
**Massachusetts Department of Revenue
Division of Local Services**

**Current Developments
in
Municipal Law**



2014

Appellate Tax Board Cases

Book 2A

**Amy A. Pitter, Commissioner
Robert G. Nunes, Deputy Commissioner**

www.mass.gov/dls

APPELLATE TAX BOARD CASES

Book 2A

Table of Contents

	<u>Page</u>
<u>Cocco d/b/a Opus v. Commissioner of Revenue</u> , Mass. ATB Findings of Fact and Report 2013-1089 (October 30, 2013), Docket Nos. C310367, C311626, C314426 - <i>Electronic Filing - Tax Administration-Penalties - Reasonable Cause</i>	1
<u>Haar v. Commissioner of Revenue</u> , Mass. ATB Findings of Fact and Report 2014-515 (July 23, 2014), Docket No. C315058 - <i>Electronic Filing - Tax Administration - Penalties-Reasonable Cause</i>	10
<u>Rheault v. Board of Assessors of Oxford</u> , Mass. ATB Findings of Fact and Report 2014-245 (May 8, 2014) Docket No. F317246 - <i>Property Tax Exemption – Veterans - Property Ownership - Trusts</i>	22
<u>RJG Realty Company, Gerald Goulston v. Brockton Water and Sewer Department</u> , Mass ATB Findings of Fact and Report 2014-92 (February 28, 2014), Docket No. F310428 - <i>Estimating Water/Sewer Use - Water/Sewer Charges - Lien against Real Estate</i>	25
<u>Truss Engineering Co. v. Board of Assessors of Springfield</u> , Mass. ATB Findings of Fact and Report 2013-1010 (October 4, 2013), Docket No. F309857 - <i>Taxable Personal Property - ATB Jurisdiction - Application of Partial Payments</i>	29
<u>University of Massachusetts, Auxiliary Services v. Commissioner of Revenue</u> , Mass ATB Findings of Fact and Report 2014-224 (May 1, 2014), Docket No. C310462 - <i>Room Occupancy Excise - Exemption for Commonwealth Agencies</i>	38
<u>Weurth Realty Trust v. Board of Assessors of Edgartown</u> , Mass. ATB Findings of Fact and Report 2013-1152 (November 27, 2013), Docket Nos. F298967, F304188, F308997 - <i>Real Estate Valuation - Errors in Assessment Records (LA-3 Reports)</i>	48
<u>Zaniboni v. Board of Assessors of Pembroke</u> , Mass. ATB Decision with Findings (January 24, 2014), Docket No. F314713 - <i>Classification of Agricultural & Horticultural Land - Rollback Tax - Sale of Property to the United States - Conversion of Use to Residential/Commercial Development</i>	106

**COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD**

**MARIAN LISA COCCO
d/b/a OPUS**

v. COMMISSIONER OF REVENUE

Docket Nos. C310367
C311626
C314426

Promulgated:
October 30, 2013

ATB 2013-1089

These are appeals filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39(c) from the refusal of the appellee, Commissioner of Revenue (“Commissioner” or “appellee”), to grant an abatement of penalties assessed to the appellant, Marian Lisa Cocco d/b/a Opus (“appellant”), for the monthly tax periods ended February 28, 2010 through and including April 30, 2011 (“tax periods at issue”).

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

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.

Marian Lisa Cocco d/b/a Opus, pro se, for the appellant.

David T. Mazzuchelli, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of a Statement of Agreed Facts and the testimony and exhibits offered into evidence at the hearing of these appeals, the Appellate Tax Board (“Board”) made the following findings of fact.

At all relevant times, the appellant was the sole proprietor and operator of Opus, a small independent retail store selling handcrafted decorative items, which was located in Greenfield. The appellant was registered with the Commissioner of Revenue (“Commissioner”) as a vendor of tangible personal property and as such was required to collect and remit sales tax to the Commonwealth on its sales of tangible personal property subject to sales tax and to file monthly sales tax returns with the Commissioner.

According to *Technical Information Release 03-11* (“*TIR 03-11*”), in effect during the tax periods at issue, vendors were required to file sales and use tax returns and pay their taxes electronically once the vendor’s aggregate tax liability had reached \$10,000.00 in any taxable

year. Although the appellant met the threshold for filing tax returns and making tax payments under *TIR 03-11*, she filed paper sales tax returns and remitted sales taxes by check for the tax periods at issue.

On November 12, 2009, the Commissioner issued to the appellant a notice of improper filing and payment under G.L. c. 63, § 33(g), based on the Commissioner's determination that the appellant met the threshold for filing sales tax returns and remitting sales taxes electronically. The notice advised the appellant that filings and payments for subsequent periods were required to be made electronically. The appellant filed her sales tax returns by paper and paid her sales taxes by check for the next two monthly tax periods.

The Commissioner sent another notice to the appellant, dated March 2, 2010, notifying the appellant that she had submitted a paper return for the January, 2010 monthly tax period, and that the Department of Revenue ("DOR") "intend[ed] to impose a penalty of \$100.00 on each subsequent non-electric return, informational filing, or payment for which DOR requires electronic filing or payment."

The jurisdictional facts pertinent to each appeal are as follows:

Docket No. C310367

The appellant timely filed paper sales tax returns and paid by check the corresponding sales taxes due for the monthly tax periods ending February 28, 2010 through and including July 31, 2010. In response to the Commissioner's assessments of \$100.00 penalties, plus interest, for each of these tax periods, the appellant timely filed abatement applications as follows:

Abatement Application Filed	Tax Periods Ending
July 14, 2010	2/28/2010 – 5/31/2010
September 10, 2010	6/30/2010 – 7/31/2010

By Notice of Abatement Determination dated November 17, 2010, the Commissioner denied the abatement applications. The appellant seasonably filed her appeal with the Board on January 13, 2011. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear the appeal for Docket No. C310367.

Docket No. C311626

The appellant timely filed paper sales tax returns and paid by check the corresponding sales taxes due for the monthly tax periods ending August 31, 2010 through and including October 31, 2010. In response to the assessments of \$100.00 penalties, plus interest, for each of these tax periods, the appellant timely filed an abatement application on December 8, 2010. By Notice of Abatement Determination dated March 29, 2011, the Commissioner denied the

abatement application. The appellant seasonably filed her appeal with the Board on May 18, 2011. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear the appeal for Docket No. C311626.

Docket No. C314426

The appellant timely filed paper sales tax returns and paid by check the corresponding sales taxes due for the monthly tax periods ending November 30, 2010 through and including April 30, 2011. In response to the assessments of \$100.00 penalties, plus interest, for each of these tax periods, the appellant timely filed abatement applications as follows:

Abatement Application Filed	Tax Periods Ending
March 7, 2011	11/30/10 - 01/31/11
June 16, 2011	02/28/11 – 04/30/2011

By Notice of Abatement Determination dated July 8, 2011, the Commissioner denied the abatement applications. The appellant seasonably filed her appeal with the Board on September 7, 2011. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear the appeal for Docket No. C314426.

At the hearing of these appeals, the appellant testified that she did not own a computer and that she did not know how to use a computer. She maintained that, “[a]t this stage of [her] life,” it would be a hardship for her to file and pay electronically, because she would be forced to purchase a computer and learn to use it competently. She had operated her business for over twenty years using paper records and paper returns, and she testified that she found the prospect of transferring to electronic filing and payment to be daunting. She further testified that she did not trust the reliability or the security of filing by electronic means, including filing by telephone, for transmitting her confidential financial information to the Commissioner.

The appellant also explained that the alternative of electronic filing and payment through a tax professional would create an additional cost for her small business, one that she would ultimately have to pass on to her customers, and she thus found the mandate to be particularly unfair to her small business. She also pointed out that, despite its insistence that she file and pay sales tax electronically, the DOR generated paper forms for her to use to pay her penalties by check through the mail, and that the Commissioner had accepted these payments by check.

The appellant had attempted to explain her position to the DOR. Upon receipt of the notice advising her of the electronic-filing mandate, she contacted the Taxpayer Advocate at the DOR, and she requested that she be “grandfathered” into an exemption from the mandate, but the Commissioner denied her requests for exemption and for abatement of penalties.

At the hearing of these appeals, the Commissioner argued that, pursuant to G.L. c. 62C, §§ 5 and 33(g), she had the authority to mandate electronic filing for vendors. Moreover, under § 33(g), failure to file sales tax returns and remit sales taxes electronically was considered a failure to file and pay, and the appellant was required to demonstrate reasonable cause for these failures. However, the Commissioner maintained that the appellant did not establish reasonable cause in these appeals based on the following language from *Administrative Procedure 633* (“*AP 633*”): “The fact that a taxpayer does not own a computer or is uncomfortable with electronic data or funds transfer will not support a claim for reasonable cause.”

On the basis of these facts, the Board found that the appellant, using paper returns filed by mail and making payments by check, did, in fact, file her returns and pay her full sales tax liabilities within the required twenty days from the end of the filing period for each of the tax periods at issue.¹ However, under § 33(g) the paper returns and payments were “considered not to have been” filed and paid, thereby exposing the appellant to penalties absent “reasonable cause” for her failure to file and pay electronically. Therefore, the Board next considered whether the appellant’s reasons for failing to conform to the Commissioner’s prescribed filing and payment methods constituted reasonable cause.

First, the appellant did not own a computer and had no experience using one. Compliance with the Commissioner’s mandate would have required her not only to purchase a computer, but also to learn to operate it, and to learn to file her returns and pay her taxes with it. The Board agreed with the appellant that she acted reasonably in failing to comply with a governmental mandate which would require her to purchase a computer, learn to use it competently and to alter significantly her business practices, particularly since she had consistently filed her returns and paid her taxes timely since opening her business in 1989.

Further, the appellant credibly testified that her lack of familiarity with computers, her mistrust of their reliability, and her concern about the privacy of transmitting confidential financial information and payments by electronic means, also drove her decision to rely on paper returns and checks. Finally, the alternative of hiring a professional tax preparer to file electronically would create an unreasonable additional cost for her small business, which she would have to pass on to her customers.

On the basis of these facts, the Board found that the appellant established reasonable cause for her failure to abide by the Commissioner’s electronic-filing mandate. Accordingly, the

¹ According to a Notice of Assessment dated June 27, 2011, the appellant owed \$535.13 in tax liability, plus \$7.24 in interest, for the tax period ending March 31, 2011. However, the Board found that she paid that liability by a check mailed to the Commissioner on April 19, 2011.

Board issued decisions for the appellant abating a total of \$1,500.00 in penalties, \$100.00 for each of the monthly tax periods at issue, together with statutory additions.

OPINION

Pursuant to G.L. c. 62C, § 5, the Commissioner may regulate the form and manner of tax returns and tax payments: “Any return, document or tax payment required or permitted to be filed under this chapter shall be filed with or transmitted to the commissioner in such manner, format and medium as the commissioner shall from time to time prescribe.” Under this statute, the Legislature granted to the Commissioner broad authority to require that all returns and payments of all Massachusetts taxes, including the sales taxes at issue in these appeals and even personal income taxes,² be filed and paid electronically.

The Commissioner has exercised her authority to mandate electronic filing of sales tax returns and payment of sales tax liabilities by promulgating two technical information releases, *TIR 02-22* and *TIR 03-11*. In issuing *TIR 03-11*, the Commissioner modified and expanded, but did not revoke, the electronic filing and payment requirements that she announced in *TIR 02-22*. Accordingly, although *TIR 03-11* was applicable for the tax periods at issue, certain parts of *TIR 02-22* also remained applicable.

Through the promulgation of *TIR 03-11*, the Commissioner has mandated that a vendor, defined in G.L. c. 64H, § 1 as a retailer or other person required to collect and remit sales tax, is required to file returns and pay taxes electronically once the vendor’s aggregate tax liability has reached \$10,000.00 in any one taxable year. This threshold marked a significant reduction from the one announced one year earlier in *TIR 02-22*, which required electronic filing and payment only when the vendor’s sales tax liability reached \$100,000.00 in one taxable year. In addition, *TIR 02-22* provided that once a taxpayer reaches the threshold in one taxable year, the taxpayer must thereafter continue to electronically file in all subsequent years, regardless of whether the threshold has been reached in those subsequent years.

A very limited exception to electronic filing is permitted under *TIR 02-22*, which allows relief only if the failure to file electronically is the result of a “breakdown of the systems or equipment at the Department of Revenue, or other circumstances under which the commissioner may exercise discretion to waive penalties.” With respect to individuals who are not familiar with computers, *TIR 02-22* provides: “[i]f, despite its best efforts, a filing entity has difficulty in

² Although the Commissioner has not fully exercised her authority under § 5 to require that all returns and payment of personal income taxes be electronically filed and paid, she has required, where certain criteria are met, that personal income tax extension requests and accompanying payment, as well as personal income tax returns filed by compensated tax preparers, be filed and paid electronically. See *TIR 04-30*.

its transition from paper to E-file returns, the filing entity should contact the Department's Customer Service Bureau . . . to inquire about the process for a waiver of penalties.” However, after seemingly offering relief for taxpayers such as the appellant who are unfamiliar with computers, the Commissioner contradicts this statement in *AP 633*, in which she states her position that not owning a computer or understanding how to operate one will not constitute reasonable cause for waiver or abatement of penalties.

It was undisputed that the appellant met the applicable \$10,000.00 threshold requirement and therefore, the appellant was required to file sales tax returns and pay sales tax liabilities electronically pursuant to *TIR 03-11*. Upon receipt of the notice advising her of the electronic-filing mandate, the appellant contacted the DOR Taxpayer Advocate for assistance with having her penalties waived, as *TIR 02-22* suggests, but the Commissioner denied her request.

G.L. c. 62C, § 33(g) provides a penalty for failing to file an electronic return or make an electronic tax payment if the Commissioner has notified the taxpayer of such a requirement:

(g) If after the commissioner has required taxpayers either to prepare or file any required return, document, or information, or to make a required tax payment or estimated payment, by way of a specified automated or electronic means, format, method, or medium, a taxpayer fails to comply with the prescribed method for the filing, data transfer, or payment, ***the taxpayer shall be considered not to have made the required filing or the required payment.*** Upon a failure to comply, the commissioner, in addition to other remedies available to him, shall send the taxpayer a notice of improper filing or payment specifying the nonconformity therein, but shall not be required to send the notice for subsequent instances of noncompliance. ***Thereafter, if the taxpayer, without reasonable cause, fails to conform any filing, data transfer or payment with the method prescribed by the commissioner in tax years beginning on or after January 1, 2005, there shall be added to and become a part of the tax required to be paid a penalty in an amount not greater than \$100 for each improper return, document or data transmission, and for each improper payment.***

The § 33(g) penalty may be waived if the taxpayer’s failure to comply with the Commissioner’s prescribed filing and payment methods are due to “reasonable cause.” Section 33(g) provides that the penalty is applicable only if the taxpayer “without reasonable cause” fails to conform any filing or payment method to the Commissioner’s requirements and, further, § 33(g) also explicitly states that the penalty imposed is “subject to [§ 33(f)] relative to the waiver of penalties.” Section 33(f) provides as follows:

(f) If it is shown that any failure to file a return or to pay a tax in a timely manner is ***due to reasonable cause and not due to willful neglect***, any penalty or addition to tax under this section may be waived by the commissioner, or if such penalty or addition to tax has been assessed, it may be abated by the commissioner, in whole or in part.

See also *Commissioner of Revenue v. Wells Yachts South, Inc.*, 406 Mass. 661, 663 (1990).

Accordingly, the issue in this case is whether the appellant's failure to file sales tax returns and pay the requisite sales taxes electronically was due to reasonable cause. Because the appellant bears the burden of proving her right to the abatement, she also bears the burden of establishing reasonable cause. *Blakeley v. Commissioner of Revenue*, 28 Mass. App. Ct. 499, 501, *rev. denied*, 407 Mass. 1103 (1990); *Q Holdings Corp. v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 1996-412, 418. The Board here found that the appellant satisfied that burden.

The Supreme Judicial Court has defined "reasonable cause" for purposes of § 33(f) as establishing an "objective standard," whereby "[a]t a minimum, the taxpayer must show that he exercised the degree of care that an ordinary taxpayer in his position would have exercised." *Wells Yachts South*, 406 Mass. at 665. The "ultimate question whether there is reasonable cause within the meaning of the statute is one of law." *Id.* at 664. While reasonable cause is an objective standard, it "requires a factual analysis to determine if the taxpayer exercised 'ordinary business care' with respect to filing returns and paying taxes in a timely manner." *Id.* at 665. Reasonable cause is a federal principle which Massachusetts adopted in 1980,³ and as such, "[i]n determining the existence of reasonable cause, Massachusetts courts and this Board have looked for guidance to federal cases and regulations promulgated under Internal Revenue Code § 6651(a), the federal counterpart to G.L. c. 62C, § 33(f)." *Morris Electrical Supply Co., Inc. v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 1996-403, 408; *see* 26 CFR 301.6651-1(c) (defining reasonable cause for late filing of return and late payment of tax under Internal Revenue Code as the exercise of "ordinary business care and prudence."); *United States v. Boyle*, 469 U.S. 241 (1985); *Daly v. United States*, 480 F.Supp. 808 (D.N.D. 1979).

Contrary to the clear line of Massachusetts and federal cases that require a factual analysis to determine whether a taxpayer exercised ordinary business care and prudence, the Commissioner's pronouncement in *AP 633* purports to preempt a reasonable cause determination in certain fact situations: "The fact that a taxpayer does not own a computer or is uncomfortable with electronic data or funds transfer will not support a claim for reasonable cause." However, *AP 633* is not dispositive on the issue of reasonable cause. Administrative Procedures describe the procedures of the DOR and are informational only; they do not "supersede, alter or otherwise affect any provision of the Massachusetts General Laws, Massachusetts regulations, Department

³ St. 1980, c. 27, § 4.

rulings, or any other sources of law.” 830 CMR 62C.3.1(10)(c)(2). Further, unlike regulations, which, barring emergency situations, may be promulgated only after notice and a public hearing to “solicit data, views and arguments regarding the proposed adoption, amendment or repeal of a regulation” (831 CMR 62C.3.1(4)(c)(4)), the Commissioner may issue an administrative procedure without soliciting input from affected parties.

“Well established is the principle that “[t]he duty of statutory interpretation is for the courts.” *Casey v. Massachusetts Electric Co.*, 392 Mass. 876, 879 (1984) (quoting *Cleary v. Cardullo’s, Inc.*, 347 Mass. 337, 344 (1964)). A blanket pronouncement by the taxing authority, in a publication which does not have the force of law, that a failure to own and understand how to operate a computer will not constitute reasonable cause, is inconsistent with the objective standard, to be determined by the trier of fact, of what constitutes ordinary care and business prudence. *See Wells Yachts South*, 406 Mass. at 665.

The Commissioner’s blanket pronouncement in **AP 633** also runs contrary to the treatment of electronic filing and payment requirements by the federal government and state taxing jurisdictions, which are instructive on the issue of ordinary business care and prudence. The United States Code in 26 U.S.C. § 6011(a) provides, “[w]hen required by regulations prescribed by the Secretary [of the Treasury] any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary.” This language is similar to the language used in G.L. c. 62C, § 5 in that both statutes enable the Secretary or Commissioner to prescribe the form and manner in which tax returns must be filed.

However, unlike Massachusetts law, Congress also enacted 26 U.S.C. § 6011(e)(1), which states, “the Secretary may not require returns of any tax imposed by subtitle A on individuals, estates, and trusts to be other than on paper forms supplied by the Secretary.” The only exception to this rule is for tax preparers who file more than 10 tax returns for their clients; these preparers must electronically file their clients’ returns, unless the individual client does not wish to have their return filed electronically. 26 U.S.C. § 6011(e)(3). Thus, federal law provides for an opt-out provision for those taxpayers who use a paid tax return preparer. **Rev. Proc. 2011-25**. Therefore, under federal law, there is no mandate for an individual to file returns or pay taxes by electronic means.

Instead of a mandate, Congress enacted 26 U.S.C. § 6011(f), Promotion of electronic filing, stating:

- (1) In general.— The Secretary is authorized to promote the benefits of and encourage the use of electronic tax administration programs, as they

become available, through the use of mass communications and other means.

- (2) Incentives.— The Secretary may implement procedures to provide for the payment of appropriate incentives for electronically filed returns.

The incentives that the Internal Revenue Service employs to encourage electronic filing include faster processing time, fewer errors, faster refunds, and the delay of out-of-pocket taxpayer expense by allowing for credit-card payment of taxes. *See, e.g., IRS Publication 3112.*

While many state jurisdictions have enacted electronic-filing mandates for certain types of taxes, most include an opt-out provision for individual taxpayers. With respect to the mandate for professional tax preparers to file their client's returns electronically, California and New Jersey, for example, permit an opt-out for individual taxpayers who do not wish to have their individual income tax return filed in this manner. *See, e.g., Cal. Rev. & Tax Code § 19170(b) and N.J. Stat. Ann. 54A:8-6.1(c).* These taxing jurisdictions recognize that there may be meritorious reasons for individual taxpayers to decline to use computers to file their returns and pay their taxes.

With respect to sales tax returns, New York also has an electronic-filing mandate, but, unlike the Commissioner in *AP 633*, the New York taxing authority does not apply the mandate to taxpayers unless they use computer software to prepare their returns and have broadband internet access, and thus would not require taxpayers like the appellant in this appeal who are unfamiliar with, or distrusting of, computers to purchase and learn to use one and to change their established methods of preparing their tax returns. *See NY Tax § 29.* Rhode Island's e-file mandate for sales and use taxes includes a broad "undue hardship" exception, which, unlike *AP 633*, allows for a case-by-case inquiry. *RI-1345* (Handbook for Electronic Filers of Rhode Island Tax Returns). In fact, under its e-file mandate for sales and use taxes, Wisconsin specifically recognizes as an undue hardship a taxpayer's lack of access to a computer with internet connection. *Wisc. Tax 1.01(2)(d).*

The consistent thread that runs through these taxing jurisdictions is that there are circumstances where an individual taxpayer may reasonably decline to file returns and pay taxes electronically. Applying an objective standard of the care that an ordinary taxpayer in the appellant's position would have exercised, the Board found and ruled that the appellant exercised ordinary business care and prudence by filing paper returns and remitting taxes by check. *Wells Yachts South*, 406 Mass. at 665. The Board further ruled that penalizing the appellant for not purchasing a computer and learning to operate it goes beyond requiring the taxpayer to exercise ordinary business care and prudence. Rather, it is an extraordinary requirement particularly

where, as here, it is imposed on an individual who is an unincorporated small-business owner and operator, and the taxpayer has had an exemplary 20-year record of tax compliance.

