear and determine such complaints … and if on hearing the board finds that the property has been overrated and that the complainant has complied with all applicable provisions of law, it shall make a reasonable abatement…

G.L. c. 59, § 64.

"[A]n application [for abatement filed with the assessors] in the form prescribed [by law] is a prerequisite to the jurisdiction of the [Appellate Tax Board over] a case like the present." ***Assessors of Boston v. Suffolk Law School,*** 295 Mass. 489, 494 (1936). *See also* ***Cohen v. Assessors of Boston,*** 344 Mass. 268, 271 (1962) ("G.L. c. 59, § 59 … makes the filing of an application for abatement with the assessors a foundation of

jurisdiction in the board….") "These prerequisites [also] include being one of the persons authorized by statute to bring an appeal, that is a 'person aggrieved.'" ***Bubier v. Assessors of Lynn,*** Mass. ATB Findings of Fact and Reports 2001-12, 2001-18, *citing* ***Donlon v. Assessors of Holliston,*** 389 Mass. 848, 854 (1983).

It follows from these principles that

> limitations upon the class of persons who may apply to assessors for abatements and the conditions upon which such persons may apply for abatements are to be read into the provisions governing appeals. No person is entitled to appeal unless he is 'aggrieved by the refusal of the assessors to abate a tax'….

Boston Five Cents Savings Bank v. Assessors of Boston, 313 Mass. 762, 770 (1943).

Accordingly, jurisdictional requirements for an appeal under G.L. c. 59, §§ 64 and 65 incorporate the statutory conditions regulating the filing of applications for abatement at G.L. c. 59, § 59. Only a person with standing to apply to the assessors to abate a tax may in turn pursue an appeal from a decision to deny abatement. *See* ***Donlon,*** 389 Mass. at 853-54. *See generally* ***Household Retail Services, Inc. v. Commissioner of Revenue,*** 448 Mass. 226, 229-30 and n.6 (2007).

G.L. c. 59, § 59 provides in relevant part that:

> A person upon whom a tax has been assessed … may … on or before the last day for payment … apply in writing to the assessors, on a form approved by the commissioner, for an abatement thereof, and if they find him taxed at more than his just proportion … or upon an assessment of any of his property in excess of its fair cash value, they shall make a reasonable abatement.

G.L. c. 59, § 59. Relevant also is G.L. c. 59, § 18, which "provides general authorization for the taxation of [personal] property where it is located" to the owner subject to exceptions not relevant here.[44] *See* ***RCN-Beco-Com, LLC v. Commissioner of***

---

[44] Had the assessors treated the subject personal property as "machinery used in the conduct of the [appellant's] business", appellant might have been assessed as a "person having possession of the same on January first." G.L. c. 59, § 18. In that circumstance, the Board would have jurisdiction over

Revenue, Mass. ATB Findings of Fact and Reports 2003-410, 2003-454, *aff'd,* 443 Mass. 198 (2005). Accordingly, the disputed tax on the subject personal property was assessed to the owner, and the owner alone was statutorily authorized to apply to the assessors for an abatement on grounds of overvaluation.

G.L. c. 59, § 59 enumerates exceptions under which tenants and others with an interest in subject property may apply for abatement in particular circumstances. *See* ***Donlon,*** 389 Mass. at 853-54; ***Bubier,*** Mass. ATB Findings of Fact and Reports at 2001-18-19. However, these provisions "by which the class of persons entitled to apply for abatement was enlarged" pertain only to taxes on real property. *See* ***American Institute for Economic Research v. Assessors of Cambridge,*** Mass. ATB Findings of Fact and Reports 1944-19, 1944-25. "The Legislature in enacting this statute made no reference to a tax on personal property." ***Id.***

In ***American Institute for Economic Research,*** Mass. ATB Findings of Fact and Reports at 1944-22-23, the beneficial owner of personal property held in trust, which was not assessed for the tax, brought an appeal. It was held that "where the tax relates to personal property, the person assessed, and no one else has the right to apply for an abatement, and, since the appellant was not the person assessed, it had no right to apply and therefore was not aggrieved by the refusal of assessors to abate the tax." ***Id.***[45] Since the owner of the subject personal property was assessed under G.L. c. 59, § 18, only the owner was entitled to apply for abatement and correspondingly prosecute an appeal before the Board. *See generally* ***One Boston Place LLC v. Commissioner of Revenue,*** Mass. ATB Findings of Fact and Reports 2007-40, 2007-43 ("A person cannot be 'aggrieved' by an assessment of tax unless the person was also the one assessed.")

In the instant case, there is no dispute that Siemens owned the subject personal property on January 1, 2004 and was assessed for the tax in dispute. As the assessed owner of the subject personal property, Siemens was the party with standing to request an abatement under the provisions of G.L. c. 59, § 59. Siemens in fact filed the Application for Abatement from which the present appeal is being taken. The jurisdictional defect arose because Siemens, the party aggrieved by the denial of abatement, did not act to pursue an appeal. The appellant,

---

appellant's claim for abatement. *See* ***Pal's Café, Inc. v. Assessors of Westfield,*** Mass. ATB Findings of Fact and Reports 1998-600.