The Board therefore ruled that the appellant met her burden of proving reasonable cause under §§ 33(f) and (g) for her failure to file returns and pay taxes electronically. Accordingly, the Board issued decisions for the appellant in the instant appeals, and ordered abatements of \$100.00 for each of the tax periods at issue, for a total abatement of \$1,500.00 in penalties, plus statutory additions.

APPELLATE TAX BOARD

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

A true copy,

Attest: _____
Clerk of the Board

**COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD**

JONATHAN HARR

v. COMMISSIONER OF REVENUE

Docket Nos. C315058

Promulgated:
July 23, 2014

ATB 2014-515

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39(c) from the refusal of the appellee, Commissioner of Revenue (“Commissioner” or “appellee”), to grant an abatement of a penalty assessed to the appellant, Jonathan Haar, (“Mr. Haar” or “appellant”), for the tax year ended December 31, 2010 (“tax year at issue”).

Commissioner Scharaffa heard this appeal and was joined by Chairman Hammond and Commissioners Rose, Chmielinski, and Good in a decision for the appellant.

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.

Jonathan Haar, pro se, for the appellant.

Bensen V. Solivan, Esq., and Timothy R. Stille, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

INTRODUCTION

On the basis of a Statement of Agreed Facts and the testimony and exhibits offered into evidence at the hearing of this appeal, the Appellate Tax Board (“Board”) made the following findings of fact.

This appeal involves the Commissioner’s assessment of a \$100 penalty, pursuant to G.L. c. 62C, § 33(g) (“§ 33(g)”), because of the appellant’s failure to electronically submit the payment that accompanied his Form-4868, Application for Automatic Six-Month Extension of Time to File Massachusetts Income Tax Return (“extension application”) for the tax year at issue. Although the penalty was assessed for tax year 2010, a portion of the appellant’s compliance history is relevant and is therefore briefly recounted below.

I. APPELLANT’S FILING AND PAYMENT HISTORY

On April 15, 2006, the appellant filed a paper extension application for the tax year ended December 31, 2005. The paper extension application was accompanied by a \$5,000 payment in the form of a check (“paper payment”). The paper extension application and paper payment did not comply with the requirements set forth in *Technical Information Release (“TIR”) 04-30 (“TIR 04-30”)*, which states that if a payment accompanying an extension application equals \$5,000 or more, such extension application and payment must be submitted electronically. *See TIR 04-30 (II)(D)*.

Under § 33(g), the Commissioner is required to notify taxpayers of their first failure to comply with the electronic filing and payment mandates, but is not required “to send the notice for subsequent instances of noncompliance.” Thus, by notice dated May 2, 2006, the Commissioner informed the appellant that the paper extension application and paper payment for the 2005 tax year did not comply with the electronic filing and payment mandates and that any further instance of non-compliance would result in the assessment of a \$100 penalty. The appellant was assessed a \$100 penalty for failing to make an electronic payment with his extension application for the 2006 tax year, but complied with the Commissioner’s electronic filing and payment mandates for the 2007 tax year. Because the amount accompanying his extension applications for tax years 2008 and 2009 did not exceed the \$5,000 threshold, the appellant’s paper extension applications and paper payments did not run afoul of *TIR 04-30*, and no penalties were assessed for those tax years.

1. On April 15, 2011, the appellant filed a paper extension application for the tax year at issue, which was accompanied by a paper payment in the amount of \$19,517.00. By

Notice of Assessment dated October 24, 2011, the Commissioner assessed a \$100 penalty to the appellant for his failure to make an electronic payment in connection with his extension application for the tax year at issue.¹

On December 15, 2011, the appellant applied in writing to the Commissioner, seeking an abatement of the \$100 penalty. By Notice of Abatement Determination dated March 14, 2012, the Commissioner denied the appellant's abatement request. On April 3, 2012, the appellant timely filed his appeal with the Board. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

II. APPELLANT'S TESTIMONY

The appellant testified that each year, he applies to the Commissioner for an extension to file his Massachusetts income tax return, because a portion of his income is derived from a Texas partnership in which he has an interest with his uncle, who resides in Texas. For the tax year at issue, the appellant engaged a paid professional tax preparer to file his income tax return because he determined that it was a complicated return.

Mr. Haar maintained that the Commissioner's electronic payment mandate is a "serious invasion of both [his] privacy and [his] personal business practices," as it exposes his finances to risk of cyber attack. On his abatement application, Mr. Haar explained, "I intentionally do no electronic banking nor direct bill paying, I have none of my credit cards linked to my bank accounts directly and I think anyone who does any of the above is exposing themselves to multiple risks of cybercrime and identity theft." At the hearing, Mr. Haar testified that he does not link his "bank account information in any electronic way to any other electronic medium" because he believes it is a "very foolish thing to do." Mr. Haar further expressed doubts as to the security of the computer systems used by the Department of Revenue ("DOR"), noting that "if the Pentagon can be hacked," he had little confidence that DOR could protect his – or any other taxpayer's – personal data from theft.

III. COMMISSIONER'S CASE

It was the Commissioner's position in this appeal that, pursuant to G.L. c. 62C, §§ 5, 33(g) and 85, she has the authority to mandate electronic filing and payment and to assess penalties if, after notice, a taxpayer failed to comply with the prescribed filing and payment mandates. While § 33(g) provides that the penalties may be abated if a taxpayer can demonstrate "reasonable cause" for non-compliance, the Commissioner maintained that the appellant did not

¹ Although *TIR 04-30* likewise specified that the appellant should have filed his extension application electronically, the Commissioner did not separately assess a penalty to the appellant for his failure to file the extension application electronically.

establish reasonable cause because *Administrative Procedure 633* (“*AP 633*”) provides that “[t]he fact that a taxpayer does not own a computer or is uncomfortable with electronic data or funds transfer will not support a claim for reasonable cause.” *AP 633(II)(D)*.

In support of her position, the Commissioner offered the testimony of two witnesses, Robert Allard and Theresa O’Brien-Horan, both longtime employees of DOR. Mr. Allard, who is a Tax Auditor, testified regarding Mr. Haar’s tax filing and payment history. Based upon records maintained by DOR’s MASSTAX computer system, Mr. Allard was able to determine that the personal income tax return ultimately filed by Mr. Haar for the tax year at issue was electronically filed with the assistance of a paid preparer. However, MASSTAX records showed that Mr. Haar, as he did with the \$19,517.00 check he mailed with his extension request, paid the amount shown on the return as the tax due, \$1,926.00, by check.

Ms. O’Brien-Horan testified that she has been employed by DOR for 26 years in several senior positions. At the time of the hearing, she was a Deputy Commissioner assigned to the Commissioner’s Office as a participant in the development of MASS TAX 2, DOR’s new integrated computer system. Prior to her assignment in the Commissioner’s Office, she served as Deputy Commissioner of the Taxpayer Service Division and Deputy Commissioner of the Processing Division. Ms. O’Brien-Horan, who was part of the management team that implemented the electronic filing and payment mandates at issue here, described the policy reasons behind their implementation.

She testified that DOR was “looking for ways to make compliance easier for taxpayers, to enable them to file more simply [and] improve our services.” Ms. O’Brien-Horan observed that, in the 1990s, many taxpayers were turning to software, such as Turbo Tax®, to prepare and file tax returns, “but they were pressing print and mailing us the paper, rather than pressing send and transmitting the documents electronically.” Therefore, DOR began looking for ways to incentivize more taxpayers to use electronic options for tax filing, including a free on-line application, which was successfully utilized by numerous taxpayers. However, even though the number of taxpayers filing electronically was growing, Ms. O’Brien-Horan testified that DOR was still processing a large volume of paper returns.

With the 2002 amendment of G.L. c. 62C, § 5, which authorized the Commissioner to require electronic filing and payment, DOR began mandating electronic filing and payment for certain taxpayers above specific dollar thresholds, originally, those businesses that owed a

combined total of more than \$100,000 in 3 specific trustee taxes²: wage withholding, room occupancy, and sales and use taxes. See *TIR 02-22*. No such mandate was put in place by *TIR 02-22* for individual taxpayers filing personal income tax returns. Through the issuance of a series of TIRs, however, DOR gradually expanded the scope of the mandates. For example, the threshold for electronic filing with respect to businesses submitting certain trustee taxes was gradually lowered from \$100,000 to \$10,000, while the threshold for tax return preparers required to electronically file was lowered from over 200 returns to over 10 returns. See *TIR 02-22*, *TIR 03-11*, *TIR 04-30* and *TIR 11-13*. Ms. O’Brien-Horan testified that these thresholds were lowered in order to capture more and more taxpayers.

According to Ms. O’Brien-Horan, electronic data and funds transfer is preferable to paper returns and payment because it: (1) is the fastest and most accurate way to transmit data and payment; (2) reduces DOR’s processing costs; and (3) facilitates DOR’s data analysis, allowing it to make more accurate budget projections.

Ms. O’Brien-Horan testified that the mandate at issue in this appeal – requiring individual taxpayers who apply for an extension with an accompanying payment of \$5,000 or more to file and pay electronically – is helpful to DOR because it maximizes up-front revenue intake. According to Ms. O’Brien-Horan, the \$5,000 threshold was chosen because it would “impact 17% of the taxpayers, but get . . . the money banked for 84% of the revenue.” She elaborated that when DOR analyzed the population of taxpayers that would be affected by the \$5,000 threshold, it determined that 98% of such taxpayers were already filing using a software package, so DOR “didn’t think [the mandate] would be too burdensome.” She further testified that many taxpayers choose to file and pay electronically, even when not required to by the mandates, because they recognize the benefits of electronic filing and payment, including a reduction in calculation errors by taxpayers and processing errors by DOR, as well as faster refunds.

In response to questioning by the hearing officer regarding whether DOR was eventually going to require all taxpayers to file and pay electronically, including all individual taxpayers filing Form 1 Personal Income Tax Returns, Ms. O’Brien-Horan responded that although she would “encourage” taxpayers to file electronically and would “love to get all of our data electronically,” there is no present requirement for all income tax payers to file and pay electronically, but she acknowledged that DOR is “certainly . . . looking for more ways” to obtain electronic data and tax payments.

² A trustee tax is a tax which an entity “collects from those with whom it does business and is obliged to pay over to the Commonwealth.” *Genaitis v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 2006-704, 713.

Ms. O'Brien-Horan noted that the penalty imposed by § 33(g) can be waived if the taxpayer demonstrates reasonable cause for non-compliance. When asked by counsel for DOR if reasonable cause was the Massachusetts "equivalent of an opt-out" of electronic filing and payment requirements, she answered in the affirmative.

IV. BOARD'S FINDINGS

On the basis of the foregoing facts, the Board initially found that the appellant timely filed his extension application with an accompanying payment for the tax year at issue, albeit in the form of a paper extension application and paper payment. Further, the appellant's filing history indicated that he was neither untimely nor otherwise neglectful in his tax filing and payment obligations; rather, he simply filed and paid in a form other than that prescribed by *TIR 04-30*.

However, despite the appellant's timely payment of the amount accompanying his extension request for the tax year at issue, G.L. c. 62C, § 33(g) provides that the paper payment was "considered not to have been" made because of the electronic payment mandate of *TIR 04-30*. Accordingly, the Board addressed the question of whether the appellant's reasons for failing to conform to the Commissioner's prescribed payment method constituted reasonable cause.

The Board found credible the appellant's testimony that he was concerned that transmitting his personal financial information electronically would expose him to a serious risk of security breaches. Given his reference to the hacking of the Pentagon's computer systems, and in light of the many well-publicized instances of large-scale thefts of financial information following computer security breaches at businesses and other institutions, and the appellant's consistent practice of avoiding electronic payment of all of his bills, including his tax obligations, the Board found that the appellant's failure to utilize the Commissioner's mandated electronic tax payment to be reasonable. In finding that the appellant's testimony concerning his consistent practice of avoiding electronic payment of bills was credible, the Board considered the fact that the appellant made an electronic payment of the amount accompanying his tax year 2007 extension request. However, the Board determined that this single instance of an electronic payment, some 3 years prior to the paper payment giving rise to the penalty at issue, did not undermine the credibility of the appellant's concerns regarding electronic payment during the period at issue. See *Commissioner of Revenue v. Wells Yachts South, Inc.*, 406 Mass. 661, 664 (1990) (ruling that, in determining whether there is reasonable cause, the fact finder "must look to the time when the returns or tax payments were due"). The Board therefore found and ruled that the appellant's paper payment of the tax accompanying his extension request in lieu of

electronic payment was consistent with the degree of care that an ordinary taxpayer in his position would have exercised.

Accordingly, the Board found and ruled that the appellant demonstrated reasonable cause for his failure to comply with the Commissioner's electronic-payment mandate for the period at issue. The Board therefore issued a decision for the appellant in this appeal and granted an abatement of the \$100 § 33(g) penalty, along with statutory additions.

OPINION

Pursuant to a 2002 amendment to G.L. c. 62C, § 5,³ the Legislature granted to the Commissioner broad authority to require that documents, including tax returns and extension applications, be filed electronically and that payments made in connection with those filings also be remitted electronically. Section 5 provides, in pertinent part, that: "Any return, document or tax payment required or permitted to be filed under this chapter shall be filed with or transmitted to the commissioner in such manner, format and medium as the commissioner shall from time to time prescribe."

As detailed in the foregoing findings, the Commissioner, through a series of *TIRs* beginning in 2002, just a few months after the effective date of the amended § 5, and extending through 2011, has gradually expanded the scope of the electronic filing and payment mandates so as to impact more and more taxpayers. For example, *TIR 02-22* required taxpayers who collect withholding, sales and use, and room occupancy taxes in excess of \$100,000 combined for all three categories of tax to file and pay electronically. The following year, the Commissioner significantly expanded the electronic filing and payment mandates, by, among other things, requiring tax return preparers who file more than 200 returns to file electronically and reducing the filing and payment threshold established in *TIR 02-22* for withholding, sales and use, and room occupancy taxes from \$100,000 to just \$10,000. *See TIR 03-11*. More recently, the Commissioner reduced the electronic filing threshold for tax return preparers from over 200 returns to now over 10 returns. *See TIR 11-13*. The obvious effect of this series of *TIRs* is to require more taxpayers to file and pay electronically.

Shortly after the first expansion of electronic filing and payment mandates in *TIR 03-11*, the Legislature enacted G.L. c. 62C, § 33(g), which imposes a penalty for failing to comply with the Commissioner's mandate to electronically file any return, document, or information or electronically pay a tax, without reasonable cause. *See St. 2003, c. 143, § 2*, effective December 4, 2003. Section 33(g) provides, in pertinent part:

³ *See St. 2002, c. 300, § 8(A)*.

If after the commissioner has required taxpayers either to prepare or file any required return, document, or information, or to make a required tax payment or estimated payment, by way of a specified automated or electronic means, format, method, or medium, a taxpayer fails to comply with the prescribed method for the filing, data transfer, or payment, the taxpayer shall be considered not to have made the required filing or the required payment. Upon a failure to comply, the commissioner, in addition to other remedies available to him, shall send the taxpayer a notice of improper filing or payment specifying the nonconformity therein, but shall not be required to send the notice for subsequent instances of noncompliance. ***Thereafter, if the taxpayer, without reasonable cause, fails to conform any filing, data transfer or payment with the method prescribed by the commissioner in tax years beginning on or after January 1, 2005, there shall be added to and become a part of the tax required to be paid a penalty in an amount not greater than \$100 for each improper return, document or data transmission, and for each improper payment. . . . A penalty imposed by the commissioner for an improper filing or payment shall be subject to subsection (f) relative to the waiver of penalties.***

(emphasis added). Accordingly, a penalty imposed under § 33(g) may be waived if the taxpayer's failure to comply with the Commissioner's prescribed filing and payment methods are due to "reasonable cause."

For the tax year at issue, ***TIR 04-30(II)(D)*** required that "any extension request and payment made by or on behalf of a taxpayer filing Forms 1 or 1-NR/PY must be made using electronic means if a payment of \$5,000 or more accompanies the extension request." In the present appeal, there was no dispute that the payment accompanying the appellant's extension request for the tax year at issue was more than \$5,000 but was not made electronically, thereby failing to conform to the ***TIR 04-30(II)(D)*** mandate. Further, the appellant did not deny that he had received a notice from the Commissioner five years earlier for failure to comply with the electronic filing and payment mandates for the 2005 tax year. Accordingly, the only issue raised by the parties in the present appeal was whether the appellant demonstrated reasonable cause for failing to comply with the electronic payment mandate of ***TIR 04-30(II)(D)***. Because the appellant bears the burden of proving his right to an abatement, he also bears the burden of establishing reasonable cause. ***Blakeley v. Commissioner of Revenue***, 28 Mass. App. Ct. 499, 501, *rev. denied*, 407 Mass. 1103 (1990); ***Q Holdings Corp. v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1996-412, 418.

Section 33(g) expressly states that penalties imposed thereunder shall be "subject to subsection (f) relative to the waiver of penalties." Massachusetts courts, and this Board, have had frequent occasion to consider "reasonable cause" for purposes of G.L. c. 62C, § 33(f) ("§ 33(f)"). The Supreme Judicial Court has consistently held that the determination of reasonable

cause requires an “objective standard,” whereby “[a]t a minimum, the taxpayer must show that he exercised the degree of care that an ordinary taxpayer in his position would have exercised.” *Geoffrey, Inc. v. Commissioner of Revenue*, 453 Mass. 17, 26 (2009), (quoting *Wells Yachts South*, 406 Mass. at 665). The determination of whether a taxpayer has met the objective standard of exercising the degree of care of an ordinary taxpayer in his position requires a factual analysis of the circumstances existing at the time the return or tax payment was due. *Wells Yachts South*, 406 Mass. at 664.

Reasonable cause is a federal principle which Massachusetts adopted in 1980,⁴ and as such, “[i]n determining the existence of reasonable cause, Massachusetts courts and this Board have looked for guidance to federal cases and regulations promulgated under Internal Revenue Code § 6651(a), the federal counterpart to G.L. c. 62C, § 33(f).” *Morris Electrical Supply Co., Inc. v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 1996-403, 408. Federal cases have consistently held that the determination of reasonable cause requires a factual inquiry in order to establish whether the taxpayer exercised “ordinary business care and prudence.” *See, e.g., United States v. Boyle*, 469 U.S. 241, 246, n.4 (1985); *Daly v. United States*, 480 F.Supp. 808, 811 (D.N.D. 1979); *see also* 26 CFR 301.6651-1(c) (defining reasonable cause for late filing of return and late payment of tax under Internal Revenue Code as the exercise of “ordinary business care and prudence”).

The Commissioner argued that the following language in *AP 633(II)(D)* precludes a finding that the appellant had reasonable cause for failing to electronically pay the tax accompanying his abatement request: “The fact that a taxpayer does not own a computer or is uncomfortable with electronic data or funds transfer will not support a claim for reasonable cause.” However, this blanket pronouncement is contrary to the clear line of Massachusetts and federal cases that require a factual analysis to determine whether a taxpayer exercised ordinary business care and prudence, and is also contrary to the Commissioner’s own regulation on electronic funds transfer. *See* 830 CMR 62C.78.1(8)(a) (“[t]he [DOR] will evaluate each case on an individual basis to determine whether failure to transmit payments by EFT was due to reasonable cause and not willful neglect.”).

In *Cocco v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 2013-1089, the Board held that a taxpayer who did not own a computer, did not know how to use one, and had credible concerns regarding the privacy of financial information transmitted electronically, established reasonable cause for her failure to comply with the Commissioner’s

⁴ St. 1980, c. 27, § 4.

electronic filing mandate, despite the blanket pronouncement of *AP 633*. The Board held that Administrative Procedures do not have the force of law, but “are informational only; they do not ‘supersede, alter or otherwise affect any provision of the Massachusetts General Laws, Massachusetts regulations, Department rulings, or any other sources of law.’” *Cocco*, Mass. ATB Findings of Fact and Reports at 2013-1103 (quoting 830 CMR 62C.3.1.(10)(c)(2)). Accordingly, consistent with its decision in *Cocco*, the Board ruled in the present appeal that the blanket pronouncement of *AP 633*, that a taxpayer’s discomfort with electronic data or funds transfer can never constitute reasonable cause for purposes of § 33(g), is inconsistent with the objective standard, to be determined by the trier of fact, of what constitutes the degree of care that an ordinary taxpayer in the appellant’s position would have exercised. *Wells Yachts South*, 406 Mass. at 665.

Applying that “objective standard” to the facts of the present appeal, the Board found and ruled that the appellant demonstrated reasonable cause for failing to comply with the Commissioner’s electronic payment mandate. The Board found credible the appellant’s testimony that it was his consistent practice to avoid electronic payment of all bills, not just his tax obligations, and to keep his bank account information separate from his e-mail and other electronic media. The Board further found that his concerns regarding the electronic transmission of his personal financial data to be reasonable in these circumstances, given his reference to the hacking of the Pentagon’s computer systems and in light of the many well-publicized instances of large-scale thefts of financial information following computer security breaches at businesses and other institutions. *See, e.g., In re: TJX Companies Retail Security Breach Litigation. Amerifirst Bank, et al v. TJX Companies, Inc., et al*, 564 F.3d 489 (1st Cir. May 5, 2009); *see also* AMERICA THE VIRTUAL: SECURITY, PRIVACY AND INTEROPERABILITY IN AN INTERCONNECTED WORLD: COMMENT: IDENTITY CRISIS: SEEKING A UNIFIED APPROACH TO PLAINTIFF STANDING FOR DATA SECURITY BREACHES OF SENSITIVE PERSONAL INFORMATION, 62 Am. U.L. Rev. 1365.