[45] G.L. c. 59 § 59 has not changed in relevant part since the Board decided the ***American Institute for Economic Research*** case 64 years ago. The precedent remains an authoritative exposition of the jurisdictional requirements governing appeals to the Board. *Cf.* ***Springfield Sugar & Products Co. v. State Tax Commission,*** Mass. ATB Findings of Fact and Reports 1979-185, 1979-188 (applying "[t]he maxim 'stare decisis'"), *aff'd,* 381 Mass. 587 (1980).

which was not assessed for the disputed tax, was not an "aggrieved party" entitled to commence an appeal. It was immaterial in these circumstances that appellant was a lessee in possession of the subject personal property as of January 1, 2004, or bore responsibility for payment of taxes under the terms of the lease. "[T]he Supreme Judicial Court has ruled that the 'person aggrieved' by the imposition of a tax" with standing to appeal to the Appellate Tax Board "is not the party that bears its economic burden, but rather the one charged with its legal incidence." ***Daimler Chrysler Corp. v. Commissioner of Revenue,*** Mass. ATB Findings of Fact and Reports 2007-270, 2007-284, *citing* ***Supreme Council of the Royal Arcanum v. State Tax Commission,*** 358 Mass. 11, 112-13 (1970).

"Since the remedy of abatement is created by statute, the [B]oard lacks jurisdiction over the subject matter of proceedings that are commenced at a later time or prosecuted in a different manner from that prescribed by statute." ***Nature Church v. Assessors of Belchertown,*** 384 Mass. 811, 812 (1981), *citing* ***Assessors of Boston v. Suffolk Law School,*** 295 Mass. 489, 495 (1936). "Adherence to the statutory prerequisites is essential to an effective application for abatement of taxes." ***Stilson,*** 385 Mass. at 732. The Board found and ruled that appellant, which did not own the subject personal property and was not assessed for the disputed tax, was not a "person aggrieved by the refusal of assessors to abate a tax on personal property" for purposes of G.L. c. 59, §§ 64 and 65. The Board accordingly dismissed this case for lack of jurisdiction.

APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,
Attest: _____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

DAVID C. & RODNEY A. SMITH, LIEBFRIED REALTY TRUST, ET AL v. **BOARD OF ASSESSORS OF THE CITY OF FITCHBURG**

Docket Nos. F277870,
F277872-F277902
F278050-F278053

Promulgated:
January 24, 2008

ATB 2008-73

These are appeals under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the appellee to abate taxes assessed on certain property, located in the City of Fitchburg, owned by and assessed to the appellants under G.L. c. 59, §§ 11 and 38, for fiscal year 2005.

Commissioner Scharaffa heard the appeals and was joined in the decisions for the appellee by Commissioners Egan, Rose and Gorton.

These findings of fact and report are made at the request of the appellants pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

Sherrill R. Gould, Esq., for the appellants.
Kenneth W. Gurge, Esq., for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of the testimony and exhibits introduced at the hearing of these appeals, the Appellate Tax Board ("Board") made the following findings of fact.

On January 1, 2004, the appellants, which include five private individuals and a for-profit realty trust (collectively the "appellants"), were the assessed owners[46] of aircraft hangars constructed by Liebfried Realty Trust, a for-profit entity, on land owned by the City of Fitchburg ("City") through its instrumentality, the Fitchburg Airport Commission.

For fiscal year 2005, the Board of Assessors of the City of Fitchburg ("assessors") assessed the hangars in existence on

[46] Appellants' attorney explained in her opening statement that Liebfried Realty Trust built the hangar units to be condominiums pursuant to the provisions of G.L. c. 183A. Liebfried Realty Trust then sold sublease unit rights to five individuals who became subject to the underlying land lease. The remaining thirty-one units were leased by Liebfried Realty Trust to aircraft owners. Neither party raised standing as an issue in this appeal, and both parties treated the subleasees as if they were the owners of the hangar units. Therefore, for purposes of this appeal, the Board refers to all appellants as owners of the hangar units.

June 30, 2004[47] and issued tax bills to the owners. The appellants timely paid all taxes due. On January 26, 2005, the appellants filed timely Applications for Abatement with the Board of Assessors of the City of Fitchburg ("assessors"), claiming that the hangars were exempt property. The assessors denied the applications on February 8, 2005. On May 2, 2005, the appellants seasonably filed Petitions with the Board. On the basis of these facts, the Board found that it had jurisdiction over the instant appeals.

At all relevant times, Fitchburg Municipal Airport ("Airport") was a municipal airport servicing private and pleasure aircraft. The Airport did not serve commercial airplanes, and no commercial flights departed or arrived at the Airport. The hangars were constructed by Liebfried Realty Trust on land leased to Liebfried Realty Trust by the Fitchburg Airport Commission in June, 2003 for a period of up to sixty years. The underlying land lease provided for rent to be paid to the Airport Commission, consisting of a monthly fee of $25.00 per hangar (one-half the normal tie-down fee) and a five percent commission paid the first time a hangar was sold. The lease also provided that the "[l]essee shall pay all taxes including real estate . . . taxes due as a result of any and all business conducted on the Leased Premises . . . ." The lease did not contain a payment in lieu of taxes ("PILOT") agreement. The appellants did not dispute the values assessed on the hangars.[48]

Pursuant to the land lease, the use of the land for commercial operations was prohibited. Therefore, the hangars were used solely for the storage of privately-owned aircraft. The hangars were secured by key lock and were not open to the general public unless accompanied by the owner/lessees or authorized Airport personnel. Aircraft using the Airport were not required to use the hangars, and the majority of aircraft operating out of the Airport did not use the subject hangars. The Airport had operated for decades without the subject hangars.[49]

---

[47] In 1990, the City adopted the provisions of Chapter 653, § 40 of the Acts of 1989, which permit a city or town to tax new construction in existence between January second and June thirtieth of the preceding fiscal year. If a city or town does not adopt Chapter 653, § 40 of the Acts of 1989, G.L. c. 59, § 2A(a) requires that buildings and other structures erected or affixed to land must be in existence by January 1 of the preceding fiscal year.

[48] At the hearing of this appeal, Andrew H. Liebfried ("Mr. Liebfried"), the owner and manager of Liebfried Realty Trust, admitted that the hangars were assessed at their fair cash value.

[49] Mr. Liebfried testified that prior to the construction of the hangars at issue, seven hangar buildings existed at the Airport, several of them constructed sometime in the 1940s, other "more modern" constructions from the 1980s.

For the reasons explained in the following Opinion, the Board found and ruled that the hangars were not exempt from real estate tax under G.L. c. 59, § 2B. Accordingly, the Board issued a decision for the appellee in these appeals.

OPINION

The issue in these appeals is whether the hangars at issue, which were constructed on city land and owned in fee by a for-profit entity and various private individuals, were subject to property tax.

1. The provisions of § 2B do not apply to the hangars.

Pursuant to G.L. c. 59, § 2, "[a]ll property, real and personal, situated within the Commonwealth wherever situated, unless expressly exempt, shall be subject to taxation." With respect to municipally-owned land, G. L. c. 59, § 2B provides that:

> real estate owned in fee or otherwise or held in trust for the benefit of . . . a . . . city or town, or any instrumentality thereof, if used in connection with a business conducted for profit or leased or occupied ***for other than public purposes***, shall for the privilege of such use, lease or occupancy, be valued, classified, assessed and taxed annually as of January first to the user, lessee or occupant in the same manner and to the same extent as if such user, lessee or occupant were the owner thereof in fee . . . . This section shall not apply to a use, lease or occupancy which is ***reasonably necessary to the public purpose of a public airport,*** . . . ***which is available to the use of the general public*** . . . . (emphasis added)

Accordingly, the general rule of § 2B is that municipally-owned property used in connection with a business, or leased or occupied for other than public purposes, shall be taxable to the user, lessee or occupant. *See, e.g.*, ***Sisk v. Board of Assessors of Essex***, 426 Mass. 651, 654 (1998) (ruling that land leased from the government was to be valued, assessed, and taxed to the lessees as if they owned the land in fee). For reasons not clear to the Board, the underlying land upon which the hangars were situated was not assessed and thus was not at issue in these appeals. *See* ***Sisk***, ***supra***.

Regarding the hangars, the appellants contend that they were exempt under the narrow exemption under § 2B for property

"reasonably necessary to the public purpose of a public airport." As a threshold matter, § 2B must be applicable to the subject appeals before considering the § 2B exemption. It is undisputed that the hangars were privately owned by a for-profit entity and several individuals. While the underlying land was owned by the City, the subject assessments were on the hangars, not the land.

The instant facts are distinguishable from those at issue in ***MCC Management Group, Inc. v. Board of Assessors of the City of New Bedford***, Mass. ATB Findings of Fact and Report 2000-886, a recent appeal in which the Board ruled that the subject land qualified under the § 2B exemption. ***MCC Management Group*** addressed the taxability of a skating arena owned by the City of New Bedford and operated by a private management company; it was undisputed that both the underlying land and the improvement, the skating rink, were owned by the Commonwealth and under the oversight and control of its instrumentality, the Division of Forests and Parks. ***Id.*** at 887. Therefore, the provisions of § 2B applied. *See generally*, ***id.*** at 896-907.

In contrast, the hangars at issue were not "owned or held in trust for the benefit of [the City]." While the hangars were located on land owned by the City, the hangars themselves, the property at issue, were owned in fee by private individuals and a for-profit entity. The Board thus found that the threshold requirement of § 2B, that the property must be municipally-owned, was not met under the facts of this appeal. Accordingly, the Board found and ruled that, by its plain terms, § 2B does not apply to these appeals.