In making this finding, the Board noted that the appellant was not tardy or otherwise neglectful with respect to his extension application and payment for the tax year at issue or in previous tax years. *See Cocco*, Mass. ATB Findings of Fact and Reports at 2013-1108 (weighing the taxpayer’s “exemplary” record of tax compliance in its consideration of reasonable cause not to file electronically). The appellant’s sole transgression was his use of paper, rather than the electronic means required by *TIR 04-30*. As it did in *Cocco*, and as have other taxing jurisdictions, the Board recognized that there are “meritorious reasons for individual taxpayers to

decline to use computers to file their returns and pay their taxes.” See *Cocco*, Mass. ATB Findings of Fact and Reports at 2013-1106-07.

As the Board noted in *Cocco*, the Commissioner’s blanket pronouncement in *AP 633* runs contrary to the treatment of electronic filing and payment requirements by the federal government and other state taxing jurisdictions, which are instructive on the issue of ordinary business care and prudence. *Cocco*, Mass. ATB Findings of Fact and Reports at 2013-1104-07. The United States Code in 26 U.S.C. § 6011(a) provides, “[w]hen required by regulations prescribed by the Secretary [of the Treasury] any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary.” This language is similar to the language used in G.L. c. 62C, § 5 in that both statutes enable the Secretary or Commissioner to prescribe the form and manner in which tax returns must be filed.

However, Congress went further by enacting 26 U.S.C. § 6011(e)(1), which explicitly states that: “the Secretary may not require returns of any tax imposed by subtitle A on individuals, estates, and trusts to be other than on paper forms supplied by the Secretary.” The only exception to this rule is for tax preparers who file more than 10 tax returns for their clients; these preparers must electronically file their clients’ returns, unless the individual client does not wish to have their return filed electronically. 26 U.S.C. § 6011(e)(3). Thus, federal law provides for an opt-out provision for those taxpayers who use a paid tax return preparer. *Rev. Proc. 2011-25, § 9.01*. Therefore, under federal law, there is no mandate for an individual to file returns or pay taxes by electronic means.

Instead of a mandate, Congress enacted 26 U.S.C. § 6011(f), Promotion of electronic filing, stating:

- (1) In general.— The Secretary is authorized to promote the benefits of and encourage the use of electronic tax administration programs, as they become available, through the use of mass communications and other means.
- (2) Incentives.— The Secretary may implement procedures to provide for the payment of appropriate incentives for electronically filed returns.

The incentives that the Internal Revenue Service employs to encourage electronic filing include faster processing time, fewer errors, faster refunds, and the delay of out-of-pocket taxpayer expense by allowing for credit-card payment of taxes. See, e.g., IRS PUBLICATION 3112. See also RECOMMENDATIONS OF THE NATIONAL COMMISSION ON RESTRUCTURING THE IRS TO EXPAND ELECTRONIC FILING OF TAX RETURNS, Subcommittee on Oversight, 105th Cong.

(1997) (statement of Donald Lubick, Acting Asst. Secretary for Tax Policy, U.S. Treasury) (“[W]e’re concerned about mandates or their functional equivalents through specific targets and we’re afraid that this will introduce a rigidity in an area where flexibility is really the order of the day.”).

Likewise, while other state jurisdictions have enacted electronic-filing mandates for certain tax types, they also include opt-out provisions or exceptions. *See, e.g.*, Cal. Rev. & Tax Code § 19170(b) and N.J. Stat. Ann. 54A: 8-6.1(c) (permitting an opt-out for individual taxpayers who do not wish to have their individual income tax return filed electronically by a tax preparer who is otherwise required to file returns electronically); NY CLS Tax § 29(c) (electronic filing mandate applies only to taxpayers who use computer software to prepare their returns); HANDBOOK FOR ELECTRONIC FILERS OF RHODE ISLAND TAX RETURNS, RI-1345 (e-file mandate includes a broad “undue hardship” exception allowing for a case-by-case inquiry and also an opt out for taxpayers who request their preparer not to file electronically); Wisc. Admin. Code Tax 2.08(3)(c) (allows opt out for preparers where taxpayer does not want return filed electronically) and 2.08(3)(e)(1) (recognizes as undue hardship excusing electronic filing the fact that taxpayer does not have a computer connected to the Internet).

While the Board is cognizant that G.L. c. 62C, § 5 gives the Commissioner broad authority to prescribe methods of tax filing and payment, and it is equally mindful of the administrative convenience and other benefits derived from the promotion of electronic filing and payment, the Board also recognizes that the penalty under §33(g) for failing to comply with the Commissioner’s electronic payment mandates was not intended to be mandatory in all circumstances. Rather, the Legislature in enacting § 33(g) recognized, as have Congress and the various state legislatures discussed above, that a taxpayer may have reasonable cause for failing to file returns or pay taxes electronically. By employing “reasonable cause” language in § 33(g) and specifically providing that the waiver of penalties imposed under § 33(g) are subject to § 33(f), with its established body of case law requiring a factual analysis to determine if the taxpayer exercised the degree of care that an ordinary taxpayer in his position would have exercised, the Legislature ensured that taxpayers had an opportunity to establish that their failure to comply with electronic filing and payment mandates was justified. *See, e.g., Alliance to Protect Nantucket Sound, Inc., et al v. Energy Facilities Siting Board, et al*, 457 Mass. 663, 673 (2010) (recognizing that Legislature acts with “full knowledge of existing law”).

On the facts of this appeal, particularly the appellant’s credible testimony concerning his consistent practice of avoiding the payment of his bills electronically, the Board found and ruled

that the appellant exercised the degree of care that an ordinary taxpayer in his position would have exercised when he made his timely payment by check, contrary to the Commissioner's electronic payment mandate. The Board therefore found and ruled that the appellant met his burden of proving reasonable cause under § 33(g) for his failure to remit payment electronically in connection with his extension application for the tax year at issue.

Accordingly, the Board issued a decision for the appellant in this appeal and granted an abatement of the \$100 penalty, along with statutory additions.

APPELLATE TAX BOARD

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

A true copy,

Attest: _____
Clerk of the Board

**COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD**

RAYMOND C. RHEAULT

v.

**BOARD OF ASSESSORS
OF THE TOWN OF OXFORD**

Docket Nos. F317246

Promulgated:
May 8, 2014

ATB 2014-245

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 Board of Assessors of the Town of Oxford ("assessors" or "appellee"), to abate taxes on certain real estate located in the Town of Oxford owned by and assessed to the 94 Fort Hill Road Realty Trust, Martha Rheault, Trustee, under G.L. c. 59, §§ 11 and 38 for fiscal year 2012 ("fiscal year at issue").

Chairman Hammond heard this appeal. Commissioners Scharaffa, Rose, Mulhern and Chmielinski 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.

Raymond C. Rheault, pro se, for the appellant.

Chris Pupka, assessor for the appellee.

FINDINGS OF FACT AND REPORT

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

On July 1, 2011, the relevant determination date for qualification for the exemption at issue in this appeal, the appellant, Raymond C. Rheault (“appellant”), resided at 94 Fort Hill Road in Oxford, a parcel of land improved with a single-family residence identified on the appellee’s Map 52 as Parcel A07 (“subject property”). Taxes on the subject property were timely paid without the incurring of interest. On January 26, 2012, the appellant filed an Application for Statutory Exemption with the assessors, which the assessors denied on April 5, 2012. The appellant seasonably filed his Petition Under Formal Procedure with the Board on July 2, 2012. On the basis of the preceding facts, the Board found and ruled that it had jurisdiction to hear and decide the instant appeal.

The sole issue raised in this appeal is whether the appellant is entitled to a Veteran’s Exemption under G.L. c. 59, § 5, Clause Twenty-Second (“Clause Twenty-Second”). The appellant is a veteran who served in the armed forces from August of 1976 until October of 1998, when he was honorably discharged from service. At all relevant times, the subject property was the appellant’s principal residence. However, title to the subject property was held by the 94 Fort Hill Road Realty Trust as of the July 1, 2011 qualification date for the exemption, with Martha Rheault, the appellant’s mother, as the Trustee. Therefore, legal title to the subject property was held by the Trustee, and the appellant held only a beneficial interest.

Because the appellant did not hold legal title to the subject property, it did not qualify for the Clause Twenty-Second exemption. Accordingly, the Board issued a decision for the appellee.

OPINION

The Veteran’s Exemption at Clause Twenty-Second applies to the “[r]eal estate of” veterans who have not been dishonorably discharged from service, and who were domiciled in Massachusetts for at least six months prior to entering service or for at least five consecutive years prior to filing for the Veteran’s Exemption, provided that the real estate in question is occupied in whole or in part as the veteran’s domicile. While the appellant established that he was a veteran who met the Massachusetts domicile requirements and that he occupied the subject property as his domicile, the appellant did not hold a sufficient ownership interest in the subject property to qualify for the exemption.

The Supreme Judicial Court and the Appeals Court have held that statutes providing property tax exemptions require that the taxpayer seeking the exemption be the legal title holder of the property, not merely a beneficiary who makes the property his domicile. In *Kirby v. Assessors of Medford*, 350 Mass. 386 (1966), the Court addressed G.L. c. 59, § 5, Clause Forty-First (“Clause Forty-First”), which provides an exemption for real property “of” a person seventy years of age or over and occupied by that person as their domicile. In *Kirby*, as here, title to the property was held by a trustee, with only a beneficial interest held by the individual seeking the exemption. The Court construed the statute’s reference to the real property “of” a taxpayer as requiring legal title, not merely beneficial ownership, and thus refused to extend the exemption to one who “has voluntarily chosen to hold his property in a form which separates the legal title and the beneficial ownership.” *Id.* at 390-91.

Relying on *Kirby*, the Appeals Court in *Moscatiello v. Assessors of Boston*, 36 Mass. App. Ct. 622 (1994) similarly ruled that the Residential Exemption at G.L. c. 59, § 5C (“§ 5C”) did not apply to property held in a nominee trust. In that case, the beneficial owner and resident had argued that, unlike Clause Forty-First, the Residential Exemption at § 5C hinges eligibility on “taxpayer” status, and since he was the party paying the taxes, the exemption should apply regardless of whether the property was held in trust. *Id.* at 623. However, noting that § 5C is granted at the time that the underlying property is assessed, “well before it can be known who will actually pay the tax,” the Appeals Court determined that “taxpayer” as used in § 5C refers to the party to whom the taxes are assessed, that is, “the holder of record title.” *Id.* Therefore, “if the holder of the record (i.e., legal) title does not qualify for the exemption, it is unavailable to the beneficial owner.” *Id.* at 624-5.

The Board here ruled that, like the Clause Forty-First Elderly Exemption and the § 5C Residential Exemption, the Veteran’s Exemption applies strictly to property “of” -- that is, legally owned by -- the veteran. A veteran must hold legal title, and not merely a beneficial interest, in real property to benefit from the statute. Qualification for the exemption does not depend on who may in fact have paid the tax. The Board rules that the requisite inquiry in this appeal is whether an otherwise qualifying veteran held legal title to the subject property as of July 1, 2011.

Under the facts of this appeal, the trustee of the 94 Fort Hill Road Realty Trust, not the appellant, was the legal title holder and assessed owner of the subject property. Therefore, because the veteran held only a beneficial interest in the subject property, the assessors correctly denied the appellant’s Clause Twenty-Second claim.

Accordingly, the Board issued 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**

**RJG REALTY TRUST,
GERALD GOULSTON**

v. **BROCKTON WATER/SEWER
DEPARTMENT**

Docket No. F310428

Promulgated:
February 28, 2014

ATB 2014-92

This is an appeal under the formal procedure pursuant to G.L. c. 40, §§ 42A through 42F, as amended, and G.L. c. 59, §§ 64 and 65, as amended, from the refusal of the Brockton Water/Sewer Department (“appellee”) to abate water and sewer usage charges (“water charges”) imposed on RJG Realty Trust, Gerald Goulston (“appellant”) for the period April 30, 2001 through September 25, 2008 (“period at issue”).

Commissioner Rose heard this appeal. Chairman Hammond and Commissioners Scharaffa, Mulhern and Chmielinski joined him in the decision for the appellant.

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.

Michael P. Stapleton, Esq. for the appellant.

Caitlin E. Leach, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

This appeal arose from the refusal of the appellee to abate water charges imposed on the appellant for the period at issue. The appellant timely filed an application for abatement of water-usage charges with the appellee and, after a series of partial abatements described below, the appellant timely appealed to the Appellate Tax Board (“Board”). The Board therefore ruled that it had jurisdiction to hear and decide this appeal.

On the basis of the testimony and documentary evidence offered at the hearing of this appeal, the Board made the following findings of fact.

At all material times, the appellant owned a single-family home located at 59 College Drive in Brockton ("subject property"). The subject property has one bathroom and was occupied by tenants of the appellant. Between 2001 and 2012, the property was occupied first by the appellant's brother-in-law, then by a family of two adults and two children and finally, by a family of two adults and three children.

Other than a minor dishwasher leak at the subject property which was promptly repaired, the tenants reported no plumbing issues to the appellant, and the appellant was aware of no plumbing issues or water leaks at the subject property at any material time.

On April 30, 2001, the appellee performed an actual reading of the water meter at the subject property. The appellee performed no subsequent reading of the water meter until it installed a new water meter at the subject property on July 15, 2008. During the over 7-year period between actual readings, which corresponds to the period at issue, the appellee sent quarterly estimated bills to the appellant, which he timely paid.

As a result of the actual reading on July 15, 2008, the appellee issued to the appellant a water and sewer bill in the amount of \$22,026.17, based on its determination of water consumption between the April 30, 2001 and July 15, 2008 actual readings, compared with the estimated consumption for which the appellant had been previously billed. The appellee determined that the actual consumption during this over 7-year period was approximately 6,000 cubic feet of water per quarterly billing period.

After discussions with the appellant, the appellee reduced the disputed water bill on at least 3 separate occasions: from \$22,026.17 to \$11,069.92; from \$11,069.92 to approximately \$8,500.00; and from \$8,500.00 to \$6,841.27. The final amount was based on an average consumption of 5,280 cubic feet of water per quarterly billing period for the period at issue.

After the water meter was changed in July of 2008, meter readings for all subsequent quarterly billing periods were actual readings. On the basis of the consumption history report in evidence and the testimony of April Troxell, the appellee's head administrative clerk, the Board found that the average consumption per quarterly billing period from September, 2008 through January, 2012 was 1,986 cubic feet.

During the period 2008 through 2012, there were more occupants of the subject property -- 2 adults and 3 children -- than at any time during the preceding 7-year period at issue. Despite the fact that there were fewer occupants of the subject property during the period at issue, the

estimated usage rate which the appellee finally determined for the period at issue was approximately 250 percent greater than the actual usage rate for the subsequent 3-year period as reflected by readings of the new meter.

On the basis of the above findings and the evidence of record, the Board found that the water charges for the period at issue were excessive. Although the appellee claimed that its charges should be upheld because the water meter used during the period at issue was tested and found to be accurate, the Board found that the overwhelming evidence of record indicated that the appellee's determination of the water charges was speculative, unreliable and without adequate support. That evidence includes: (1) the appellee failure to perform an actual reading of the appellant's water meter for over 7 years, rendering any attempt to determine the reasonableness of the usage during the period at issue futile; (2) the appellee's successive reductions of the bill at issue, based on nebulous criteria, resulting in a final bill less than one-third of the amount originally charged, indicating that even the appellee did not believe that the indicated readings shown by its meter were accurate; and (3) the appellee's use of an average consumption rate for the period at issue approximately 250 percent greater than the rate for the post-2008 actual readings from the newly installed meter.

The Board found and ruled that the best evidence of the consumption rate for the period at issue was the average consumption rate for the periods covered by the quarterly bills from September 25, 2008 through January 12, 2012. These bills were based on actual readings, from a new meter, contemporaneous with the water consumption. Further, they encompassed the periods when the highest number of tenants occupied the subject property since the commencement of the period at issue.

Accordingly, the Board found and ruled that the proper water and sewer charges for the period at issue should be based on an average consumption rate of 1,986 cubic feet and the appropriate water and sewer rate applicable for each of the quarterly billing periods during the period at issue. On the basis of a joint computation which the parties submitted to the Board pursuant to an Order under 831 CMR 1.33, the proper amount of the water charges for the period at issue is \$1,290.72. Accordingly, the Board granted an abatement in the amount of \$5,550.55.

OPINION

The appeal of an unpaid water charge is governed by G.L. c. 40, §§ 42A through 42F. Section 42E provides that “[a]n owner of real estate aggrieved by a charge imposed . . . under [§§ 42A-42F] . . . may apply for an abatement . . . with the board . . . having control of . . . [the water] department . . . and . . . the provisions of chapter fifty-nine relative to abatement of taxes

by assessors shall apply.” Section 42E further states that, if the request for abatement is refused, “the petitioner may appeal to the appellate tax board upon the same terms and conditions as a person aggrieved by the refusal of the assessors . . . to abate a tax.”

General Laws c. 59, § 65 provides in pertinent part:

A person aggrieved . . . with respect to a tax on property in any municipality may, subject to the same conditions provided for an appeal under section sixty-four, appeal to the appellate tax board by filing a petition with such board within three months after the date of the assessors’ decision on an application for abatement as provided in section sixty-three, or within three months after the time when the application is deemed to be denied as provided in section sixty-four.

Accordingly, within three months after denial or deemed denial of an application for abatement of an unpaid water use charge, the owner may appeal to this Board. *See Epstein v. Executive Secretary of the Board of Selectmen of Sharon*, 22 Mass. App. Ct. 135, 137 (1986).

In the present appeal, there was no dispute that the subject water bill remained unpaid, resulting in a lien on the subject property, a prerequisite to the Board’s jurisdiction. *Id.* at 137. The Board also found that the application for abatement of the water charge was timely filed with the appellee and that the appellant seasonably appealed to this Board within three months of the denial. *See* G.L. c. 59, §§ 64 and 65. Accordingly, the Board ruled that it had jurisdiction over this appeal.

The burden of proof is upon the appellant to make out its right as a matter of law to an abatement of an assessment or water charge. *Schlaiker v. Assessors of Great Barrington*, 365 Mass. 243, 245 (1974). The appellant must first show that it has complied with the statutory prerequisites to its appeal, *see Epstein*, 22 Mass. App. Ct. at 137; *Brown v. Board of Sewer Commissioners & Board of Water Commissioners of Chicopee*, Mass. ATB Findings of Fact and Reports 1995-14, 19-20, *aff’d*, 38 Mass. App. Ct. 1101, 1116 (1995); *Cohen v. Assessors of Boston*, 344 Mass. 268, 271 (1962), and then demonstrate that the water-usage charge on the water bill is improper. *See Foxboro Associates v. Assessors of Foxborough*, 385 Mass. 679, 691 (1982); *Epstein*, 22 Mass. App. Ct. at 136. The charge is presumed valid until the appellant sustains its burden of proving otherwise.

In the present appeal, the Board found and ruled that the appellant sustained its burden of proving that the subject water charge was excessive. In ruling that the subject water charge was excessive and must be abated, the Board relied on the testimony and documentation offered by the appellant and also the Board’s own analysis of the water bills and usage documentation for prior and subsequent periods. “[The Board can] accept such portions of the evidence as appear

to have the more convincing weight.” *Assessors of Quincy v. Boston Consol. Gas Co.*, 309 Mass. 60, 72 (1941). “The board is not required to believe the testimony of any particular witness.” *Id.* “The credibility of witnesses, the weight of evidence, and inferences to be drawn from the evidence are matters for the board.” *Cumington School of the Arts, Inc. v. Assessors of Cumington*, 373 Mass. 597, 605 (1977).

On this basis, the Board decided this appeal for the appellant and reduced the water charge on the subject water bill to \$1,290.72. Accordingly, the Board abated \$5,550.55 in water charges.

APPELLATE TAX BOARD

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

A true copy,
Attest: _____
Clerk of the Board

**COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD**

**TRUSS ENGINEERING
CORPORATION**

v. **BOARD OF ASSESSORS
OF THE CITY OF SPRINGFIELD**

Docket No. F309857 (FY 2010)

Promulgated:
October 4, 2013

ATB 2013-1010

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 Board of Assessors of the City of Springfield (the “appellee” or the “assessors”) to abate a tax on certain personal property in the City of Springfield owned by and assessed to Truss Engineering Corporation (the “appellant”) under G.L. c. 59, §§ 18 and 38, for fiscal year 2010.

Commissioner Mulhern heard this appeal. Chairman Hammond and Commissioners Scharaffa, Rose, and Chmielinski joined him in a decision for the appellant.

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.

Joseph M. Henley, pro se, for the appellant.¹

Patricia Bobba Donovan, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

Based on the evidence and testimony offered at the hearing of this appeal, as well as the parties' uncontested submissions at the hearing and subsequent rehearings of the assessors' Motion to Dismiss,² which the Appellate Tax Board (the "Board") denied, the Board made the following findings of fact.

Introduction and Jurisdiction

On January 1, 2009, the valuation and assessment date for fiscal year 2010, the fiscal year at issue in this appeal, the appellant was the assessed owner of certain personal property located at its manufacturing facility on 181 Goodwin Street in Springfield (the "subject property").³ For fiscal year 2010, the assessors valued the subject property at \$1,107,140 and assessed a tax thereon, at the rate of \$39.25 per thousand, in the amount of \$43,455.25.

On January 27, 2010, Springfield's Tax Collector (the "Tax Collector") sent out the city's actual personal property tax notices for fiscal year 2010. On February 10, 2010, in accordance with G.L. c. 59, § 59, the appellant timely filed with the assessors an Application for Abatement of Personal Property Tax. On May 10, 2010, the assessors denied the appellant's abatement request, and on May 11, 2010, they mailed to the appellant a Notice of Refusal to Abate Personal Property Tax. In accordance with G.L. c. 59, §§ 64 and 65, the appellant timely mailed a Petition Under Formal Procedure to the Board in an envelope postmarked August 10, 2010, which the Board received on August 16, 2010.⁴ On the basis of these uncontested facts, the Board found and ruled that the appellant had seasonably complied with its jurisdictional filing obligations.