2. Even if they were municipally-owned, the hangars were not "reasonably necessary to the public purpose of a public airport," and therefore did not qualify for exemption pursuant to § 2B.

The exception of § 2B applies only if the appellants can meet their burden of proving that the use, lease, or occupancy of the hangars was "reasonably necessary to the public purpose of a public airport." As an exemption from tax, the § 2B exemption applies strictly: "An exemption is a matter of special favor or grace and [is] to be recognized only where the property falls clearly and unmistakably within the express words of a legislative command." ***Southeastern Sand & Gravel, Inc. v. Commissioner of Revenue***, 384 Mass. 794, 796 (1981) (citations omitted).

a. The hangars did not serve a public purpose.

In ***MCC Management Group***, the conveyance of land by a city to the Commonwealth was made "in consideration of the Department of Natural Resources completing a skating rink and holding and administering that facility . . . for the benefit of the general public." ***MCC Management Group***, Mass. Findings of Fact and Report 2000 at 902. By the terms of the conveyance in that appeal, the city contemplated that the transfer of the land for the operation of a public skating rink would be "for the benefit of the general public." ***Id***. By contrast, the hangars at issue were not transferred to the City or held for the City's benefit. Instead, they were either held and rented to private individuals by a private for-profit entity or subleased to other private individuals for their private use. Also unlike the skating rink in ***MCC Management Group***, the hangars were not available for use by the general public for a modest admission charge. Rather, the hangars were available only for use by those who rented or subleased them for the storage of their private aircraft. In fact, the land lease prohibited the use of hangars located at the Airport for other than private purposes, and access to the hangars was restricted by lock and key.

The appellants cited two cases, ***Cabot v. Assessors of Boston***, 335 Mass. 53 (1956) and ***Board of Assessors of Newton v. Pickwick***, 351 Mass. 621 (1967), which they contend establish that the operation of private property can confer a public benefit sufficient for exemption under the § 2B exception. The appellant cited ***Cabot*** for the proposition that the operation of the garage by a private entity, upon land leased by the City, served a public purpose, because it accomplished "the abatement of the public nuisance, consisting of congestion of the public ways of Boston, caused by the great number of motor vehicles." ***Cabot***, 335 Mass. at 58. The appellant next cited ***Pickwick*** for the proposition that the land owned by the Massachusetts Bay Transportation Authority ("MBTA") but leased to a private for-profit entity for the operation of a retail establishment served a public purpose, because the lease provided for payments to the fiscally-struggling MBTA to relieve it of its financial burdens. ***Pickwick***, 351 Mass. at 624.

However, in both cases, precise statutory exemptions provided the particular tax relief sought. In ***Cabot***, section 2A of St. 1946, c. 294, inserted by St. 1948, c. 654, § 1, specifically provided that "No private corporation . . . shall be assessed any tax upon any real estate, garage" located on the city's land and leased for the operation of a public garage. ***Cabot***, 335 Mass. at 56. In ***Pickwick***, St. 1949, c. 572, § 6 amended § 14 of St. 1947, c. 544 by specifically extending the

MBTA's tax exemption to all of its property "whether or not used in the transit system." ***Pickwick***, 351 Mass. at 623.

By contrast, the only exemption cited in these appeals was § 2B. The appellants failed to demonstrate that the hangars at issue served the City or its instrumentality, the Airport, in some specific manner, perhaps by relieving traffic congestion, as in ***Cabot***, or relieving a financial burden of the City, as in ***Pickwick***. The only remuneration paid to the municipality was one-half the normal non-hangar tie-down fee per month ($25.50 per hangar unit) and the one-time five percent commission, to be paid to the Airport Commission; the City received no other remuneration, including PILOT payments, pursuant to the lease, other than municipal taxes levied upon improvements to the land. The Board found and ruled that the monthly fee, which was less than the fee paid for a non-hanger tie-down, could hardly be said to relieve the Airport of any financial distress, even if the appellants had demonstrated financial distress.

The Board thus found and ruled that the appellants failed to meet their burden of proving that the subject hangars served a public purpose of the City or its instrumentality, the Airport.

b. The hangars were not "reasonably necessary to the public purpose of a public airport."

Secondly, the appellants failed to demonstrate that the hangars sufficiently benefited the operations of the Airport to merit exemption under § 2B. The Airport had existed for many years with only outdoor tie-downs available for use. Moreover, the majority of the planes operating out of the Airport still used the tie-downs, even after the hangars became available. The convenience of the small number of aircraft which used the hangars is not sufficient to establish that the hangars were reasonably necessary to the public purpose of the Airport. *Contrast*, ***MCC Management Group***, Mass. ATB Findings of Fact and Reports 2000 at 902-04 (finding that a skating rink open to the public satisfied the criteria that the subject property be "reasonably necessary to the public purposes" of a park). Furthermore, the appellants failed to demonstrate that any monetary gain bestowed upon the City or its instrumentality, the Airport, by virtue of increased airport traffic, if any, was the direct result of the hangars and not the result of normal growth in airport usage or other factors.