¹ Mr. Henley is an officer, shareholder, registered agent, and director of the appellant.

² The assessors based the Motion to Dismiss on the appellant's purported failure to timely pay at least one-half of the personal property tax due.

³ The subject property would be exempt from tax under G.L. c. 59, § 5, clause 16(3) if owned by a "manufacturing corporation." Prior to the fiscal year at issue, the appellant purchased the assets of Truss Engineering, Corp., a predecessor manufacturing corporation, but neglected to file with the Commissioner of Revenue ("Commissioner") a Form 355-Q to receive manufacturing corporation classification from the Commissioner under G.L. c. 58, § 2. The appellant has since remedied the situation and is now classified as a manufacturing corporation, rendering the subject property exempt beginning in fiscal year 2012.

⁴ When the Board receives a petition after the three-month due date, the date of the postmark is deemed to be the date of filing. G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 & 65. Because the envelope containing the appellant's petition was postmarked August 10, 2010, the appellant's appeal was deemed filed with the Board that same day and was therefore timely. See *Ainsworth v. Assessors of Mattapoisett*, Mass. ATB Findings of Fact and Reports 2012-705, 707.

Regarding the jurisdictional payment issue, which the assessors raised in their motion to dismiss, it is necessary to review the communications between the appellant and the assessors. In February, 2010, shortly after receiving the subject tax bill, the appellant not only filed its abatement application but met with the assessors to determine the basis of the assessment. At the February meeting, the assessors informed the appellant that, although the subject property could not qualify for an exemption for fiscal year 2010 because the Commissioner did not classify the appellant as a manufacturing corporation for that year, the assessors would “work with” the appellant on the valuation issue.

After the February, 2010 meeting, as the three-month period within which the assessors had to act on the abatement application was nearing expiration, the assessors informed the appellant that they were unable to complete their consideration of the appellant’s application in the time remaining due to the “high volume” of abatement applications that they had received from Springfield taxpayers. Rather than request that the appellant consent to additional time to review its application,⁵ the assessors informed the appellant that they were going to deny the application, but would continue to work with the appellant to reach a satisfactory valuation of the subject property.

Toward that end, the appellant and its certified public accountant (“CPA”) met and conversed telephonically with the assessors and their valuation consultant on numerous occasions between February and August, 2010. In an early August conversation concerning valuation, the assessors advised the appellant’s CPA that the deadline for filing an appeal with the Board -- August 10, 2010 -- was drawing near. The assessors further advised the appellant’s CPA that a requirement for preserving the Board’s jurisdiction was that the appellant pay one-half of the tax assessed.

On August 10, 2010, Joseph M. Henley, an officer and director of the appellant, appeared at the office of Tax Collector and paid \$21,727.63, which was more than one-half of the \$43,455.25 personal property tax due. The appellant was not billed for, or otherwise advised of, any charges related to his tax bill, such as interest or fees. The Board found that Mr. Henley credibly testified that he intended to preserve the appellant’s appeal rights by timely paying at least one-half of the personal property tax due, and that, had he known that the appellant’s payment would be allocated to charges other than tax, he would have increased the appellant’s

⁵ G.L. c. 59, § 64 provides that an abatement application will be deemed denied if the assessors fail to act on an abatement application within 3 months of its filing, unless the assessors receive the written consent of the applicant to take additional time.

payment by the amount necessary to ensure that at least one-half of the personal property tax due was timely paid.

Upon the appellant's payment of one-half of the personal property tax assessed, the clerk in the Tax Collector's office handed Mr. Henley a receipt. The hand-delivered receipt, called a "Notice of Paid Invoices," recites, under the heading "Important Information Below," that "\$21,727.63" is the "amount paid" on the appellant's "personal property tax" "account" for fiscal "year 2010" on "08/10/2010" at "13:52." The receipt is stamped "Paid" and initialed, and does not provide any indication of any potential allocations of this \$21,727.63 payment amount to any categories other than tax, such as interest or fees. Given that the appellant never received a bill or other communication advising it of an obligation to pay interest or other fees, and that the receipt it received showed no allocation of its payment to anything other than tax, the Board found that the appellant received no notice that a portion of its payment was diverted to interest and fees.

In addition, the assessors were apparently also unaware of any allocation for at least several months after the appellant's August tax payment. The assessors and the appellant continued to communicate after the appellant's tax payment in an effort to arrive at a revised value for the subject property. On October 6, 2010, the assessors' valuation consultant faxed to the appellant a proposed revised valuation of \$591,990, down from the assessed value of \$1,107,140. The parties continued to have discussions until January, 2011, when the assessors discovered, apparently by viewing information from an internal data base into which the Tax Collector had entered his payment allocations, that the amount of tax credited to the appellant fell short of one-half the tax due. Thereupon, the assessors ceased all discussions with the appellant, believing that there was a fatal jurisdictional defect.⁶

The information from the municipal data base revealed that, notwithstanding the lack of any notice to the appellant of interest and fees charged or deducted from its tax payment, the Tax Collector allocated the appellant's payment as follows: \$2,200.14 to interest; \$22.00 to "warrant" and "notice" fees; \$5.00 to a "demand" fee;⁷ and the remaining \$19,500.49 to the personal property tax. The assessors argued that the allocation of the appellant's payments first to interest

⁶ The Board notes that the assessors had the authority to grant an abatement even if they determined that the appellant had no right to appeal to the Board. The provisions of G.L. c. 59, §§ 64 and 65, including the requirement that one-half of the personal property tax be paid, concern the required prerequisites for the Board to grant an abatement, and do not affect the authority of the assessors to act on a timely filed abatement application.

⁷ There is no explanation in the record for the basis of fees for "notice" and "demand" when no notice was given and no demand was made.

and fees and then to tax is required under G.L. c. 60, § 3E.⁸ Because the allocation left a tax balance due of more than one-half of the tax due, the assessors argued that the appellant had failed to make the required one-half tax payment.

On the basis of these subsidiary findings and reasonable inferences drawn therefrom, the Board found that the appellant timely paid at least one-half of the tax on the subject property prior to filing its appeal in accordance with G.L. c. 59, § 64. For the reasons detailed in the Opinion below, the Board found and ruled that the internal act of allocating the appellant's tax payment, without notice to the appellant, does not affect the appellant's procedural right to appeal its assessment. Accordingly, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

Valuation of the Subject Property

For fiscal year 2010, the assessors initially valued the subject property at \$1,107,140. To arrive at the assessed value, the assessors hired a valuation consultant, who "presented us with a determined value for that property" which the assessors adopted as the assessed value. After the assessors denied its abatement application, the appellant consulted with a personal property valuation expert of its own who valued the same subject property at \$415,000. The principal difference between the two valuations turned on the practice of the assessors' valuation consultant to value even the oldest personal property components at no less than thirty percent of their original cost (termed "thirty percent to the good"). By October, 2010, the assessors' valuation consultant reconsidered her valuation for fiscal year 2010 and determined that the subject property's value should have been \$591,990. The assessors, however, did not commensurately reduce the original assessment because of their belief that the appellant had forfeited its right to appeal the fiscal year 2010 abatement denial. The assessors did, however, value virtually the identical personal property at \$496,370 for fiscal year 2011.

Board's Valuation Findings

The Board ultimately found that the evidence proved that the subject property was overvalued for fiscal year 2010. While the appellant's own personal property valuation expert valued the subject property at \$415,000, the Board gave his opinion of value no weight because this expert was not present and did not testify at the hearing of this appeal. Similarly, the assessors' personal property valuation consultant was not present and did not testify at the hearing. The Board, however, adopted her revised value of \$591,990 for the subject property for

⁸ G.L. c. 60, § 3E provides in pertinent part that "[p]artial payments of bills for taxes, excises or municipal charges and fees . . . shall be applied first to any interest due, then to collection charges, that have been added to the bills"

two reasons: first, the assessors relied on the consultant to arrive at the value of the subject property and her revised value for the fiscal year at issue, which the consultant communicated to the appellant in October, 2010, acknowledged that the subject property had been overvalued; and, second, for fiscal year 2011, the assessors lowered the assessment of nearly the identical personal property to \$496,370, consistent with an additional year's depreciation from a value of \$591,990 for fiscal year 2010. Under these circumstances, the Board found that the revised value determined by the assessors' consultant for fiscal year 2010 was a more accurate reflection of the subject property's fair market value than the assessed value.

On this basis, the Board found that the value of the subject property for fiscal year 2010 was \$591,990 and, therefore, issued a decision for the appellant abating the corresponding personal property tax in the amount of \$20,219.64.

OPINION

Jurisdiction

The jurisdictional issue presented by this appeal is whether a taxpayer who timely tenders payment of the required one-half of the tax due on personal property nevertheless loses its right to appeal because, without notice, the payment is first allocated to interest and other fees, leaving the amount credited to tax less than one-half of the tax due.

G.L. c. 59, §§ 64 and 65 provide, in pertinent part, that “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 appeal therefrom” to the Board. (emphasis added). There is no dispute that the appellant, from its side of the transaction, paid more than one-half of the personal property tax when it tendered a check in the amount of \$21,727.63, exactly one penny more than one-half of the tax assessed. It is only because the Tax Collector, on his side of the transaction, internally allocated the payment in such a manner that the appellant's tax account was not fully credited.

In *EMC Corp. v. Commissioner of Revenue*, 433 Mass. 568 (2001), the Court analyzed an analogous jurisdictional issue. In *EMC Corp.*, the taxpayer filed its application for abatement with the Commissioner of Revenue (“Commissioner”) under G.L. c. 62C, § 37, more than two years after the Commissioner's internal assessment date, but less than two years after the date of notice of the assessment, which occurred later. Section 37 requires the application to be filed within “two years of the date of assessment.” The Board found and ruled the “date of assessment” was the date of the Commissioner's internal assessment and concluded that the application was late.

The Court reversed the Board and held that “the date of assessment” as used in § 37 was the date of notice of the assessment and not the date of the Commissioner’s internal assessment. The Court reasoned that:

The idea that a taxpayer’s procedural rights to challenge that assessment can be affected or determined by an internal government act, without notice, is anomalous, at best. One of the hallmarks of due process is notice (citations omitted).

Id. at 574. Further, a requirement that procedural rights may be affected only if a taxpayer has notice of governmental action “comports with contemporary notions of openness in government and fundamental fairness.” *Id.*; see also *SCA Disposal Services of New England, Inc. v. State Tax Commission*, 375 Mass. 338, 341 (1978) (ruling that it is fundamentally unfair to hold a taxpayer accountable for an untimely appeal to the Board where the commission’s notice of determination was not received). Accordingly, the Court held in *EMC Corp.* that the government’s internal act of assessment, without notice to the taxpayer, cannot affect the taxpayer’s right to challenge the assessment.

In the present appeal, the appellant received no prior notice of the existence or amount of any interest or fees due. Rather, the appellant’s personal property tax bill showed a tax due of \$43,455.25, and, cognizant of the jurisdictional payment requirement, it tendered a check for one-half of that amount. The Board therefore concluded, consistent with the holding in *EMC Corp.*, that the appellant’s right of appeal cannot be denied by a completely internal governmental action of which the appellant had no notice.

This ruling is consistent with the fundamental principle of Massachusetts law that “statutes embodying procedural requirements should be construed, when possible, to further the statutory scheme intended by the Legislature without creating snares for the unwary.” *Becton, Dickenson & Co. v. State tax Commission*, 374 Mass. 230, 234 (1978); see also *Phifer v. Assessors of Cohasset*, 28 Mass. App. Ct. 552, 555 (noting the particular applicability of this principle to taxpayers who are proceeding *pro se*). The statutory scheme embodied in the § 64 personal property tax payment requirement is to put “applicants for an abatement of a personal property tax upon a more equitable parity with applicants for an abatement of a real estate tax in so far as the obligation to make payment was concerned before an appeal.” See *Assessors of Everett v. Gen. Elec. Co.*, 330 Mass. 464, 467-68 (1953). Prior to the enactment of St. 1945, c. 621, § 5, taxpayers seeking personal property tax abatements were required to pay all of the contested tax before filing an appeal. Accordingly, the current requirement of a one-half tax payment represents a relaxation of the payment requirement, making access to an appeal less

onerous on taxpayers. Clearly, allocation of tax payments without notice so as to deny a taxpayer's appellate rights creates a "snare for the unwary" and is contrary to the Legislature's intention in reducing the amount of tax payment necessary to maintain a personal property tax appeal.

In addition, the receipt given to the appellant indicating that one-half of the tax assessment was paid on the due date constitutes satisfactory evidence of timely payment for jurisdictional purposes. See *Belair Constr. Co. v. Bd. of Assessors of Quincy*, 393 Mass. 1007, 1008 (1985) (holding that a receipt given by the assessors to a taxpayer following payment of a tax bill was "ample evidence" that the payment was applied to real estate tax and not a water lien that appeared on the tax bill). Further, in a case analogous to the present appeal that again stresses the importance of taxpayer notice, the Court has held that, where procedural appeal rights are at stake, assessors may be held to information contained in a document given to a taxpayer. In *General Dynamics Corp. v. Assessors of Quincy*, 388 Mass. 24 (1983), the Court ruled that the "pre-stamped" due date on the application for abatement form that was disseminated by that city's assessors was strong evidence of the date that the tax bills were mailed, despite the parties' agreement that the city's collector-treasurer would have testified to a mailing date more than thirty days earlier. *Id.* at 40-41. Like the Board here, the Court would "not attribute to [city officials] the intention of misleading taxpayers." *Id.* at 41. Rather, the Court construed the assessors' actions as "admissions to the effect that the . . . real estate tax bills were sent for purposes of G.L. c. 59, § 59, [thirty days before the date stamped on the applications for abatement]." *Id.* The Court went on to "conclude that [the taxpayer]'s abatement applications were filed within the statutory time limit." *Id.* Similarly, the Board ruled in the present appeal that the receipt given to the appellant is further evidence that the appellant paid at least one-half of the tax due for purposes of § 64.

The assessors' argument that the Tax Collector's allocation of the appellant's tax payment was required under G.L. c. 60, § 3E is of no consequence. The question presented in the present appeal is not whether the Tax Collector was authorized to allocate the appellant's tax payment; rather, it is whether the appellant's statutory right to appeal an assessment can be denied by governmental action taken without notice. On the basis of the foregoing authorities, the answer to the latter question is clearly no.

For all of the foregoing reasons, the Board concluded that the appellant timely paid at least one-half of the personal property tax due for purposes of § 64. Accordingly, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

Valuation of the Subject Property

The assessors are required to assess personal property at its fair cash value. G.L. c. 59, §§ 38 and 52. Fair cash value is defined as the price at which a willing seller and a willing buyer in a free and open market 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).

The 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 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 taxpayer[] . . . prov[es] the contrary.’” *Gen. Elec. Co. v. Assessors of Lynn*, 393 Mass. 591, 598 (1984) (quoting *Schlaiker*, 365 Mass. at 245)).

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.” *Gen. Elec. Co.*, 393 Mass. at 600 (quoting *Donlon v. Assessors of Holliston*, 389 Mass. 848, 855 (1983)).

In the instant appeal, the appellant offered affirmative evidence of value and also criticized the assessors’ personal property valuation consultant’s original methodology. The Board gave no weight to the opinion of value proposed by the appellant’s personal property valuation expert because he was not present at the hearing and was, therefore, unavailable for questioning and cross-examination. See *Turner v. Assessors of Lunenburg*, Mass. ATB Findings of Fact and Reports 2012-912, 917-18 (rejecting and giving no weight to absent appraisers’ adjustments and opinions of value)(citing *Papernik v. Assessors of Boston*, Mass. ATB Findings of Fact and Reports 2011-600, 615).

The evidence revealed, however, that the assessors’ personal property valuation consultant, who was likewise unavailable at the hearing, lowered her original valuation upon which the subject property’s assessed value for fiscal year 2010 was based from \$1,107,140 to \$591,990 after reconsidering some of her earlier assumptions which the appellant had challenged. Further, for fiscal year 2011, the assessors valued the appellant’s nearly identical personal property at \$496,370, consistent with an additional year’s depreciation from a value of \$591,990 for fiscal year 2010. On this basis, the Board found and ruled that the fair cash value of the subject property for fiscal year 2010 was \$591,990.

Based on all of the evidence presented in this appeal as well as its subsidiary findings and rulings, the Board ultimately found and ruled that the appellant proved that the subject property's assessed value exceeded its fair cash value. Accordingly, the Board decided this appeal for the appellant and issued a decision abating the corresponding personal property tax in the amount of \$20,219.64.

APPELLATE TAX BOARD

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

A true copy,
Attest: _____
Clerk of the Board

**COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD**

**UNIVERSITY OF MASSACHUSETTS v. COMMISSIONER OF REVENUE
AUXILIARY SERVICES**

Docket No. C310462

Promulgated:
May 1, 2014

ATB 2014-224

This is an appeal filed under the formal procedure pursuant to G.L. c. 62C, § 39, from the refusal of the appellee, the Commissioner of Revenue (the "appellee" or "Commissioner"), to abate room occupancy excise for the monthly taxable periods beginning August 2009 through June 2010, inclusive.

Commissioner Rose heard the appeal. Chairman Hammond and Commissioners Scharaffa, and Chmielinski joined him in the decision for the appellant.

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

James C. Donnelly, Jr., Esq., Andrew B. O'Donnell, Esq. and Matthew R. Fisher, Esq. for the appellant.

Kevin M. Daly, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

Based on an agreed statement of facts and exhibits and testimony offered into evidence at the hearing of this appeal, the Appellate Tax Board (“Board”) made the following findings of fact.

University of Massachusetts Auxiliary Services (“UMass Auxiliary Services”) is a subdivision of the Department of Administration and Finance of the University of Massachusetts at Amherst (“UMass Amherst” or “appellant”). UMass Amherst was created by the Legislature pursuant to G.L. c. 75, § 1 as a “public institution of higher learning” which serves as the flagship of the state’s public university system, with an enrollment of over 27,000 students. UMass Amherst is authorized by G.L. c. 75, § 11 to create and administer special trust funds for self-supporting revenue-generating activities, which are overseen by UMass Auxiliary Services. However, there are no separate legal entities which hold the trust funds and the UMass Auxiliary Services is not a separate legal entity from UMass Amherst. UMass Amherst receives its funding from appropriations made by the General Court and its activities are overseen by a Board of Trustees made up of a group of individuals appointed by the Legislature and from members of the student body. See G.L. c. 75, §§ 1A and 8. One of the revenue-generating activities overseen by UMass Auxiliary Services is the operation of a hotel open to the public, called UMass Hotel (“Hotel”) that is located in the Campus Center Student Union building complex (“Campus Center”), in the heart of the campus grounds.

The appellant began collecting room occupancy excise related to Hotel operations beginning in August 2009. Claiming that the Hotel’s operations are statutorily exempt from the room occupancy excise under G.L. c. 64G, § 2 (“§ 2”), which exempts lodging accommodations provided by a federal, state, or municipal institution, the appellant filed three Applications for Abatement requesting abatements of room occupancy excise paid. An initial application dated February 5, 2010, was made for the monthly periods of August 2009 through December 2009; a second application dated July 26, 2010, was made for the monthly periods of January 2010 through March 2010; and a final application dated August 25, 2010, was made for the monthly periods of April 2010 through June 2010, totaling \$199,536.99 in aggregate, plus interest and penalties. On December 16, 2010, the Commissioner denied each of the Applications for Abatement. On February 14, 2011, the University timely filed its Petition Under Formal Procedure with the Board. The Board therefore ruled that it had jurisdiction to hear and decide this appeal.

Background of Hotel Operations

The appellant offered the testimony of Meredith Schmidt, Director of the Campus Center, who has been employed there since the 1970s. Ms. Schmidt testified that no third parties outside of UMass Amherst are involved in the administration of the Hotel. The Hotel does not operate under any license from the Town of Amherst or any other municipal body.

The Hotel occupies the third through seventh floors of the Campus Center, a large complex in the center of campus, which also houses campus facilities such as the campus radio station, the *Collegian* student newspaper office, student organization offices, the University store, and administrative offices. Of the 219,963 square foot complex, the Hotel occupies 34,525 square feet, or approximately 15.7%. Ms. Schmidt testified that approximately 12,000 students and faculty visit the Campus Center each day, which she noted was widely referred to as the “living room” of the campus. She also testified that the Hotel does not have its own dining facilities or a separate entrance for guests, who proceed through the main floor of the Campus Center to the Hotel’s reception area on the third floor. According to the appellant’s guest tracking software system, guests of the Hotel were largely made up of either groups attending conferences or athletic events at the university or campus visitors such as prospective students and parents.

The hotel is operated by 12 full-time employees and 20 to 25 students. All employees and students are employed by the Commonwealth of Massachusetts, as required by G.L. c. 75, § 14. The school has a large Hospitality and Tourism Management program (“HTM program”), which offers a major within the Isenberg Business School to prepare students seeking to pursue careers in that industry. As part of the HTM program requirements, students are required to complete a certain amount of work experience hours in a position within the hospitality and tourism industry. Ms. Schmidt testified that UMass Amherst students are given preference in hiring for jobs at the Hotel in order to assist them with fulfilling the work experience requirement. Additionally, students may use work at the Hotel as work-study to supplement financial aid.

2009 Amendment to the Room Occupancy Excise Statute

UMass Amherst had never collected room occupancy excise from guests of its Hotel prior to 2009. Historically, § 2 had provided exemptions for all lodging provided by a federal, state, or municipal institution or an educational institution. John Musante, previously the Finance Director and currently the Town Manager of Amherst, testified that the Town of Amherst had unsuccessfully approached UMass Amherst on multiple occasions in the past to induce them to

voluntarily collect the tax from guests of the Hotel, as Amherst College, a private university in the town of Amherst, had done for many years with respect to a hotel that it operated.

The appellee attempted to offer evidence in the form of an email chain between State Senator Rosenberg and two of his staffers, to assert that the senator, whose district includes the town of Amherst, intended to draft legislation to compel the appellant to collect room occupancy excise at the Hotel. The chain began with an email dated February 5, 2009 from the senator to his staffers expressing his desire to amend § 2 to impose room occupancy excise on hotels operated by educational institutions and specifically referring to the appellant:

I want to make sure that we insert language into [§ 2] that effectively says that hotels that are located on college campuses or operated by any other form of nonprofit/educational organizations [are] subject to [room occupancy excise]. This is extremely important as I have been trying to get UMass to do the right thing and apply this tax for a very long time voluntarily and they have refused. This is wrong and I do not want to miss the chance to fix this finally now that we have a chance to do it.

As a result of this effort, § 2(b) was amended in June 2009, effective August 1, 2009, to limit the exemption for “lodging accommodations, including dormitories, at religious, charitable, educational and philanthropic institutions” by excluding “accommodations provided by any such institution at a hotel or motel operated by the institution.” St. 2009, Chapter 27, § 50 (“2009 Amendment”). The appellee also attempted to offer into evidence an email chain between Rosalie Adams, a legislative aide to State Senator Rosenberg, Laurence Shaffer, then the Town Manager of Amherst, and John Musante. In an email from that chain dated July 20, 2009, Ms. Adams stated to Mr. Musante that the 2009 Amendment would impose room occupancy excise on the appellant beginning August 1, 2009. Neither State Senator Rosenberg nor Ms. Adams testified at the hearing.

The appellee also offered a document titled *Finance Committee Report to Amherst Citizens and Recommendations for the July 27, 2009 Special Town Meeting* (“Amherst Finance Committee Report”) related to a July 2009 town meeting where the Town of Amherst voted to raise the local option room occupancy excise from 4% to 6%. The Amherst Finance Committee Report advocated for the increase, specifically noting the increased revenue which would be derived from tax on the Hotel. This view is consistent with the testimony of Mr. Musante before the Board that the Town of Amherst believed the 2009 Amendment applied to the appellant.

The only other evidence of legislative intent offered by the appellee was a report by the General Court’s Special Commission on Municipal Relief, on which State Senator Rosenberg served as co-chairman, published in May 2009 (“Special Commission Report”). While the

Special Commission Report cites the general need for increased municipal revenue and provides ideas for augmenting room occupancy excise revenue by allowing an increase in the local option excise rate and applying tax to vacation rentals, the report makes no mention whatsoever of imposing tax on hotel lodging provided by a state or educational institution.

Correspondence Between the Town of Amherst and the Department of Revenue

On November 5, 2009, Mr. Shaffer sent a letter to Edward Lauper, the Deputy Chief of the Rulings and Regulations Bureau of the Massachusetts Department of Revenue (“Department”), requesting a written ruling from the Department as to whether the Hotel was subject to room occupancy excise in the wake of the 2009 Amendment. The letter was copied to State Senator Rosenberg, Robert Holub, the Chancellor of UMass Amherst, and Richard H. Conner, Executive Director, Government and Community Relations, UMass Amherst.

On November 13, 2009, Mr. Lauper responded to the request in a letter to Mr. Shaffer, which was copied to Joe McDermott, Deputy Commissioner of the Audit Division of the Department, but was not copied to any party affiliated with the appellant (“DOR Response Letter”). After noting the exact language of the 2009 Amendment, Mr. Lauper stated:

This section was effective August 1, 2009. Our understanding of the legislative intent of the provision is the same as yours; going forward the state and local room occupancy excise would apply to a hotel or motel operated by an educational institution, but not dormitories. Further, we believe that the specific language in G.L. c. 64G, (b) [sic] as amended, applies here rather than the more general language is [sic] G.L. c. 64G, (a) [sic], exempting accommodations at state institutions. Although the Campus Center Hotel has not contacted the Rulings and Regulations Bureau, their website <http://www.umasshotel.com/> confirms that this is a full service hotel open to the public.

Based on the foregoing, it appears that the Campus Center Hotel should have begun collecting state and local room occupancy taxes on August 1, 2009.

Summary of Findings of Fact

On the basis of the evidence presented, the Board made the following findings and rulings. For the reasons detailed in the following Opinion, the Board found and ruled that the Hotel was not subject to room occupancy excise because: (1) it did not fit within the definition of a taxable “hotel” or “motel” as the appellant was not licensed by the Town of Amherst; and (2) the appellant was properly characterized as a “state institution” for the purposes of § 2(a) and thus was exempt from room occupancy excise on any lodging it operated, regardless of the 2009 Amendment to § 2(b).

With respect to the Commissioner's attempt to offer evidence supporting her claim that there was a legislative intent to subject the Hotel to room occupancy excise, the Board found and ruled that both email chains were unsubstantiated hearsay and irrelevant to its analysis, given the clear and unambiguous language of the amended statute and were therefore excluded. Furthermore, the Board found that neither the interpretation of the statute by the Town of Amherst in the Amherst Finance Committee Report nor the description of the need of municipalities to raise tax revenue in the Special Commission Report constituted evidence of any intent of the Legislature or otherwise carried any probative value. Further, because the DOR Response Letter was not issued to a taxpayer, the Board found and ruled that the Department's response was not a letter ruling pursuant to 830 CMR 62C.3.2 and therefore should not be accorded the deference of a public written statement. Finally, as the Department's interpretation was contrary to the plain language of the statute, the Board did not find the DOR Response Letter to be persuasive.

Accordingly, the Board issued a decision for the appellant and an abatement of all room occupancy excise collected during the periods at issue in the amount of \$199,536.99, plus interest and penalties.

OPINION

G.L. c. 64G, § 3 imposes an excise on the transfer of occupancy of a room in a bed and breakfast establishment, hotel, lodging house, or motel in Massachusetts. G.L. c. 64G, § 3A allows cities and towns the option to impose an additional local excise on room occupancy, which Amherst has exercised.

Treatment of the Appellant as a "Person" and the Hotel as a "hotel" or "motel" under G.L. c. 64G, § 1

Pursuant to G.L. c. 64G, § 3, the room occupancy excise is imposed on the transfer of occupancy of lodgings by any "operator" in the Commonwealth, which is then defined in G.L. c. 64G, § 1(f) as any "person" who operates a "bed and breakfast establishment, hotel, lodging house or motel" in the Commonwealth. The appellant argued that the room occupancy excise should not be applicable to it as (1) UMass Amherst does not meet the definition of a "person" under the statute and (2) the Hotel does not meet the definition of a "hotel" or "motel."

"Person" is defined for purposes of Chapter 64G to include:

an individual, partnership, trust or association, with or without transferable shares, joint stock company, corporation, society, club, organization, **institution**, estate, receiver, trustee, assignee or referee and any other person acting in a fiduciary capacity, whether appointed by a court or otherwise, or any combination of individuals acting as a unit.

G.L. c. 64G, § 1(g)(emphasis added). The enabling statute that allowed for the creation of UMass Amherst, G.L. c. 75, § 1, specifically refers to the university as a “public **institution** of higher learning.” (Emphasis added). Although the appellant would therefore appear to be a “person” for purposes of G.L. c. 64G, the Board need not reach this issue since the Hotel is not a “hotel” or “motel” for purposes of G.L. c. 64G, § 1.¹

A “hotel” is defined as “any building used for the feeding and lodging of guests **licensed or required to be licensed** under the provisions of section six of chapter one hundred and forty.” G.L. c. 64G, § 1(c)(emphasis added). A “motel” is defined as “any building . . . in which persons are lodged for hire with or without meals and which is **licensed or required to be licensed** under the provisions of section thirty-two B of chapter one hundred and forty . . .” G.L. c. 64G, § 1(e)(emphasis added).

The Hotel is not licensed by the Town of Amherst under Chapter 140. Neither party offered evidence or argument on the issue of whether the Hotel was required to be licensed under Chapter 140 and likewise the Board did not make a determination on this issue. Instead, it ruled that the Commissioner has no authority to require that the Hotel be licensed where the Town has not done so and thus she had no authority to require the Hotel to collect room occupancy excise, irrespective of whether the Hotel falls within a specific exemption under G.L. c. 64G, § 2. See also 1965/1966 Op. Atty. Gen. 2 (July 8, 1966).

Treatment of the Appellant as a Federal, State, or Municipal Institution and Effect of 2009 Amendment

Even if the Hotel were included within the definition of a hotel or motel subject to room occupancy excise, there are six enumerated statutory exemptions to the excise contained in § 2, which provides that the provisions of Chapter 64G shall not be construed to include, *inter alia*:

- (a) lodging accommodations at federal, state or municipal institutions; [or]
- (b) lodging accommodations, including dormitories, at religious, charitable, educational and philanthropic institutions; provided, however, that this exemption shall not apply to accommodations provided by any such institution at a hotel or motel operated by the institution...

¹ The other types of lodgings subject to room occupancy excise are a “bed and breakfast establishment,” a “bed and breakfast home,” and a “lodging house,” none of which would apply to the appellant. See G.L. c. 64G, §§ 1 and 3.

While Chapter 64G does not define a “federal, state or municipal institution” for purposes of the room occupancy excise, the appellant is referred to in its enabling statute at different times as a “public institution” and has repeatedly been found to be an “agency” of the Commonwealth. G.L. c. 75, § 1. *See e.g., Wong v. The Univ. of Mass.*, 438 Mass. 29, 39 n.3 (2002); *McNamara v. Honeyman*, 406 Mass. 43, 47-48 (1989); *Robinson v. Commonwealth*, 32 Mass. App. Ct. 6, 9 (1992). All of the appellant’s employees, including all employees and students involved in the Hotel operation, are employees of the Commonwealth, the appellant receives all of its funding from appropriations by the General Court, and the appellant’s activities are required by statute to be overseen by a Board of Trustees made up of individuals appointed by the Legislature or members of the student body. Accordingly, the Board found that the appellant was a state institution for purposes of the exemption from room occupancy excise under § 2(a).² See 1975/1976 Atty. Gen. Op. 60 (April 12, 1976) (because the Hotel was part of a facility constructed and operated by state bodies for the purpose of serving the state university, the Attorney General opined that it clearly constituted lodging accommodations at a state institution for purposes of § 2(a)).

§ 2(b) was amended, effective August 1, 2009, to limit the exemption for “lodging accommodations, including dormitories, at religious, charitable, educational and philanthropic institutions” to exclude “accommodations provided by any such institution at a hotel or motel operated by the institution.” St. 2009, Chapter 27, § 50. The Commissioner attempted to introduce evidence in the form of an email from the state senator who sponsored the amendment stating his express wish to subject UMass Amherst to the room occupancy excise on its Hotel operation. The Commissioner’s view is that the statute must be read, in light of the senator’s intent, to apply the provision added by the amendment to § 2(b) subjecting hotel lodging provided by an educational institution to tax, to *all* educational institutions, including ones which would fall under another exemption.

It is well established that if the language of a statute is “plain and unambiguous it is conclusive as to legislative intent” as “statutory language is the principal source of insight into legislative purpose.” *Sterilite Corp. v. Continental Casualty Co.*, 397 Mass. 837, 839 (1986), quoting *Bronstein v. Prudential Ins. Co.*, 390 Mass. 701, 704 (1984). Where the language of a

² The Commissioner argued that the term “state institution” in § 2(a) should only be limited to state hospitals where residents are institutionalized. Furthermore, the Commissioner argued that while she agrees that UMass Amherst is a “state agency,” that fact does not necessarily lead to the conclusion that it is a “state institution.” The Board found these arguments to be wholly without merit and that the Commissioner failed to properly articulate any basis in the case law or statutes for these assertions.

statute is clear and unambiguous, it is conclusive as to legislative intent. *Boston Neighborhood Taxi Ass'n v. Department of Pub. Utils.*, 410 Mass. 686, 690 (1991); *Sterilite Corp.*, 397 Mass. at 839. It may be very well that State Senator Rosenberg's personal intention in proposing the amendment was that UMass Amherst would become subject to room occupancy excise; however, "[s]tatements of individual legislators as to their motives concerning legislation are an inappropriate source from which to determine the intent of legislation" as they may not reflect the ideas of the body as a whole. *Boston Water & Sewer Com. v. Metropolitan Dist. Com.*, 408 Mass. 572, 578 (1990), citing *Administrative Justice of the Hous. Court Dep't v. Commissioner of Admin.*, 391 Mass. 198, 205 (1984).

It is only the exemption provided by § 2(b) that was limited in scope to specifically include language excluding hotel lodging accommodations. A modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose which requires a different interpretation. *Commonwealth v. Brown*, 391 Mass. 157, 160 (1984); *Moulton v. Brookline Rent Control Bd.*, 385 Mass. 228, 230-231 (1982); *Hopkins v. Hopkins*, 287 Mass. 542, 547 (1934). As the Board shall not "read into the statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose," in the absence of an act by the Legislature to explicitly modify § 2(a), the Board will not construe any limitation thereto based on a modification to another subsection. *Sterilite Corp.*, 397 Mass. at 839, n.3, quoting *King v. Viscoloid Co.*, 219 Mass. 420, 425 (1914).

This approach is consistent with the approach taken by the Supreme Judicial Court in *Dir. of the Div. of Employment Security v. Roman Catholic Bishop of Springfield*, 383 Mass. 501 (1981). In that case, the Court addressed an exemption from an unemployment insurance coverage requirement for employees of the Roman Catholic Diocese of Springfield ("Church") who worked at elementary and secondary parochial schools operated by the Church in Massachusetts. *Id.* at 503. Historically, the governing federal statute and the Massachusetts statute upon which it was based had required coverage for employees of all non-profit corporations, except for, *inter alia*, those in the employ of a church or religious organization or in the employ of a school which was not an institution of higher education. *Id.* See I.R.C. § 3309(b) (1970); G.L. c. 151A, § 6(r) (1974). Both statutes were later amended in concert to remove the exemption for employees of a school which was not an institution of higher education, leaving the exemption for employees of a church organization untouched. *Id.*

The Director of the Division of Employment Security argued that the amendment evinced an intent on the part of Congress to subject all employers operating elementary or secondary

schools to an unemployment insurance coverage obligation, including employers that were religious organizations. *Id.* at 503-504. The Court disagreed, ruling that because the church-operated schools held a dual exemption, “the elimination of one exemption did not by itself subject these schools to the provisions of the unemployment compensation.” *Id.* The fact that the exemption for employees of a church organization remained intact subsequent to the amendment indicated to the Court that there was no legislative intent to subject church-operated schools to an unemployment insurance obligation. Similarly, the Board held here that if the appellant continued to properly qualify as a federal, state or municipal institution under § 2(a), any of its lodging accommodations would be exempt from room occupancy excise, regardless of any change to § 2(b).

Commissioner’s Letter to the Town of Amherst

Finally, the appellee argued that the conclusion in the DOR Response Letter to the Town of Amherst that the appellant was subject to room occupancy excise should be entitled to deference from the Board. The Commissioner is authorized to issue written letter rulings under G.L. c. 62C, § 3, in response to questions raised by a taxpayer or his authorized representative. 830 CMR 63.3.2(2). The Department’s Division of Local Services may issue a Letter of Opinion on Local Taxation to a city or town on matters pertaining to assessment, classification, and administration of local taxes. 830 CMR 63.3.1(9).

The DOR Response letter at issue was neither; it was an informal, unpublished letter which was not addressed to the taxpayer. It was not made available to the public and contained nothing beyond a cursory analysis of the issue, which did not even correctly cite to the statute in question. Even if the Commissioner had issued a formal letter ruling, while it is appropriate to “grant substantial deference to an interpretation of a statute by the administrative agency charged with its administration . . . [a]n incorrect interpretation of a statute . . . is not entitled to deference.” *Massachusetts Hosp. Ass’n v. Department of Medical Sec.*, 412 Mass. 340, 345-346 (1992), citing *Kszepka's Case*, 408 Mass. 843, 847 (1990) and *Manning v. Boston Redevelopment Auth.*, 400 Mass. 444, 453 (1987). The Department’s conclusion that “the specific language in G.L. c. 64G, (b) [sic] as amended, applies here rather than the more general language is [sic] G.L. c. 64G, (a) [sic], exempting accommodations at state institutions” has no basis under the clear language of the statute.

Conclusion

Accordingly, the Board found that the appellant was not required to charge and collect the room occupancy excise as assessed by the Commissioner and issued a decision for the appellant, granting an abatement of \$199,536.99, plus interest and penalties.

APPELLATE TAX BOARD

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

A true copy,
Attest: _____
Clerk of the Board

**COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD**

**WUERTH REALTY TRUST¹ v. BOARD OF ASSESSORS
OF THE TOWN OF EDGARTOWN**

Docket Nos.: F298967 (FY 2008)
F304188 (FY 2009)
F308997 (FY 2010)

**WILLIAM BOATNER REILY, III v. BOARD OF ASSESSORS
OF THE TOWN OF EDGARTOWN**

Docket No.: F298963 (FY 2008)

**CHAPEDA HILL CORP. v. BOARD OF ASSESSORS
OF THE TOWN OF EDGARTOWN**

Docket No.: F298954 (FY 2008)

**EDWARD CROWLEY and SARAH BRADBURY RORER v. BOARD OF ASSESSORS
OF THE TOWN OF EDGARTOWN**

Docket Nos.: F298965 (FY 2008)
F304180 (FY 2009)
F309001 (FY 2010)

**MARK L. and NEIL D. COHEN and DIANE ZACK v. THE BOARD OF ASSESSORS
OF THE TOWN OF EDGARTOWN**

Docket Nos.: F298951 (FY 2008)
F304202 (FY 2009)
F309004 (FY 2010)

¹ John M. & Joan A. Wuerth are named as trustees on the fiscal year 2008 tax bill.

JPBK HOLDING-MA LLC

v.

**BOARD OF ASSESSORS
OF THE TOWN OF EDGARTOWN**

Docket Nos.: F298959 (FY 2008)
F304200 (FY 2009)
F309002 (FY 2010)
F311168 (FY 2011)

Promulgated:
November 27, 2013

ATB 2013-1152

These are appeals filed under the formal procedure, pursuant to G.L. c. 58A, § 7 and c. 59, §§ 64 and 65, from the refusal of the Board of Assessors of the Town of Edgartown (the “assessors” or the “appellee”) to abate taxes on certain real estate located in Edgartown, owned by and assessed to the above-captioned appellants under G.L. c. 59, §§ 11 and 38, for various fiscal years from 2008 to 2011.

Commissioner Egan heard and materially participated in the deliberations of these appeals which Chairman Hammond and Commissioners Scharaffa and Rose decided for the appellee.²

The Appellate Tax Board (the “Board”), on its own motion under G.L. c. 58A, § 13 and 831 CMR 1.32, promulgates these findings of fact and report simultaneously with the decisions in these appeals.

Donald P. Quinn, P.C., Esq. and *Danielle Justo*, Esq. for the appellants.

Ellen M. Hutchinson, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

Introduction

These findings of fact and report involve fifteen appeals by six appellants of the assessments on six residential properties located in Edgartown on Martha’s Vineyard over various fiscal years from 2008 to 2011. The Board consolidated the appeals into one Findings of Fact and Report because the same attorneys brought them against the same assessors who used

² On August 15, 2011, Commissioner Egan was sworn as a temporary member of the Appellate Tax Board pursuant to G.L. c. 58A, § 1, her status as a member of the Board having terminated on that date with the appointment and qualification of her successor. *See* G.L. c. 30, § 8. This appointment was renewed for an additional year commencing August 15, 2012. Commissioner Egan’s material participation in the deliberations of these appeals included, *inter alia*, drafting and distributing proposed Findings and giving a detailed report on the evidence, including her view, and her observations as to witness credibility. She also made oral presentations of her recommendations to the Board members.

the same counsel to defend them against all of the appellants. Moreover, the parties tried and the Board heard these appeals consecutively, and each of the appeals used the same real estate valuation expert and essentially the same valuation methodology with many of the same purportedly comparable-sale properties. The Board conducted one view which included each of the subject properties, the neighborhoods, and the purportedly comparable-sale properties. The Board, however, issued separate decisions relating to each of the subject properties.

The six properties that are the subject of these appeals are referred to herein by their corresponding street address or, in the proper context, as the “subject property.” The following table sets forth those street addresses along with the corresponding appellants, docket numbers, and fiscal years at issue.

<u>Street Address</u>	<u>Appellants</u>	<u>FY 2008</u>	<u>FY 2009</u>	<u>FY 2010</u>	<u>FY 2011</u>
44 Green Hollow Rd.	Trustees of Wuerth Realty Trust	F298967	F304188	F308997	n/a
35 Green Hollow Rd.	William Boatner Reily, III	F298963	n/a	n/a	n/a
31 Tower Hill Rd.	Chapeda Hill Corp.	F298954	n/a	n/a	n/a
18 Menamsha Ln.	Edward & Sarah Rorer	F298965	F304180	F309001	n/a
52 Witchwood Ln.	Mark & Neil Cohen & Diane Zack	F298951	F304202	F309004	n/a
48 Witchwood Ln.	JPBK Holding-MA, LLC	F298959	F304200	F309002	F311168

Collectively, these properties are referred to as the “subject properties.” The following table sets forth some basic descriptive and assessment information about each of the subject properties for the corresponding fiscal years at issue, which will be augmented, *infra*.

<u>Street Address</u>	<u>Approx Acres</u>	<u>SF Living Area of Buildings</u>	<u>Water-Front</u>	<u>Pier or Dock</u>	<u>FY2008 Assessed Value \$</u>	<u>FY2009 Assessed Value \$</u>	<u>FY2010 Assessed Value \$</u>	<u>FY 2011 Assessed Value \$</u>
44 Green Hollow Rd.	1.14	1,676	yes	yes	10,789,600	10,767,000	10,144,700	n/a
35 Green Hollow Rd.	2.01	3,619	yes	yes	11,404,800	n/a	n/a	n/a
31 Tower Hill Rd.	1.70	4,419	yes	yes	12,044,300	n/a	n/a	n/a
18 Menamsha Ln.	2.77	5,828	yes	yes	15,558,700	15,371,900	14,717,800	n/a
52 Witchwood Ln.	1.50	n/a	yes	yes	9,036,100	9,036,100	8,713,500	n/a
48 Witchwood Ln.	3.00	14,414	yes	shared off site	15,493,400	15,680,600	15,368,900	15,368,900

The four-to-six-day hearings for each of the subject properties took place at the Board’s offices in Boston. The one-day view of the subject properties, the neighborhoods, and the purportedly comparable-sale properties was conducted at the various sites in Edgartown. At the hearings of these appeals, the appellants called multiple witnesses, including in most appeals: a duly qualified expert land surveyor, Douglas Hoehn; a duly qualified real estate valuation expert,

Paul Hartel; and Edgartown’s Principal Assessor, JoAnn Resendes. The following table summarizes the witnesses who testified with respect to each of the subject properties.