Based on all of the above factors, the Board found and ruled that the appellants failed to meet their burden of proving that the subject hangars were "reasonably necessary to the public purpose of a public airport."

c. The hangars were not available to the use of the general public.

The subject hangars were either held and rented to private individuals by a private for-profit entity or subleased to other private individuals for their private use. The hangars were not available for public usage, and in fact, access to the hangars was restricted to the general public unless accompanied by the owner/lessees or authorized Airport personnel. *Contrast* ***MCC Management Group***, Mass. ATB Findings of Fact and Report 2000 at 902-04 (skating rink open for public use for a modest admission charge). The Board thus found and ruled that the subject hangars were not "available to the use of the general public" as is required under § 2B.

Conclusion

Based on all of the above factors, the Board found and ruled that the appellants failed to meet their burden of proving that the hangars were exempt from real estate taxes pursuant to the exception in § 2B. Specifically, the appellants failed to meet their burden of proving that § 2B applied to these appeals. Moreover, the appellants failed to prove that the hangars were "reasonably necessary to the public purpose of a public airport." Accordingly, the Board issued a decision for the appellee in these appeals.

THE APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,
Attest: _____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

EDWARD H. STONE v. **BOARD OF ASSESSORS OF THE TOWN OF WAKEFIELD**

Docket No. F293551 Promulgated: May 27, 2008
ATB 2008-656

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65 from the refusal of appellee to abate taxes on real estate assessed under G.L. c. 59, §§ 11 and 38, for fiscal year 2007.

Commission Mulhern heard the appeal. Chairman Hammond and Commissioners Scharaffa, Egan and Rose joined him in a decision for appellee.

These findings of fact and report are promulgated simultaneously with the Board's Decision pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

Edward H. Stone, pro se, for appellant.

Victor P. Santaniello, Assessor, for appellee.

FINDINGS OF FACT AND REPORT

On the basis of exhibits and testimony offered at the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

On January 1, 2006, Edward H. Stone ("appellant") was the assessed owner of a parcel of real estate located at 37 Morrison Road West in the Town of Wakefield ("subject property"). For fiscal year 2007 ("fiscal year at issue"), the Wakefield Board of Assessors ("assessors") valued the subject property at $674,000 and assessed a tax of $6,416.48, which appellant timely paid without incurring interest.

On January 29, 2007, appellant timely filed an Application for Abatement with the assessors. The assessors took no action on the application within three months of January 29, 2007 and the application was, therefore, deemed denied on April 29, 2007. Appellant seasonably filed an appeal with the Board on July 16, 2007. On the basis of these facts, the Board found that it had jurisdiction over this appeal.

The subject property consists of a 16,360 square-foot parcel of real estate improved with a single-family, "Colonial" style home that was completed in 2002. The home contains 2,666 square feet of living space and includes eight rooms, including

four bedrooms, as well as two and one-half bathrooms. The home has oil-fired heating and central air conditioning.

Appellant maintained that the subject property was overvalued and that its value on the relevant valuation date of January 1, 2006 was $568,000, as reflected on appellant's abatement application and the Board's Decision dated December 28, 2005 concerning appellant's fiscal year 2005 appeal. Subsequent to the Board's fiscal year 2005 Decision, the Board issued a Decision on appellant's fiscal year 2006 appeal in favor of the assessors, upholding the fiscal year 2006 assessed value for the subject property of $661,600. *See* ***Stone v. Assessors of Wakefield,*** Mass. ATB Findings of Fact and Reports, 2007-931.

Because the assessed value at issue in the present appeal was greater than the value found by the Board for fiscal year 2005, the burden was on the assessors to establish that the assessed value at issue in the present appeal was warranted.[50]

The assessors' witness offered a series of four sales of what he had determined to be comparable, single-family, Colonial-style homes in Wakefield that had occurred during 2005, proximate to the January 1, 2006 valuation date for fiscal year 2007. His sales properties were, like the subject property, newer Colonial-style homes built between 1995 and 2005. These properties were also similar to the subject property in terms of living area, and total number of rooms, bedrooms and bathrooms. The properties and sale prices were as follows: 10 Cowdry Lane, $852,000; 18 King Street, $759,000; 2 Blueberry Lane, $830,000; and 62 Andrews Road, $815,000.

To support his overvaluation claim, appellant focused primarily on four single-family Colonial-style homes in Wakefield that were being offered for sale in February and October of 2007. His evidence consisted of: a February 26, 2007 newspaper listing of property located at 19 Fellsway Avenue being offered at $599,000; an October 1, 2007 multiple listing sheet for property located at 150 Nahant Street being offered at $519,900; an October 1, 2007 multiple listing sheet for property at 18 Butler Avenue being offered at $529,900; and a 2007 Century 21, Commonwealth listing packet for property at 7 Brant Circle being offered at $399,900. Appellant contended that these properties were similar Colonial-style homes in Wakefield that were, at the time of the hearing of this appeal, being offered for sale for substantially less than the assessed value of his property.