<u>Street Address</u>	<u>Douglas Hoehn</u>	<u>Paul Hartel</u>	<u>JoAnn Resendes</u>	<u>Other Witness</u>
44 Green Hollow Rd.	Yes	Yes	Yes	Susan Funnell
35 Green Hollow Rd.	Yes	Yes	Yes	No
31 Tower Hill Rd.	No	Yes	Yes	No
18 Menamsha Ln.	No	Yes	Yes	No
52 Witchwood Ln.	Yes	Yes	Yes	No
48 Witchwood Ln.	Yes	Yes	Yes	James Held

The appellants also introduced between 37 and 95 exhibits in each of the appeals. These exhibits generally included, among other things: various jurisdictional documents; plans of land; deeds; maps; zoning and wetlands protection bylaws; LA-3 property sales reports; photographs; property record cards; private covenants, contracts, agreements, leases, mortgages, and bylaws; and the real estate valuation expert’s summary appraisal report, updated or corrected materials, and analyses. The appellants also provided the Board with Post-Hearing Memoranda and/or Requests for Findings of Fact in each of the appeals.

For their part, the assessors did not offer any witnesses except for the hearing related to the fiscal year 2008 appeal of the 31 Tower Hill Road property in which Ms. Resendes, Edgartown’s Principal Assessor, testified not only for the appellant but also for the assessors. In most of the appeals, the assessors introduced various jurisdictional documents, and in some of the appeals, they also entered into evidence other varying documents, including, deeds, photographs, grants of easement, maps, license agreements, mortgages, and plans. The assessors additionally provided the Board with Post-Hearing Briefs.

Based on all of the evidence, including the Board’s view of the subject properties, the neighborhoods, and the purportedly comparable-sale properties, as well as reasonable inferences drawn therefrom, the Board made the following findings of fact.

Assessments and Jurisdiction

The relevant assessment information for each of the subject properties for the fiscal years at issue is contained in the following tables.

48 Witchwood Lane

<u>Fiscal Year</u>	<u>Parcel Assessment</u>	<u>Improvements Assessment</u>	<u>Total Assessment</u>	<u>Tax Rate per \$1,000</u>	<u>Tax Assessed³</u>
2008	\$ 9,474,900	\$ 6,018,500	\$15,493,400	\$2.73	\$43,557.70
2009	\$ 9,474,900	\$ 6,205,700	\$15,680,600	\$2.91	\$46,990.74

³ The “tax assessed” column includes Community Preservation Act (“CPA”) additions of \$1,260.72 for fiscal year 2008, \$1,360.19 for fiscal year 2009, \$1,415.43 for fiscal year 2010, and \$1,557.43 for fiscal year 2011.

2010	\$ 9,163,200	\$ 6,205,700	\$15,368,900	\$3.09	\$48,905.33
2011	\$ 9,163,200	\$ 6,205,700	\$15,368,900	\$3.40	\$53,811.69

44 Green Hollow Road

<u>Fiscal Year</u>	<u>Parcel Assessment</u>	<u>Improvements Assessment</u>	<u>Total Assessment</u>	<u>Tax Rate per \$1,000</u>	<u>Tax Assessed</u> ⁴
2008	\$10,489,700	\$299,900	\$10,789,600	\$2.73	\$30,331.09
2009	\$10,489,700	\$277,500	\$10,767,200	\$2.91	\$32,263.80
2010	\$ 9,867,200	\$277,500	\$10,144,700	\$3.09	\$32,278.26

18 Menamsha Avenue

<u>Fiscal Year</u>	<u>Parcel Assessment</u>	<u>Improvements Assessment</u>	<u>Total Assessment</u>	<u>Tax Rate per \$1,000</u>	<u>Tax Assessed</u> ⁵
2008	\$11,737,200	\$ 3,821,500	\$15,558,700	\$2.73	\$43,741.32
2009	\$11,777,600	\$ 3,594,300	\$15,371,900	\$2.91	\$46,065.47
2010	\$11,123,500	\$ 3,594,300	\$14,717,800	\$3.09	\$46,833.07

35 Green Hollow Road

<u>Fiscal Year</u>	<u>Parcel Assessment</u>	<u>Improvements Assessment</u>	<u>Total Assessment</u>	<u>Tax Rate per \$1,000</u>	<u>Tax Assessed</u> ⁶
2008	\$10,632,600	\$772,200	\$11,404,800	\$2.73	\$32,060.96

31 Tower Hill Road

<u>Fiscal Year</u>	<u>Parcel Assessment</u>	<u>Improvements Assessment</u>	<u>Total Assessment</u>	<u>Tax Rate per \$1,000</u>	<u>Tax Assessed</u> ⁷
2008	\$11,187,200	\$857,100	\$12,044,300	\$2.73	\$33,859.18

52 Witchwood Lane

<u>Fiscal Year</u>	<u>Parcel Assessment</u>	<u>Improvements Assessment</u>	<u>Total Assessment</u>	<u>Tax Rate per \$1,000</u>	<u>Tax Assessed</u> ⁸
2008	\$ 9,036,100	n/a	\$ 9,036,100	\$2.73	\$25,400.42
2009	\$ 9,036,100	n/a	\$ 9,036,100	\$2.91	\$27,075.17
2010	\$ 8,713,500	n/a	\$ 8,713,500	\$3.09	\$27,723.19

⁴ The "tax assessed" column includes CPA additions of \$875.48 for fiscal year 2008, \$931.25 for fiscal year 2009, and \$931.14 for fiscal year 2010.

⁵ The "tax assessed" column includes CPA additions of \$1,266.07 for fiscal year 2008, \$1,333.24 for fiscal year 2009, and \$1,355.07 for fiscal year 2010.

⁶ The "tax assessed" column includes a CPA addition of \$925.86.

⁷ The "tax assessed" column includes a CPA addition of \$978.24.

⁸ The "tax assessed" column includes CPA additions of \$731.87 for fiscal year 2008, \$780.12 for fiscal year 2009, and \$798.48 for fiscal year 2010.

In accordance with G.L. c. 59, § 57C, the actual real estate tax bills for each of the subject properties for the corresponding fiscal years at issue were timely paid without incurring interest. The other relevant jurisdictional information for each of the subject properties for the corresponding fiscal years at issue is summarized in the following table.

<u>Fiscal Year</u>	<u>Actual Tax Bill Mailed</u>	<u>Application for Abatement (“AA”) Filed</u>	<u>Denial or Deemed Denial of AA</u>	<u>Petition to Board Filed</u>
2008	05/06/2008	06/04/2008	10/30/2008 ⁹	01/26/2009
2009	12/30/2008	01/28/2009	04/28/2009	07/24/2009
2010	12/30/2009	01/21/2010	04/20/2010	07/15/2010
2011	12/30/2010	01/25/2011	04/25/2011	05/05/2011

Based on these dates and the timely payments of the actual real estate tax bills, the Board found and ruled that it has jurisdiction over these appeals.

Merits

Area Overview

Edgartown is located on the south side of Martha’s Vineyard and is bordered by Oak Bluffs and Nantucket Sound on the north, Katama Bay on the east, the Atlantic Ocean on the south, and West Tisbury on the west. Edgartown is separated from Chappaquiddick Island by Katama Bay.

The subject properties are situated in a neighborhood comprised of large seasonal homes along Katama Bay shore and Edgartown Harbor. The subject properties are located approximately one mile south of Main Street, Edgartown, which is the commercial center of town, and two miles north of the public South Beach. A bike path runs along Katama Road providing bike access to both downtown and area beaches.

Mr. Hoehn’s Contributions

For four of the subject properties, Mr. Hoehn, the appellants’ expert surveyor, attempted to show certain restrictions or limitations affecting the subject properties, which Mr. Hartel then incorporated into his analyses. These matters include easements and rights-of-way, but, more particularly, the location of wetlands and flood plains, and the subject properties’ coastline and views. In assessing these restrictions and limitations, Mr. Hoehn primarily used geographic

⁹ On August 5, 2008, in accordance with G.L. c. 59, §§ 64 and 65, the parties agreed in writing to extend the time within which the assessors could act on the appellants’ fiscal year 2008 applications for abatement for the subject properties to October 31, 2008.

information system (“GIS”) maps, which are essentially satellite photographs, created for the assessors for assessment purposes.¹⁰

On cross-examination, Mr. Hoehn admitted that certain maps upon which he relied to estimate the amount of wetlands on the subject properties’ parcels would not be acceptable to the town’s Conservation Commission and were not precise enough to “pinpoint the accuracy of . . . wetland.” Mr. Hoehn or his survey company performed or supervised land surveys for some of the subject properties but he did not submit or analyze any recent actual land surveys for other subject properties. The appellants did not introduce any direct evidence quantifying the impact of wetlands or other restrictions on the subject properties’ value. Rather, they relied on Mr. Hartel to incorporate into his methodology any issues raised by Mr. Hoehn. As a result, and because of the Board’s findings below with respect to Mr. Hartel’s valuation methodology and his purportedly comparable-sale properties, the Board was not able to develop values that reliably captured the impact, if any, of wetlands or other restrictions on the subject properties’ value for the corresponding fiscal years at issue.

Mr. Hartel’s Valuation Methodology

To ascertain values for each of the subject properties for their corresponding fiscal years at issue, Mr. Hartel employed what can best be described as a blended or combined, comparable-sales, land-extraction, and cost (assessment) approach. Essentially, Mr. Hartel first identified about four to six purportedly comparable-sale properties for the corresponding fiscal years at issue for each of the subject properties.¹¹ He then backed-out the assessed values of the improvements from each of the sale prices, and then adjusted the extracted land values for five factors: time; location; site utility and size; view; and caliber of interest in a dock or pier. After completing these steps, he derived an indicated land value for each sale property, which he then rounded and weighted to garner an estimated land value for the subject property. As a final step, Mr. Hartel added back the assessed values of the subject property’s improvements to determine his estimated fair cash value for the subject property.¹² Mr. Hartel did not perform separate cost analyses for either the subject properties’ or his sale properties’ improvements, and he did not attempt to confirm the improvements’ assessed values with any relevant market data. Mr. Hartel admitted that he simply relied on the assessed values as being reasonable estimates of the improvements’ values as “placeholders.”

¹⁰ A legend on each of the GIS maps warns that “map data is for assessment purposes” and the creator of the maps (Cartographic Associates, Inc.) is not “responsible for use for other purposes.”

¹¹ There are numerous overlapping comparable-sale properties among those chosen for the corresponding fiscal years at issue for each of the subject properties.

¹² The sole exception is 52 Witchwood Lane, which, at all relevant times, was vacant, undeveloped land.

A similar methodology to the one that Mr. Hartel used in these appeals is described in the Appraisal Institute's treatise, *THE APPRAISAL OF REAL ESTATE* (13th ed. 2008), in the section detailing alternative techniques for valuing *vacant parcels of land*. *Id.* at 366. "Market extraction is a technique in which land value is extracted from the sale price of an improved property by deducting the contributory value of the improvements, often estimated at their depreciated cost. The remaining value represents the value of the land. Improved sales in rural areas are frequently analyzed in this way because the building and site improvements contribute little value in comparison to the underlying land value." *Id.* It is an alternative technique for valuing vacant parcels of land when sales of comparable vacant land are so rare that their values cannot be estimated reliably by direct comparison or with sufficient comparable data. *Id.* The treatise goes on to caution that "extraction methods should be used with extreme care and only when lack of market data prevents application of more direct methods and procedures." *Id.* at 368.

In the present appeals, Mr. Hartel's methodology takes the extraction method even further than that described in the treatise; he used it, with only one exception, to value improved waterfront property, not simply vacant parcels or large tracts of rural land with negligible building or improvement value. Moreover, Mr. Hartel relied on this approach despite not convincingly demonstrating a dearth of market data or that a more traditional sales-comparison approach was incapable of valuing the subject properties for the fiscal years at issue. Mr. Hartel's own submissions, in addition to the LA-3 sales reports in evidence, reveal that between 2006 and 2010 there were over 330 sales of single-family homes in Edgartown. As stated above, Mr. Hartel also used the improvements' assessed values instead of developing his own, assuming, but not verifying, that the assessed values were reasonably close approximations of the improvements' values as "placeholders."

In *Salem Traders Way Realty, LLC v. Assessors of Salem*, Mass. ATB Findings of Fact and Reports 2009-54, the Board rejected indicated values developed using a land-extraction (or land-allocation) methodology to value the subject *vacant* lot at issue. In that appeal, the appellant's real estate valuation expert used, among other comparable-sale properties, two sales of improved properties and "simply determined the percentage of the most recent assessment, which was attributable to the land." He then applied "that percentage to the sales price to calculate an extracted land value." *Id.* at 2009-59-60. The Board criticized and rejected the values derived from this approach because "[the real estate valuation expert] did not provide

market evidence to demonstrate that the comparable properties' land and building assessment allocation was indicative of the property's fair market value." *Id.* at 2009-64.

In the instant appeals, Mr. Hartel similarly calculated his extracted land values by subtracting the assessed values of his sale properties' improvements from their sale prices without verifying the assessment component with the market or with a separate appropriately prepared cost analysis. He further compounded the problem, with respect to all of the subject properties save one, by adding the subject property's improvement assessment to his indicated land value to ascertain his estimate of the subject property's fair cash value. He therefore failed to verify or use appropriately developed data in two separate steps within his methodology.

It is noteworthy that the appellants can point to no previous appeal where the Board has adopted a similar blended methodology that relies primarily on a land-extraction technique to value improved, or for that matter even vacant, parcels.

Moreover, as will be detailed below in the Board's discussion of each of the subject properties, the Board found that the vast majority of the purportedly comparable-sale properties which Mr. Hartel used in his valuation methodology lacked basic comparability to the subject property. The Board further found that it disagreed with some of the adjustments that Mr. Hartel applied to the sale properties. The Board, therefore, rejected his valuation analysis and found that it did not provide probative evidence of fair cash value in these appeals.

Further, the Board found that the comparable-sales evidence that Mr. Hartel offered was not sufficient for the Board to derive fair cash value determinations using comparable-sales analyses. The improvements on many of his purportedly comparable-sale properties were vastly inferior to the subject properties' improvements, and he offered no adjustments to account for any improvement differences. While his methodology essentially ignored the improvements on his purportedly comparable-sale properties, evaluation of the differences between the subject properties' improvements and those on his purportedly comparable-sale properties is critical to a sound comparable-sales analysis.

In addition, the Board found that because Mr. Hartel did not provide sufficient information, appropriately analyze, or suggest suitable adjustments to account for the differences between his sale properties' improvements (except for docks) and the subject property's improvements, the Board did not have adequate data from him, or even the record as a whole, to perform a comparable-sales or similar analysis on its own.

With respect to his approach for determining the adjustments to apply to his purportedly comparable-sale properties to account for their differences in dock or pier rights compared to the

subject properties' rights, the Board found that it was unreliable. Mr. Hartel analyzed what he termed "paired sales," by comparing the extracted land price of a sale with a pier to the extracted land price of a sale without a pier and then attributed the entire difference in sale prices, reformulated as a percentage, to the pier. Similar to its criticism of his blended land-extraction methodology for valuing the subject properties, the Board found that this approach contained many of the same failings in that it used assessed as opposed to market values for improvements and did not adjust for important factors, including time, location, site utility, or view. Accordingly, the Board found that the approach underlying his adjustments to account for differing dock rights was significantly flawed.

Furthermore, the Board found that Mr. Hartel's credibility as a real estate valuation expert witness was compromised not only by his complete reliance on his blended land-extraction valuation methodology for valuing the subject improved, save one, waterfront properties, but also by, among other things: his use of listings in his analyses of sales; his vacillating testimony at the prodding of appellants' counsel;¹³ his need, during trial, to change and update his valuation grids; his failure to sufficiently support his conclusion that a more traditional sales-comparison approach was unsuitable here; his failure to confirm with market data his use of assessments as market values for improvements; his use of incorrect improvement assessments; his use of inconsistent time adjustments; his contradictory use of the "cost" approach, premised on assessments, to ascertain the value of improvements when his appraisal reports state that the cost approach is not a "reliable indicator of value"; and his faulty paired-sales analysis for determining the value of rights in piers or docks.

For all of the preceding reasons, the Board found that Mr. Hartel's methodology and the values derived from it were flawed and unreliable.

Mr. Hartel's Market Overview

In his market overview, Mr. Hartel analyzed single-family sales statistics for Edgartown. The following table summarizes the eleven-year history of median sale prices and number of sales for Edgartown upon which Mr. Hartel relied for his time adjustments.¹⁴

¹³ This testimony concerned the origination date of certain pictures depicting the view associated with one of the subject properties. Mr. Hartel's initial testimony, which was later proved to be correct, placed the date months beyond the relevant valuation and assessment date, while his later tainted testimony placed the date well before.

¹⁴ The Board noted that some of the median sale prices and number of sales that Mr. Hartel listed in the table that he included in his summary appraisal reports for each of the subject properties differed to some extent. For example, in his summary appraisal report of 48 Witchwood Lane for fiscal year 2011, he listed the number of sales for 2009 at 69, not 38; for 2008 at 63, not 61; and for 2007 at 83, not 82.

<u>Year</u>	<u>Median Sale Price</u>	<u>Number of Sales</u>
2010	\$675,000	83
2009	\$704,000	38
2008	\$618,750	61
2007	\$700,000	82
2006	\$750,000	69
2005	\$717,500	93
2004	\$590,000	139
2003	\$535,000	107
2002	\$500,000	113
2001	\$465,000	103
2000	\$327,000	112

Based on this data, Mr. Hartel surmised that during the period of 2004 through 2006, Edgartown experienced significant double-digit appreciation. As of January 1, 2007, the valuation and assessment date for fiscal year 2008, Mr. Hartel believed that the market continued to appreciate despite a decreased sales volume portending some price leveling. He observed, however, that high-priced real estate, like the subject properties, was not impacted. As of January 1, 2008, the valuation and assessment date for fiscal year 2009, he related that the subprime mortgage crisis began to unfold resulting in the tightening of credit and a decline in the market. As of January 1, 2009, the valuation and assessment date for fiscal year 2010, he explained that the subprime mortgage crisis expanded and further depressed the market. He posited that the government's intervention, however, stabilized the credit markets and enhanced the availability of financing. While the market continued to decline, he observed that it also exhibited signs of stabilization. As of January 1, 2010, the valuation and assessment date for fiscal year 2011, he observed an increase in sales volume which he believed demonstrated the beginning of a revival in the market, albeit at somewhat lower prices. Mr. Hartel based his time adjustments on this analysis.

Mr. Hartel's Valuation of Each of the Subject Properties

48 Witchwood Lane – Fiscal Years 2008, 2009, 2010, & 2011

This 3.00-acre improved waterfront parcel, which is identified for assessing purposes as map 36, parcel 303.1, overlooks Edgartown Harbor and is located in the exclusive and private Witchwood Lane subdivision situated off Katama Road. The relevant assessment information for each of the fiscal years at issue is repeated in the table below.

<u>Fiscal Year</u>	<u>Parcel Assessment</u>	<u>Improvements Assessment</u>	<u>Total Assessment</u>
2008	\$ 9,474,900	\$ 6,018,500	\$15,493,400
2009	\$ 9,474,900	\$ 6,205,700	\$15,680,600
2010	\$ 9,163,200	\$ 6,205,700	\$15,368,900
2011	\$ 9,163,200	\$ 6,205,700	\$15,368,900

Heavy vegetation and woods provide the properties within the subdivision with an effective privacy buffer from Katama Road. Vegetation, woods, and long driveways located within the subdivision provide privacy among the subdivision's parcels. The subject parcel is improved with a 13,071-square-foot spectacular home which was built in 2001-2002 and a 1,071-square-foot arched carriage house which contains both garage and living space. There is also a pier located on this parcel, the use of which is shared among 12 other property owners within the subdivision,¹⁵ and a gunite pool for the exclusive use of this subject property's owners. In addition, the owners of this subject property have the deeded right to use the pier on the abutting property to the south and, along with only three other property owners, to dock a boat larger than 18 feet. They also own non-exclusive rights to use tennis courts on a nearby parcel.

Where the subject parcel meets the water, there is a rip-rap supporting the coastal bank, but no beach. The evidence indicates that a special permit would likely be issued by the local authorities for the construction of a stairway to the water's edge if the appellant chose to apply for one. The subject property's eastern boundary is the mean high water mark in Edgartown Harbor. There are also several easements affecting the subject property, including a 25-foot wide easement running along the northern and western boundaries of the subject property, leading to the pier, a 50-foot walkway by the pier, and a 10-foot wide secondary easement which only springs into use if the 25-foot easement is not being used.

The subject property's residence is a U-shaped 13,071-square-foot single family home for which Mr. Hartel provided little description. Relying primarily on the subject property's property record card and the Board's view, the subject property's residence is a two-story, "New England" custom home with wood shingle exterior siding and seven bedrooms, 7.5 bathrooms, central air conditioning, and forced hot air gas heating. The flooring is hardwood, and some of the interior walls are custom wood paneling. In addition, the residence has several fireplaces, 1,795 square feet of finished basement space, an attached 925-square-foot garage, a 1,851-square-foot open porch, and a 549-square-foot wood deck.