On the basis of the evidence submitted, the Board found that the assessors met their burden of proving that the increase

---

[50] *See* G.L. c. 58A, § 12A.

in the assessed value of the subject property over the value found by the Board for the fiscal year 2005 appeal concerning the subject property was warranted. In particular, the Board found that the assessors' witness demonstrated that the properties on which he relied to support the assessment were comparable to the subject property, particularly with respect to their recent construction, size of dwelling and the number of rooms, bedrooms and bathrooms that each offered. Further, the sales of these properties occurred near the time of the relevant valuation date and reflected market conditions at that time.

Conversely, the Board found that appellant did not present credible affirmative evidence to support his claim of overvaluation. First, appellant offered insufficient evidence to support a finding that his sale properties were comparable to the subject property and he attempted no adjustments to account for differences between these properties and the subject property. Further, appellant offered asking prices, rather than actual sales prices, for these properties. Compounding this problem is that his evidence concerned asking prices long after the relevant valuation date - in some cases, nearly two years after January 1, 2006 - and appellant offered no evidence of market conditions at the time of these offerings compared to the relevant valuation date.

For all of the foregoing reasons, the Board issued a decision for appellee in this appeal.

OPINION

The assessors are required to assess real estate at its "fair cash value." G.L. c. 59, § 38. Fair cash value is defined as the price on which a willing seller and a willing buyer will agree if both of them are fully informed and under no compulsion. ***Boston Gas Co. v. Assessors of Boston,*** 334 Mass. 549, 566 (1956).

Appellant has the burden of proving that the property has a lower value than that assessed. "'The burden of proof is upon the petitioner to make out its right as a matter of law to abatement of the tax.'" ***Schlaiker v. Assessors of Great Barrington,*** 365 Mass. 243, 245 (1974) (quoting ***Judson Freight Forwarding Co. v. Commonwealth***, 242 Mass. 47, 55 (1922)). "[T]he board is entitled to 'presume that the valuation made by the assessors [is] valid unless the taxpayers . . . prov[e] the contrary.'" ***General Electric Co. v. Assessors of Lynn***, 393 Mass. 591, 598 (1984) (*quoting* ***Schlaiker***, 363 Mass. at 245).

If, however, within the two preceding fiscal years the Board has determined the fair cash value of the subject property and the assessment at issue exceeds that determination, then "the burden shall be upon the [assessors] to prove that the

assessed value was warranted." G.L. c. 58A, § 12A. Because the fiscal year 2007 assessed value at issue in this appeal exceeded the fair cash value found by the Board for fiscal year 2005, the burden was on the assessors to prove that the fiscal year 2007 assessed value was warranted.

Notwithstanding this shift in the burden of production, the burden of persuasion on the issue of fair cash value remains on appellant. *See* ***Johnson v. Assessors of Lunenburg***, Mass. ATB Findings of Fact and Reports 1992-1, 1992-8; ***Cressey Dockham & Co., Inc. v. Assessors of Andover***, ATB Findings of Fact and Reports 1989-72, 1989-86-87.

In the present appeal, the Board found and ruled that the assessors' witness provided persuasive, credible evidence to establish the validity of the assessment placed on the subject property for the fiscal year at issue. The assessors' witness identified sales of properties that were comparable to the subject property, particularly with respect to their recent construction, size of dwelling and the number of rooms, bedrooms and bathrooms that each offered. Further, the sales of these properties occurred near the time of the relevant valuation date and reflected market conditions at that time.

Sales of comparable realty in the same geographic area and within a reasonable time of the assessment date contain credible data for determining the value of the property at issue. ***McCabe v. Chelsea,*** 265 Mass. 494, 496 (1929). "[T]he market value of a property is related to the [sale] prices of comparable, competitive properties." THE APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE (12th ed. 2001) 277, 417

In contrast, appellant offered listings of property presently on the market as his sole evidence to challenge or contradict the assessors' analysis and provided no credible affirmative evidence of overvaluation. Listing prices of properties are not reliable indicators of value. *See* ***Sands v. Assessors of Bourne,*** Mass. ATB Findings of Fact and Reports, 2007-1098, 2007-1103. Further undercutting the reliability of this data was that appellant's evidence consisted of asking prices long after the relevant valuation date with no indication of the relevant market conditions at the time of these offerings compared to the relevant valuation date. ***Id.*** (ruling that actual sales that did not occur at or sufficiently near the relevant assessment date and were not adjusted to reflect the market value of the properties as of that date were unreliable indicators of fair cash value).

In appeals before this Board, a taxpayer "may present persuasive evidence of overvaluation either by exposing flaws or errors in the assessors' method of valuation, or by introducing affirmative evidence of value which undermines the assessors'

valuation." ***General Electric Co.,*** 393 Mass. at 600 (quoting ***Donlon v. Assessors of Holliston***, 389 Mass. 848, 855 (1983)). On this record, the Board ruled that appellant offered no credible evidence of overvaluation.

Accordingly, on the basis of all of the evidence of record in these appeals, the Board ruled that the assessors met their burden of proving that the subject assessment was warranted and that appellant did not met his burden of proving that the subject property was overvalued for fiscal year 2007. Therefore, the Board issued a decision for appellee in this appeal.

APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,
Attest: _____
Assistant Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

W. DAVID ZITZKAT AND LINDA LARUE, TRUSTEES, ZITZKAT NOMINEE TRUST	**v.**	**BOARD OF ASSESSORS OF THE TOWN OF TRURO**

Docket No. F282934
ATB 2008-957

Promulgated:
July 25, 2008

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65 from the refusal of the appellee to abate real estate taxes paid for fiscal year 2005.

Commissioner Egan heard the appeal. Chairman Hammond and Commissioners Scharaffa and Rose joined her in the decision for the appellants.

These findings of fact and report are made pursuant to a request by the appellee pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

W. David Zitzkat, pro se, for the appellants.

Michael I. Flores, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of testimony and exhibits submitted at the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

On January 1, 2004, the appellants, W. David Zitzkat and Linda Larue, Trustees of the Zitzkat Nominee Trust ("appellants"), were the owners of property located at 574 Shore Road in Truro, Massachusetts ("subject property"). The appellee, the Board of Assessors of the Town of Truro ("assessors") valued the subject property at $899,400 and assessed a tax thereon, at the rate of $4.65 per thousand, in the amount of $4,308.14. The appellants paid the first half prior to the January 20, 2005 deadline for payment of the bill. The appellants paid the second half of the tax bill on May 12, 2005, eleven days after the May 1, 2005 deadline.

On July 6, 2005, the appellee sent the appellants a letter notifying them that they would be receiving a revised tax bill for additional fiscal year 2005 taxes on the subject property. The appellee contended that a reduction in land value, which it had originally granted in fiscal year 2002, was no longer

warranted. The appellee's determination was based on the following grounds:

> In fiscal 2002 a factor was added to your land assessment to reduce the value by 40%, to allow for the fact that the septic had not been replaced prior to or by the date you purchased the property, Sept. 8, 2000. Therefore, as of Jan. 1, 2001 . . . we considered your property value to be affected because you could not occupy the property with the cesspool in place. However, the Board of Health issued to you an extension to occupy the property, while options were pursued to upgrade the cesspool to a new septic. This means that the 40% reduction was excessive, given that you have had full use of the property for the past couple of years. Therefore, we have adjusted the reduction to only 5% for fiscal 2005 . . . .

The July 6, 2005 letter further states that "[i]t had been our intention to review this matter prior to the original fiscal 2005 billing in December 2004, but somehow it was overlooked." The property record cards for fiscal years 2002 through 2005 each contain the notation: "has extensions to occupy prop with cesspool only."

The assessors issued a revised assessment, purportedly pursuant to G.L. c. 59, § 76, to the appellants on August 3, 2005. The revised assessment total was $4,308.14, which included $21.59 interest payment for the second half taxes that were overdue. The appellants timely paid the additional taxes on August 2, 2005. On August 15, 2005, the appellants timely filed an abatement application with the assessors, requesting abatement of the revised assessment taxes. On November 21, 2005, the appellee sent to the appellants a notice of abatement determination notifying the appellants that their abatement application had been deemed denied on November 15, 2005. On February 10, 2006, the appellants seasonably filed their appeal with the Board.

The assessors filed a Motion to Dismiss, claiming that the appellants did not pay their taxes timely and, therefore, were barred from pursuing their appeal. However, the evidence reveals that the average of the real estate tax due on the subject property for the preceding three fiscal years was $2,181.91, which is less than the $3,000 threshold under G.L. c. 59, § 64.[51] Therefore, as will be explained in the following

---

[51]

Fiscal year	Tax due
2002	$2,065.51
2003	$2,207.51
2004	$2,272.72

Opinion, the Board denied the motion, and it found and ruled that it had jurisdiction over the instant appeal despite the incurring of interest on the tax due.

The Board found that the assessors failed to show that the subject property had been unintentionally "valued or classified in an incorrect manner" because of a perfunctory "clerical, data processing or other good faith reason," as is required for a revised assessment under G.L. c. 59, § 76. Instead, based on the July 6, 2005 letter, the Board found that the assessors had made a reasoned and intentional decision to discount the subject property's assessment since fiscal year 2002, based on what the assessors believed to be occupancy issues affected by the presence of a cesspool. That the assessors later discovered that an occupancy issue did not exist does not render its original decision unintentional due to a clerical error.

Moreover, the extension of the appellants' occupancy permit was a fact known to the assessors from fiscal year 2002 through and including fiscal year 2005, as reflected on the property record cards for those years, which each contain the notation: "has extensions to occupy prop with cesspool only." The Board thus found that the assessors had at their disposal the proper information with which to make an assessment of the subject property but, as stated in the July 6, 2005 letter, they "somehow . . . overlooked" reviewing their previous decision.