The approach along the driveway to the subject property's residence is distinguished by a grand arched entrance through the two-story carriage house. Above the main level garage space, the carriage house has 1,071 square feet of guest living space with two bedrooms and two bathrooms. Similar to the main residence, the carriage house's exterior siding is wood shingle,

¹⁵ The appellant relinquished its right to use this pier as part of an apparent exchange for approval from the Witchwood Subdivision trustees of the building plans for the aforementioned 13,000-plus-square-foot residence.

and it also has central air conditioning, forced hot air gas heating, hardwood flooring, and some custom wood paneling on its interior walls.

To estimate the value of the subject property for fiscal year 2008, Mr. Hartel used as his purportedly comparable-sale properties in his methodology: 27 Tower Hill Road (comparable sale 1); 91 North Water Street (comparable sale 2); 38 Cow Bay Road (comparable sale 3); and 12 Guernsey Lane (comparable sale 4).

Comparable sale 1, 27 Tower Hill Road, is a 1.5-acre waterfront parcel that, at the time of sale, was improved with a 5,500-square-foot residence which was razed after the sale and replaced with a modern structure. The assessors adjusted this sale property's assessment by \$500,000 to account for its location abutting a cemetery. Comparable sale 1 was purchased in April, 2005 for \$7,413,500 after being marketed for a full year. Excluding his time adjustment of 17%, Mr. Hartel's gross adjustments for the parcel alone totaled 30%. Mr. Hartel did not account for this sale property's proximity to a cemetery. Had he accounted for this sale property's location next to the cemetery, his gross adjustments would have likely totaled closer to 40%.

Comparable sale 2, 91 North Water Street, is a 0.33-acre waterfront parcel that, at the time of sale, was improved with an approximately 1,900-square-foot residence with eight rooms, including four bedrooms and 2.5 bathrooms. It was substantially renovated after the sale. Comparable sale 2 is located in the downtown section of Edgartown with a hotel situated next door and the Chappaquiddick ferry (the "Chappy ferry") nearby. This sale property was purchased in August, 2006 for \$9,000,000. It had not been marketed; the negotiations and sale were conducted privately. Excluding his time adjustment of 1.5%, Mr. Hartel's gross adjustments for the parcel alone totaled 35%.

Comparable sale 3, 38 Cow Bay Road, is a 2.6-acre, non-waterfront parcel that, at the time of sale, was improved with two buildings – one being the 4,364-square-foot residence and the other being a 943-square-foot guest house with one bedroom and one bathroom. The house underwent substantial renovation after the sale. Pedestrian access to the beach is provided by a right to pass on foot across adjacent common land. This sale property is also burdened by an 18-foot right of way, and its improvements at the time of sale totaled almost 30% of the overall assessment (\$2,969,000 to \$10,280,000). This sale property does not have a pier and is located in an area of Edgartown that appeals more to a non-boating, country club and golfing enthusiast. Excluding his time adjustment of 3%, Mr. Hartel's gross adjustments for the parcel alone totaled 20%.

Comparable sale 4, 12 Guernsey Lane, is a 2.1-acre, waterfront parcel that, at the time of sale, was improved with two small dated cottages. After its sale in January, 2009 for \$7,500,000, a new home was built on the property. This sale property has a small beach area and a small pier. As of January 1, 2007, the valuation and assessment date for fiscal year 2008, this sale property was merely a listing, and the Presiding Commissioner ruled that it would not be considered in the valuation appeal for this fiscal year.

Mr. Hartel's updated adjustment grid for fiscal year 2008 is substantially reproduced in the two tables below.

Fiscal Year 2008

	<u>Subject</u>	<u>Comparable Sale 1</u>	<u>Comparable Sale 2</u>
Location	48 Witchwood Ln	27 Tower Hill Rd	91 N. Water St
Map & Parcel	36-303.10	29-127	20D-282
Parcel Size (acres)	3.00	1.50	0.33
Sale Price	n/a	\$ 7,413,500	\$ 9,000,000
Improvements AV	\$ 6,018,500	\$ 533,200	\$ 454,200
Extracted Land Value	n/a	\$ 6,880,300	\$ 8,545,800
Date of Sale	01/01/2007	04/14/2005	08/31/2006
Time Adjustment		\$ 1,169,651 (17%)	\$ 128,187 (1.5%)
Adjusted Subtotal		\$ 8,049,951	\$ 8,673,987
Location	Good	Inferior 5%	Superior -10%
Site Utility Size	Average	Superior - 5%	Superior - 5%
View	Average	Superior -10%	Superior -10%
Dock	Shared Right	Superior -10%	Superior -10%
Net Adjustment		\$(1,609,990)-20%	\$(3,035,895)-35%
Indicated Land Value		\$ 6,439,961	\$ 5,638,092
Rounded Land Value		\$ 6,400,000	\$ 5,600,000

Fiscal Year 2008 (cont.)

	<u>Subject</u>	<u>Comparable Sale 3</u>	<u>Comparable Sale 4</u>
Location	48 Witchwood Ln	38 Cow Bay Rd	12 Guernsey Ln
Map & Parcel	36-303.10	12-26	36-336
Parcel Size (acres)	3.00	2.60	2.10
Sale Price	n/a	\$10,280,000	\$ 8,500,000
Improvements AV	\$ 6,018,500	\$ 2,969,000	\$ 200,300
Extracted Land Value	n/a	\$ 7,311,000	\$ 8,299,700
Date of Sale	01/01/2007	04/07/2006	Listing
Time Adjustment		\$ 219,330 (3%)	(0%)
Adjusted Subtotal		\$ 7,530,330	\$ 8,299,700
Location	Good	Similar 0%	Inferior 5%
Site Utility Size	Average	Superior - 5%	Superior - 5%
View	Average	Superior - 5%	Superior - 5%
Dock	Shared Right	Inferior 10%	Superior -10%
Net Adjustment		0%	\$(1,244,955)-15%
Indicated Land Value		\$ 7,530,330	\$ 7,054,745
Rounded Land Value		\$ 7,500,000	\$ 7,100,000

Mr. Hartel applied the most weight to comparable sales 1 and 3, in determining a rounded indicated land value for the subject property of \$6,900,000. He then added back the \$6,018,500

assessed value of the subject property's improvements and estimated the fair cash value of the subject property at \$12,918,500 for fiscal year 2008.

In sum, of the four purportedly comparable-sale properties on which Mr. Hartel relied to estimate the fair cash value of the subject property for fiscal year 2008: one of them is a mere listing; another is not a waterfront property and contains an improvement with an assessed value approaching 30% of the sale price, which undermines the usual rationale and Mr. Hartel's reasoning for using it in a land-extraction methodology; a third is located in the congested downtown area, has a considerably smaller parcel, was not marketed before its sale, and requires extensive adjustment; and the fourth has a time adjustment of 17% and additional gross adjustments for the parcel alone totaling 30%. The Board determined that this latter sale property should have been adjusted further to account for its location next to a cemetery.

To estimate the value of the subject property for fiscal year 2009, Mr. Hartel continued to use as his purportedly comparable-sale properties in his methodology: 91 North Water Street (comparable sale 2); 38 Cow Bay Road (comparable sale 3); and 12 Guernsey Lane (comparable sale 4); but replaced 27 Tower Hill Road with 93 N. Water Street (comparable sale 1).

Comparable sale 1 for this fiscal year, 93 N. Water Street, is located next to comparable sale 2 in downtown Edgartown near a hotel and the Chappy ferry. Comparable sale 1 has a 0.25-acre waterfront parcel that, at the time of sale, was improved with an approximately 1,900-square-foot residence with eight rooms, including four bedrooms as well as 2.5 bathrooms. It was substantially renovated after the sale. This sale property was purchased in February, 2007 for \$9,300,000. Excluding his time adjustment of 5.5%, Mr. Hartel's gross adjustments for the parcel alone totaled 35%.

Mr. Hartel's updated adjustment grid for fiscal year 2009 is substantially reproduced in the two tables below.

Fiscal Year 2009

	<u>Subject</u>	<u>Comparable Sale 1</u>	<u>Comparable Sale 2</u>
Location	48 Witchwood Ln	93 N. Water St	91 N. Water St
Map & Parcel	36-303.10	20D-281	20D-282
Parcel Size (acres)	3.00	0.25	0.33
Sale Price	n/a	\$ 9,300,000	\$ 9,000,000
Improvements AV	\$ 6,205,700	\$ 416,000	\$ 454,200
Extracted Land Value	n/a	\$ 8,884,000	\$ 8,545,800
Date of Sale	01/01/2008	02/22/2007	08/31/2006
Time Adjustment		\$ -488,620 (-5.5%)	\$ -444,382 (-5.2%)
Adjusted Subtotal		\$ 8,395,380	\$ 8,101,418
Location	Good	Superior -10%	Superior -10%
Site Utility Size	Average	Superior - 5%	Superior - 5%
View	Average	Superior -10%	Superior -10%
Dock	Shared Right	Superior -10%	Superior -10%

Net Adjustment	\$(2,938,383)-35%	\$(2,835,496)-35%
Indicated Land Value	\$ 5,456,997	\$ 5,265,922
Rounded Land Value	\$ 5,500,000	\$ 5,300,000

Fiscal Year 2009 (cont.)

	<u>Subject</u>	<u>Comparable Sale 3</u>	<u>Comparable Sale 4</u>
Location	48 Witchwood Ln	38 Cow Bay Rd	12 Guernsey Ln
Map & Parcel	36-303.10	12-26	36-336
Parcel Size (acres)	3.00	2.60	2.10
Sale Price	n/a	\$10,280,000	\$ 8,500,000
Improvements AV	\$ 6,205,700	\$ 2,969,000	\$ 200,300
Extracted Land Value	n/a	\$ 7,311,000	\$ 8,299,700
Date of Sale	01/01/2008	04/07/2006	Listing
Time Adjustment		\$ -263,196 (-3.6%)	(0%)
Adjusted Subtotal		\$ 7,047,804	\$ 8,299,700
Location	Good	Similar 0%	Inferior 5%
Site Utility Size	Average	Superior - 5%	Superior - 5%
View	Average	Superior - 5%	Superior - 5%
Dock	Shared Right	Inferior <u>10%</u>	Superior <u>-10%</u>
Net Adjustment		0%	\$(1,244,955)-15%
Indicated Land Value		\$ 7,047,804	\$ 7,054,745
Rounded Land Value		\$ 7,000,000	\$ 7,100,000

Mr. Hartel applied the most weight to comparable sale 3, in determining a rounded indicated land value for the subject property of \$6,500,000. He then added back the \$6,205,700 assessed value of the subject property's improvements and estimated the fair cash value of the subject property at \$12,705,700 for fiscal year 2009.

In sum, of the four purportedly comparable-sale properties on which Mr. Hartel relied to estimate the value of the subject property for fiscal year 2009: one of them is a mere listing; two others, among other differences, are located in the congested downtown area, have considerably smaller parcels, and require extensive adjustment (35% each for the parcel alone, not including additional time adjustments exceeding 5%), and the fourth is a non-waterfront property which contains an improvement with an assessed value approaching 30% of the sale price, which undermines the usual rationale and Mr. Hartel's reasoning for using it in a land-extraction methodology.

To estimate the value of the subject property for fiscal year 2010, Mr. Hartel continued to use as his purportedly comparable-sale properties in his methodology: 93 North Water Street (comparable sale 2) and 12 Guernsey Lane (comparable sale 4); but replaced 91 N. Water Street with 65 N. Water Street (comparable sale 1) and 38 Cow Bay Lane with 41 S. Water Street (comparable sale 3).

Comparable sale 1 for this fiscal year, 65 N. Water Street, is situated on the water in the downtown area of Edgartown, very near comparable sale 2, 91 N. Water Street. Comparable

sale 1 is improved with a classic antique captain's house that is located near the street with only 0.31-acres of land. The house was built in 1870 and contains 2,434 square feet of living space with five bedrooms and 2.5 bathrooms. The house was renovated to some extent after the sale. This sale property was purchased in January, 2009 for \$11,750,000. Even without a time adjustment, Mr. Hartel's gross adjustments for the parcel alone totaled 35%.

Comparable sale 3 for this fiscal year, 41 S. Water Street, is situated much closer to the three N. Water Street sale properties than the subject property. It also has more property characteristics in common with the N. Water Street sale properties than it has with the subject property, including a waterfront parcel of only 0.26 acres. The residence on this sale property was built about 1900 and contains 5,046 square feet, including five bedrooms and three bathrooms. This sale property was purchased in December, 2008 for \$8,350,000. Even without any time adjustment, Mr. Hartel's gross adjustments for the parcel alone totaled 25%.

Mr. Hartel's adjustment grid for fiscal year 2010 is substantially reproduced in the two tables below.

Fiscal Year 2010

	<u>Subject</u>	<u>Comparable Sale 1</u>	<u>Comparable Sale 2</u>
Location	48 Witchwood Ln	65 N. Water St	93 N. Water St
Map & Parcel	36-303.10	20D-293	20D-281
Parcel Size (acres)	3.00	0.33	0.25
Sale Price	n/a	\$11,750,000	\$ 9,300,000
Improvements AV	\$ 6,205,700	\$ 992,600	\$ 416,000
Extracted Land Value	n/a	\$10,757,400	\$ 8,884,000
Date of Sale	01/01/2009	01/23/2009	02/22/2007
Time Adjustment		(0%)	\$-1,510,280 (-17%)
Adjusted Subtotal		\$10,757,400	\$ 7,373,720
Location	Good	Superior -10%	Superior -10%
Site Utility Size	Average	Superior - 5%	Superior - 5%
View	Average	Superior -10%	Superior -10%
Dock	Shared Right	Superior -10%	Superior -10%
Net Adjustment		\$(3,765,090)-35%	\$(2,580,802)-35%
Indicated Land Value		\$ 6,992,310	\$ 4,792,918
Rounded Land Value		\$ 7,000,000	\$ 4,800,000

Fiscal Year 2010 (cont.)

	<u>Subject</u>	<u>Comparable Sale 3</u>	<u>Comparable Sale 4</u>
Location	48 Witchwood Ln	41 S. Water St	12 Guernsey Ln
Map & Parcel	36-303.10	20D-328	36-336
Parcel Size (acres)	3.00	0.26	2.10
Sale Price	n/a	\$ 8,350,000	\$ 7,500,000
Improvements AV	\$ 6,205,700	\$ 731,700	\$ 293,000
Extracted Land Value	n/a	\$ 7,618,300	\$ 7,207,000
Date of Sale	01/01/2009	12/05/2008	01/28/2009
Time Adjustment		(0%)	(0%)
Adjusted Subtotal		\$ 7,618,300	\$ 7,207,000
Location	Good	Similar 0%	Inferior 5%

Site Utility Size	Average	Superior - 5%	Superior - 5%
View	Average	Superior -10%	Superior - 5%
Dock	Shared Right	Superior -10%	Superior -10%
Net Adjustment		\$(1,904,575)-25%	\$(1,081,050)-15%
Indicated Land Value		\$ 5,713,725	\$ 6,125,950
Rounded Land Value		\$ 5,700,000	\$ 6,100,000

Mr. Hartel applied the most weight to comparable sales 3 and 4, in determining a rounded indicated land value for the subject property of \$5,900,000. He then added back the \$6,205,700 assessed value of the subject property's improvements and estimated the fair cash value of the subject property at \$12,105,700 for fiscal year 2010.

In sum, of the four purportedly comparable-sale properties on which Mr. Hartel relied to estimate the value of the subject property for fiscal year 2010: two of them, among other differences, are located in the congested downtown area, have considerably smaller parcels, and require extensive adjustment (35% each not including an additional time adjustment of 17% for one of them); another has a considerably smaller parcel and has more property characteristics in common with the downtown sale properties than the subject property; and the fourth was not well described by Mr. Hartel in either his summary report or in his testimony and required a gross adjustment of 25% for the parcel alone.

To estimate the value of the subject property for fiscal year 2011, Mr. Hartel continued to use as his purportedly comparable-sale properties in his methodology: 65 N. Water Street (comparable sale 1) and 12 Guernsey Lane (comparable sale 2), but replaced his other comparables with 9 Guernsey Lane & 40 Down Harbor Road (comparable sale 3); 10, 18 & 24 Ocean View Avenue (comparable sale 4); and 51 Witchwood Lane (comparable sale 5).

Comparable sale 3 for this fiscal year, 9 Guernsey Lane and 40 Down Harbor Road, are two separate adjacent parcels that Mr. Hartel combined into and treated as one sale because they were sold simultaneously by the same seller to separate buyers who were husband and wife. At the time of sale, 9 Guernsey Lane was a 2.0-acre, waterview, but non-waterfront parcel improved with a 2,406-square-foot home that was built in 1964 and a small 586-square-foot guest house that was built in 1965. A garage and two large storage sheds were also located on this parcel. The 40 Down Harbor Road property was a 1.3-acre, non-waterfront, non-conforming parcel of vacant land with water views, which was located directly in front of 9 Guernsey Lane. The 40 Down Harbor Road parcel borders the Down Harbor Association beach and also has access to the association's dock. These sale properties were purchased in August, 2009 for

\$2,120,000 and \$3,180,000, respectively. Excluding his time adjustment of 5%, Mr. Hartel's gross adjustments to these two combined sale properties totaled 20% for the parcels alone.

Comparable sale 4 for this fiscal year, 10, 18, and 24 Ocean View Avenue, is composed of three parcels which total 4.78 acres. Both 10 and 18 Ocean View Avenue are 0.69-acres, while 24 Ocean View Avenue is a 3.40-acre waterfront parcel. These three parcels comprise what Mr. Hartel terms "a true estate," which includes impressive views, water frontage, docks, and privacy, as well as a 4,369-square-foot, ten-room residence, with seven bedrooms, seven bathrooms, and two half bathrooms. The estate also has a 1,094-square-foot carriage/guest house with two bedrooms and two bathrooms, along with an outdoor pool and pool house and several other outbuildings. According to Mr. Hartel, the improvements "reflect[] a timeless elegance." This sale property was purchased in August, 2010 for \$17,375,000. Excluding his time adjustment of 2.72%, Mr. Hartel's gross adjustments for the combined parcel alone totaled 50%.

Comparable sale 5 for this fiscal year, 51 Witchwood Lane, is a 2.31-acre waterfront parcel which was improved, at the time of the sale, with a 726-square-foot, three room, two bedroom, plus one bathroom, cabin. This sale property was purchased in January, 2011 for \$8,000,000. Excluding his time adjustment of 5.5%, Mr. Hartel's gross adjustments for the parcel alone totaled 25%.

Mr. Hartel's adjustment grid for fiscal year 2011 is substantially reproduced in the two tables below.

Fiscal Year 2011

	<u>Subject</u>	<u>Comparable Sale 1</u>	<u>Comparable Sale 2</u>
Location	48 Witchwood Ln	65 N. Water St	12 Guernsey Ln
Map & Parcel	36-303.10	20D-293	36-336
Parcel Size (acres)	3.00	0.33	2.10
Sale Price	n/a	\$11,750,000	\$ 7,500,000
Improvements AV	\$ 6,205,700	\$ 992,600	\$ 154,400
Extracted Land Value	n/a	\$10,757,400	\$ 7,345,600
Date of Sale	01/01/2010	01/23/2009	01/28/2009
Time Adjustment		\$ 1,358,660 (12.63%)	\$ 927,749 (12.63%)
Adjusted Subtotal		\$12,116,060	\$ 8,273,349
Location	Good	Superior -10%	Inferior 5%
Site Utility Size	Average	Superior -05%	Superior - 5%
View	Average	Superior -10%	Superior - 5%
Dock	1/6 Shared Right	Superior -10%	Superior -10%
Net Adjustment		\$(4,240,621)-35%	\$(1,241,002)-15%
Indicated Land Value		\$ 7,875,439	\$ 7,032,347
Rounded Land Value		\$ 7,900,000	\$ 7,000,000

Fiscal Year 2011 (cont.)

	<u>Comparable Sale 3</u>	<u>Comparable Sale 4</u>	<u>Comparable Sale 5</u>
Location	9 Guernsey Ln & 40 Down Harbor Rd	10, 18 & 24 Ocean View Ave	51 Witchwood Ln

Map & Parcel	29-334 & 338	29-154, 146 & 149	36-303.12
Parcel Size (acres)	3.30	4.78	2.31
Sale Price	\$ 5,300,000	\$17,375,000	\$ 8,000,000
Improvements AV	\$ 543,000	\$ 3,885,100	\$ 30,700
Extracted Land Value	\$ 4,757,000	\$13,489,900	\$ 7,969,300
Date of Sale	08/21/2009	08/16/2010	01/25/2011
Time Adjustment	\$ 237,850 (5%)	\$ -366,925 (-2.72%)	\$ 443,890 (5.57%)
Adjusted Subtotal	\$ 4,994,850	\$13,122,975	\$ 8,413,190
Location	Inferior 5%	Superior -10%	Similar 0%
Site Utility Size	Superior – 5%	Superior -15%	Superior -10%
View	Superior -10%	Superior -15%	Superior - 5%
Dock	Similar <u>0%</u>	Superior <u>-10%</u>	Superior <u>-10%</u>
Net Adjustment	\$(499,485)-10%	\$(6,561,487)-50%	\$(2,103,298)-25%
Indicated Land Value	\$ 4,495,365	\$ 6,561,487	\$ 6,309,893
Rounded Land Value	\$ 4,500,000	\$ 6,600,000	\$ 6,300,000

Mr. Hartel applied the most weight to comparable sale 2 and the least to comparable sale 1, in determining a rounded indicated land value for the subject property of \$6,400,000. He then added back the \$6,205,700 assessed value of the subject property's improvements and estimated the fair cash value of the subject property at \$12,605,700 for fiscal year 2011.

In sum, of the five purportedly comparable-sale properties on which Mr. Hartel relied to estimate the value of the subject property for fiscal year 2011: one, among other differences, is located in the congested downtown area, has a considerably smaller parcel, and requires extensive adjustment (35% for the parcel alone, not including an additional time adjustment of 12.63%); three others have improvements that are not remotely similar or comparable to the subject property's, and one of those is not waterfront property; and the fifth required gross adjustments totaling 50% for the parcel alone, not including an additional time adjustment of over 2%.