On the basis of these facts, the Board found that the assessors' failure to review their decision prior to the fiscal 2005 billing was not due to a clerical, data processing or similar mechanical error. Therefore, for the reasons stated more fully in the following Opinion, the Board found that the revised assessment was not issued in accordance with G.L. c. 59, § 76 and was therefore null and void. Accordingly, the Board issued a decision for the appellants.

OPINION

1. The Board's jurisdiction to hear this appeal.

The Board's jurisdiction is prescribed by G.L. c. 59, § 64, which provides that "if the tax due for the full fiscal year on a parcel of real estate is more than $3,000, said tax shall not be abated unless the full amount of said tax due has been paid without the incurring of any interest charges on any part of said tax pursuant to section fifty-seven of chapter fifty-nine of the General Laws." The assessors contended that this provision barred the Board's jurisdiction, because the tax for

---

Three year average = $2,181.91

the fiscal year at issue exceeded $3,000. However, § 64 goes on to state that, "for purposes of this section a sum not less than the average of the tax assessed, reduced by abatements, if any, for the three years next preceding the year of assessment may be deemed to be the tax due." As detailed in the Findings, the average of the tax assessed for fiscal years 2002 through and including 2004 was $2,181.91, which is less than $3,000. The Board thus ruled that $2,181.91 was "deemed to be the tax due" for purposes of determining the Board's jurisdiction under § 64. Because this tax amount is less than $3,000, timely payment without the incurrence of interest was not required for the Board to have jurisdiction over the instant appeal. Accordingly, the Board denied the assessors' Motion to Dismiss, and it found and ruled that it had jurisdiction over the instant appeal.

2. The validity of the revised assessment issued to the appellants.

"The 'right to tax must be found within the letter of the law; it is not to be extended by implication.'" ***Commissioner of Revenue v. Destito***, 23 Mass. App. Ct. 997 (1987) (quoting ***Curtis v. Commissioner of Corp. & Tax'n***, 340 Mass. 169, 173 (1959)). With respect to revised assessments, G.L. c. 59, § 76 prescribes that

> [i]f any property subject to taxation has been unintentionally valued or classified in an incorrect manner due to clerical or data processing error or other good faith reason, the assessors shall revise its valuation or classification and shall assess any additional taxes resulting from such revision in the manner and within the time provided by section seventy-five and subject to its provisions.

According to the July 6, 2005 letter, the assessors admitted that they had previously made an intentional and reasoned decision to discount the subject property because "we considered your property value to be affected because you could not occupy the property with the cesspool in place." The assessors then claimed that, once they discovered that the Board of Health had issued an extension to occupy the property, they determined that their previous discount had been "excessive."

The Board has previously ruled that the assessors may only impose a revised assessment under G.L. c. 59, § 76 when they had previously committed an "unintentional" error in valuing the subject property "because of a clerical or data processing type of mistake." ***Mt. Auburn Hospital v. Board of Assessors of the***

Town of Watertown, Mass. ATB Findings of Fact and Reports 2000-441, 448. In that appeal, "[t]he Board found and ruled that 'unintentional,' as used in § 76, means 'not done by design' or 'not intended.'" ***Id.*** at 458. That the assessors later determined that the premise upon which they had based their consistent and continuous discount of the subject property since fiscal year 2002 was faulty does not thus render their original decision "unintentional" because of a clerical or data processing type of mistake. On the contrary, the Board found that the original fiscal year 2005 valuation represented the continuation of a reasoned decision by the assessors, first made for fiscal year 2002, to reduce the value of the subject property by a certain percentage for conditions which continued to exist at the property as of January 1, 2004. The assessors made a reasoned judgment based on information which they believed to be true at that time, and therefore, their original assessment was done by design. The Board thus ruled that the assessors' original valuation, classification and evaluation were not "unintentional" as that term is used in G.L. c. 59, § 76.

Moreover, as explained in the Findings, the extension of the appellants' occupancy permit was a fact known to the assessors from fiscal year 2002 through and including fiscal year 2005. The Board found and ruled that the assessors' failure to revisit their decision prior to the fiscal year 2005 billing was not the result of a clerical, mechanical or other perfunctory error.

Changes in judgment cannot be made by means of a revised assessment. *See* ***id.*** at 448; *see also* ***New England Deaconess Association v. Assessors of Concord***, Mass. ATB Findings of Fact and Reports, 1997-1063 ("`The assessors cannot simply change their minds about the value or taxable status of the property after the commitment.'")(quoting Department of Revenue Information Guideline Release 90-215). In the instant appeal, the Board ruled that the assessors did not have the necessary statutory authority under G.L. c. 59, § 76 to issue a valid revised assessment of the subject property for fiscal year 2005. Accordingly, the Board issued a decision for the appellants.

THE APPELLATE TAX BOARD

By:_____

Thomas W. Hammond, Jr., Chairman

A true copy,

Attest:_____

Clerk of the Board