The Board's Findings for the 48 Witchwood Lane Property

With respect to 27 Tower Hill Road, the Board found that its location next to a cemetery and its outdated improvements, which were razed after the sale, rendered this sale property not fundamentally comparable to the subject property whose improvements were assessed at over \$6 million and consisted of a 13,071-square-foot spectacular home which was built in 2001-2002 and a 1,071-square-foot arched carriage house which contains both garage and living space. Mr. Hartel's failure to adjust for the improvements' differences negated the Board's ability to consider this sale property in a conventional comparable-sales approach. In addition, the Board found that it would have increased Mr. Hartel's adjustments relating to the location and size and utility of this sale property's parcel bringing his gross adjustment total for the parcel alone closer to 40% than his 30%. In other recent appeals, the Board has found that gross adjustments totaling just 40% indicate that purportedly comparable-sale properties are not fundamentally

comparable to the property to which it is being compared. *See, e.g., Salem Traders Way Realty, LLC*, Mass. ATB Findings of Fact and Reports at 2009-63. The Board found that to be true here as well.

Moreover, even though this sale property's outdated improvements were razed after the sale, Mr. Hartel still subtracted their assessed values from the sale price in prescribing a land value to this sale property. Presumably, this sale property was sold with the razing and demolition costs in mind. Accordingly, and assuming all other things being equal, it was not appropriate for Mr. Hartel to adjust the sale price thought to be attributable to the land by subtracting the improvements' assessed values to ascertain an indicated value for the subject property's parcel.

With respect to 91 N. Water Street, the Board found that its noisier, in-town location, next to a hotel and near the Chappy ferry, as well as its significantly smaller parcel size of 0.33 acres compared to the subject property's 3.00 acres and improvement age, style, and size of 1,914 square feet compared to the subject property's 13,000 plus square feet, and its near complete lack of privacy rendered this sale property not fundamentally comparable to the subject property. Mr. Hartel's failure to adjust for the improvements' differences negated the Board's ability to consider this sale property in a conventional comparable-sales approach. Moreover, this sale property sold privately and was not marketed. Without considering his time adjustments, Mr. Hartel's adjustments for this property's parcel alone totaled 35%, which, under the circumstances, supports the Board's finding of non-comparability.

With respect to 38 Cow Bay Road, the Board found that it is not waterfront property — one of the most important considerations for valuing property in Edgartown; it does not have access to a pier; and, unlike the subject property, it is located in an area of Edgartown that appeals to a non-boating, country club and golfing type of buyer. This sale property is also burdened by an 18-foot right of way, and its improvements at the time of sale totaled almost 30% of the overall assessment, which is inconsistent with the usual rationale and Mr. Hartel's reasoning for utilizing a valuation methodology which relies on a land-extraction analysis — an approach best suited for valuing, and using in the valuation analysis, vacant land or property with minimal or negligible value in its improvements, like large rural tracts. Accordingly, the Board found that this sale property was not fundamentally comparable to the subject property and should not have been included in Mr. Hartel's methodology.

With respect to 12 Guernsey Lane, it was only a listing at all times relevant to the fiscal year 2008 and 2009 appeals — the sale having occurred in November, 2008, and the Presiding

Commissioner therefore limited its consideration to the fiscal year 2010 and 2011 appeals. Mr. Hartel applied gross adjustments totaling 25% to this sale property's parcel alone. While the Board found that the parcel associated with 12 Guernsey Lane was reasonably comparable to the subject property's parcel, this sale property lacked overall basic comparability because the 12 Guernsey Lane property was improved with only two small cottages, while the subject property was improved with a 13,000-plus-square-foot spectacular residence plus an impressive carriage house, which were assessed for over \$6 million. Mr. Hartel's failure to adjust for the improvements' differences negated the Board's ability to consider this sale property in a conventional comparable-sales approach.

Furthermore, and similar to what occurred with the sale property located at 27 Tower Hill Road, 12 Guernsey Lane's outdated improvements were razed after the sale and a new home was built. Notwithstanding this foreseeable development, Mr. Hartel still subtracted the improvements' assessed values from the sale price in developing an indicated value for the subject property's parcel. Presumably, this sale property was sold with the razing and demolition costs in mind. Accordingly, and assuming all other things being equal, it was not appropriate for Mr. Hartel to adjust the sale price by subtracting the assessed values of the improvements to ascertain an indicated value for the subject property's parcel.

With respect to 93 N. Water Street, it is located next to another sale property for fiscal years 2008 and 2009, 91 N. Water Street. Similar to that sale property, 93 N. Water Street is situated in the downtown area of Edgartown in a much busier, heavily trafficked, and less private section of town than the subject property. A hotel and the Chappy ferry are located nearby, which exposes this sale property to significant additional traffic and congestion. Moreover, this sale property's parcel size is only 0.25 acres compared to the subject property's 3.00 acres. At the time of sale, this sale property was improved with an approximately 1,900-square-foot residence with eight rooms, including four bedrooms, as well as 2.5 bathrooms, compared to the subject property's much larger, higher valued, and more spectacular improvements. Mr. Hartel's failure to adjust for the improvements' differences negated the Board's ability to consider this sale property in a conventional comparable-sales approach. The Board found that this sale property lacked basic comparability to the subject property. Excluding his time adjustment, Mr. Hartel's gross adjustments for this sale property's parcel alone totaled 35%, which, under the circumstances, support the Board's finding of non-comparability.

With respect to 65 N. Water Street, the Board found that, similar to the other N. Water Street sale properties, this sale property lacked basic comparability to the subject property

because it is also located in the downtown area of Edgartown in a much busier and heavily trafficked area than the subject property. In addition, this sale property is improved with a significantly smaller, classic antique captain's home situated near the street. Mr. Hartel's failure to adjust for the improvements' differences negated the Board's ability to consider this sale property in a conventional comparable-sales approach. The improvement's assessed value is nearly \$1 million, which represents almost 10% of the overall assessed value for this property. While not as pronounced a percentage as that for the 38 Cow Bay Road sale property's improvement, it is still significant enough to undercut the usual rationale and Mr. Hartel's reasoning for using it in a valuation methodology that relies on a land-extraction analysis. Excluding his time adjustment, Mr. Hartel's gross adjustments for this sale property's parcel alone total 35%, which supports the Board's finding of non-comparability.

With respect to 41 S. Water Street, the Board found that it is situated much closer to the three N. Water Street sale properties than the subject property. It also shares more property characteristics with them than with the subject property, including a parcel size of only 0.26 acres compared to the subject property's 3.00 acres and an improvement barely one-third the size of the subject property's main residence. Mr. Hartel's failure to adjust for the improvements' differences negated the Board's ability to consider this sale property in a conventional comparable-sales approach. The Board found that this sale property lacked basic comparability to the subject property.

With respect to 9 Guernsey Lane and 40 Down Harbor Road, they are both non-waterfront properties of 2.0 acres and a non-conforming 1.3 acres, respectively. The former property was improved with an older, modest, 2,406-square-foot home and a small, older, 586-square-foot guest house, while the latter property was vacant. These two properties sold simultaneously - one to the husband and the other to the wife - who later reconfigured them to allow the 40 Down Harbor Road property to become a buildable lot and meet minimum zoning requirements. The assessors invalidated these sales because of the razing and rebuilding of the improvements and the reconfiguration of the parcels. Similarly, the Board found that the sales of these two properties were problematic, and they lacked basic comparability to the subject property, even with the neighborhood association's benefits, which provided beach and dock access, primarily because of the vast difference between the improvements - the subject property's improvements were assessed for over \$6 million compared to the sale property's \$543,000. Mr. Hartel's failure to adjust for the improvements' differences negated the Board's ability to consider this sale property in a conventional comparable-sales approach.

With respect to 10, 18 and 24 Ocean View Avenue, excluding his time adjustment, Mr. Hartel's gross adjustments for the parcel alone totaled 50%, which by itself strongly indicates that this sale property lacks basic comparability to the subject property. Moreover, the value of the improvement on this sale property represents over 20% of its overall value, which undermines the usual rationale and Mr. Hartel's reasoning for using this sale property in a valuation methodology that relies on a land-extraction analysis. The Board found that this sale property was not comparable to the subject property.

With respect to 51 Witchwood Lane, the Board found that while its parcel may be reasonably comparable to the subject property -- Mr. Hartel applied gross adjustments to the parcel alone totaling 25%, excluding his time adjustment -- the property as a whole is not. The 51 Witchwood Lane property is composed of an essentially vacant lot while the subject property is improved with over a 13,000-square-foot residence plus an expansive carriage house along with some other outbuildings. Mr. Hartel's failure to adjust for the improvements' differences negated the Board's ability to consider this sale property in a conventional comparable-sales approach.

On these bases and considering the infirmities with Mr. Hartel's valuation methodology and his purportedly comparable-sale properties, the Board found that the values which he proposed were unreliable, and there was insufficient evidence upon which the Board could rely to develop fair cash values for the subject property for fiscal years 2008, 2009, 2010, and 2011 using a comparable-sale or alternative method of valuation.

44 Green Hollow Road – Fiscal Years 2008, 2009, & 2010

The subject property, identified as map 29, parcel 134 for assessing purposes, consists of an approximately 1.14 acre registered waterfront parcel,¹⁶ with several improvements, including an unheated, non-winterized, 1,676-square-foot, older but well-maintained four- or five-bedroom cottage with two full bathrooms and two fireplaces, an unattached three-car garage and a shared wooden pier or dock. The garage also has an attached in-law suite composed of a bedroom, a sitting area, and a bathroom. The subject property does not have sewer or septic but instead uses two cesspools.

The subject property's assessed values for the fiscal years at issue are summarized in the following table.

¹⁶ The assessors place the subject parcel's area at 1.14 acres while the appellant's expert land surveyor, Douglas Hoehn, places it at 1.11 acres, a difference of 0.03 acres or about 1,300 square feet. All of Mr. Hoehn's measurements are estimated from his readings of maps and their scales; the measurements are not the result of actual field work performed by him or under his auspices.

<u>Fiscal</u> <u>Year</u>	<u>Parcel</u> <u>Assessment</u>	<u>Improvements</u> <u>Assessment</u>	<u>Total</u> <u>Assessment</u>
2008	\$10,489,700	\$299,900	\$10,789,600
2009	\$10,489,700	\$277,500	\$10,767,200
2010	\$ 9,867,200	\$277,500	\$10,144,700

The subject parcel is comprised of two lots which are side-by-side and have about 96 to 107 feet of combined water-frontage along Edgartown Harbor.¹⁷ Lot 1 is by far the wider and larger lot; it is on the northern side of the subject parcel. Lot 2 is approximately 16 feet wide with an area of about 7,552 to 7,819 square feet;¹⁸ it is on the southern side of the parcel. The subject property's pier is constructed on Lot 2; the other improvements are on Lot 1. To the north and adjacent to the subject property is an improved 1.6-acre parcel with an address of 40 Green Hollow Drive and an assessing parcel designation of 29-132. At all relevant times, this parcel was owned by Walter Leland Cronkite, Jr. or was part of his estate (the "Cronkite property").¹⁹

The subject property is burdened by several easements. One of the easements is ten feet wide and runs the length of the southern boundary of Lot 1 and along the northern boundary of Lot 2 to the water. This easement, which permits pedestrian as well as vehicular traffic to access and share the subject property's pier, inures to the benefit of the property adjacent to the western boundary of the subject property (assessing parcel 29-131).²⁰ Another easement is a right-of-way that provides access to the Cronkite property from Green Hollow Road. This easement is located in the far western portion of the subject parcel. A third easement is a view easement which restricts the height of vegetation or fencing along the boundary between the subject property and the Cronkite property to 3.5 feet. The purpose of this easement is to protect the views from the west for assessing parcel 29-131. Finally, there was a life-tenancy/lease agreement with Mr. Cronkite entitling him to use the subject property's pier, store a large boat at the dock, traverse from his pier to the subject property's pier and back, and to utilize up to two parking spaces in the garage. In conjunction with this agreement, Mr. Cronkite assumed a conditional obligation to maintain the subject property's pier and to pay \$50 per month for each garage space used.

¹⁷ According to Mr. Hoehn, in 1989 the subject parcel's water-frontage was 107 feet but, due to certain erosive forces, is now only 96 feet.

¹⁸ All of Mr. Hoehn's measurements are estimated from his readings of maps and their scales; the measurements are not the result of actual field work performed by him or under his auspices.

¹⁹ The executor of the estate of Mr. Cronkite sold the Cronkite property for \$11.3 million on January 31, 2011. The Presiding Commissioner ruled that this sale was inadmissible because the sale date was two years after the latest valuation and assessment date at issue.

²⁰ The owners of this parcel are related to the owners of the subject property.

To estimate the value of the subject property for fiscal years 2008, 2009, and 2010, Mr. Hartel used the same purportedly comparable-sale properties that he used to value the previously discussed subject property, 48 Witchwood Lane.

Mr. Hartel's adjustment grid for fiscal year 2008 is reproduced in the tables below.

Fiscal Year 2008

	<u>Subject</u>	<u>Comparable Sale 1</u>	<u>Comparable Sale 2</u>
Location	44 Green Hollow Rd	27 Tower Hill Rd	91 N. Water St
Map & Parcel	29-134	29-127	20D-282
Parcel Size (acres)	1.14	1.50	0.33
Sale Price	n/a	\$ 7,413,500	\$ 9,000,000
Improvements AV	\$ 253,300	\$ 533,200	\$ 454,200
Extracted Land Value	n/a	\$ 6,880,300	\$ 8,545,800
Date of Sale	01/01/2007	04/14/2005	Listing
Time Adjustment		\$ 1,169,651 (17%)	\$ 128,187 (1.5%)
Adjusted Subtotal		\$ 8,049,951	\$ 8,673,987
Location	Average	Inferior 5%	Superior -10%
Site Utility Size	Fair	Superior -20%	Superior -20%
View	Average	Superior -10%	Superior -10%
Dock	Fair	Superior -10%	Superior -10%
Net Adjustment		\$(2,817,483)-35%	\$(4,336,994)-50%
Indicated Land Value		\$ 5,232,468	\$ 4,336,994
Rounded Land Value		\$ 5,200,000	\$ 4,300,000

Fiscal Year 2008 (cont.)

	<u>Subject</u>	<u>Comparable Sale 3</u>	<u>Comparable Sale 4</u>
Location	44 Green Hollow Rd	38 Cow Bay Rd	12 Guernsey Ln
Map & Parcel	29-134	12-26	36-336
Parcel Size (acres)	1.14	2.60	2.10
Sale Price	n/a	\$10,280,000	\$ 8,500,000
Improvements AV	\$ 253,300	\$ 2,969,000	\$ 200,300
Extracted Land Value	n/a	\$ 7,311,000	\$ 8,299,700
Date of Sale	01/01/2007	04/07/2006	01/01/2007
Time Adjustment		\$ 219,330 (3%)	(0%)
Adjusted Subtotal		\$ 7,530,330	\$ 8,299,700
Location	Average	Similar 0%	Inferior 5%
Site Utility Size	Fair	Superior -10%	Superior -20%
View	Average	Similar 0%	Similar 0%
Dock	Fair	Inferior 10%	Superior -10%
Net Adjustment		0%	\$(2,074,925)-25%
Indicated Land Value		\$ 7,530,330	\$ 6,224,775
Rounded Land Value		\$ 7,500,000	\$ 6,200,000

Mr. Hartel apparently applied equal weight to his purportedly comparable-sale properties' rounded indicated land values in recommending an estimated land value for the subject property of \$5,800,000. He then added back the \$253,300 assessed value of the subject property's improvements and estimated the fair cash value of the subject property at \$6,053,300 for fiscal year 2008.

In sum, of the four purportedly comparable-sale properties on which Mr. Hartel relied to estimate the fair cash value of this subject property for fiscal year 2008: one of them is a mere listing; another is not a waterfront property; a third is located in the congested downtown area, has a considerably smaller parcel, and requires extensive adjustment; and the fourth has a time adjustment of 17% and additional gross adjustments for the parcel alone totaling 45%.

Mr. Hartel's adjustment grid for fiscal year 2009 is reproduced in the tables below.

Fiscal Year 2009

	<u>Subject</u>	<u>Comparable Sale 1</u>	<u>Comparable Sale 2</u>
Location	44 Green Hollow Rd	93 N. Water St	91 N. Water St
Map & Parcel	29-134	20D-281	20D-282
Parcel Size (acres)	1.14	0.25	0.33
Sale Price	n/a	\$ 9,300,000	\$ 9,000,000
Improvements AV	\$ 230,900	\$ 416,000	\$ 454,200
Extracted Land Value	n/a	\$ 8,884,000	\$ 8,545,800
Date of Sale	01/01/2008	02/22/2007	08/31/2006
Time Adjustment		\$ -488,620 (-5.5%)	\$ -444,382 (-5.2%)
Adjusted Subtotal		\$ 8,395,380	\$ 8,101,418
Location	Average	Superior -10%	Superior -10%
Site Utility Size	Fair	Superior -20%	Superior -20%
View	Average	Superior -10%	Superior -10%
Dock	Fair	Superior -10%	Superior -10%
Net Adjustment		\$(4,197,690)-50%	\$(4,050,709)-50%
Indicated Land Value		\$ 4,197,690	\$ 4,050,709
Rounded Land Value		\$ 4,200,000	\$ 4,100,000

Fiscal Year 2009 (cont.)

	<u>Subject</u>	<u>Comparable Sale 3</u>	<u>Comparable Sale 4</u>
Location	44 Green Hollow Rd	38 Cow Bay Rd	12 Guernsey Ln
Map & Parcel	29-134	12-26	36-336
Parcel Size (acres)	1.14	2.60	2.10
Sale Price	n/a	\$10,280,000	\$ 8,500,000
Improvements AV	\$ 230,900	\$ 2,969,000	\$ 200,300
Extracted Land Value	n/a	\$ 7,311,000	\$ 8,299,700
Date of Sale	01/01/2008	04/07/2006	Listing
Time Adjustment		\$ -263,196 (-3.6%)	(0%)
Adjusted Subtotal		\$ 7,047,804	\$ 8,299,700
Location	Average	Similar 0%	Inferior 5%
Site Utility Size	Fair	Superior -10%	Superior -20%
View	Average	Similar 0%	Similar 0%
Dock	Fair	Inferior 10%	Superior -10%
Net Adjustment		0%	\$(2,074,925)-25%
Indicated Land Value		\$ 7,047,804	\$ 6,224,775
Rounded Land Value		\$ 7,000,000	\$ 6,200,000

Mr. Hartel apparently applied equal weight to his purportedly comparable-sale properties' rounded indicated land values in recommending an estimated land value for the subject property of \$5,400,000. He then added back the \$230,900 assessed value of the subject property's improvements and estimated the subject property's fair cash value at \$5,630,900 for fiscal year 2009.

In sum, of the four purportedly comparable-sale properties on which Mr. Hartel relied to estimate the value of the subject property for fiscal year 2009: one of them is a mere listing; two of them are located in the congested downtown area, have considerably smaller parcels, and require extensive adjustment (50% each not including additional time adjustments exceeding 5%); and the fourth contains an improvement with an assessed value approaching 30% of the sale price, which undermines the usual rationale and Mr. Hartel's reasoning for using this sale property in his land-extraction methodology.

Mr. Hartel's adjustment grid for fiscal year 2010 is reproduced in the tables below.

Fiscal Year 2010

	<u>Subject</u>	<u>Comparable Sale 1</u>	<u>Comparable Sale 2</u>
Location	44 Green Hollow Rd	65 N. Water St	93 N. Water St
Map & Parcel	29-134	20D-293	20D-281
Parcel Size (acres)	1.14	0.33	0.25
Sale Price	n/a	\$11,750,000	\$ 9,300,000
Improvements AV	\$230,900	\$ 992,600	\$ 416,000
Extracted Land Value	n/a	\$10,757,400	\$ 8,884,000
Date of Sale	01/01/2009	01/23/2009	02/22/2007
Time Adjustment		(0%)	\$-1,510,280 (-17%)
Adjusted Subtotal		\$10,757,400	\$ 7,373,720
Location	Average	Superior -10%	Superior -10%
Site Utility Size	Fair	Superior -20%	Superior -20%
View	Average	Superior -10%	Superior -10%
Dock	Fair	Superior -10%	Superior -10%
Net Adjustment		\$(5,378,700)-50%	\$(3,686,860)-50%
Indicated Land Value		\$ 5,378,700	\$ 3,686,860
Rounded Land Value		\$ 5,400,000	\$ 3,700,000

Fiscal Year 2010 (cont.)

	<u>Subject</u>	<u>Comparable Sale 3</u>	<u>Comparable Sale 4</u>
Location	44 Green Hollow Rd	41 S. Water St	12 Guernsey Ln
Map & Parcel	29-134	20D-328	36-336
Parcel Size (acres)	1.14	0.26	2.10
Sale Price	n/a	\$ 8,350,000	\$ 7,500,000
Improvements AV	\$230,900	\$ 731,700	\$ 293,000
Extracted Land Value	n/a	\$ 7,618,300	\$ 7,207,000
Date of Sale	01/01/2009	12/05/2008	01/28/2009
Time Adjustment		(0%)	(0%)
Adjusted Subtotal		\$ 7,618,300	\$ 7,207,000
Location	Average	Similar 0%	Inferior 5%
Site Utility Size	Fair	Superior -10%	Superior -20%
View	Average	Superior -10%	Similar 0%
Dock	Fair	Superior -10%	Superior -10%
Net Adjustment		\$(2,285,490)-30%	\$(1,801,750)-25%
Indicated Land Value		\$ 5,332,810	\$ 5,405,250
Rounded Land Value		\$ 5,300,000	\$ 5,400,000

Mr. Hartel apparently applied equal weight to his purportedly comparable-sale properties' rounded indicated land values in recommending an estimated land value for the

subject property of \$5,000,000. He then added back the \$230,900 assessed value of the subject property's improvements and estimated the fair cash value of the subject property at \$5,230,900 for fiscal year 2010.

In sum, of the four purportedly comparable-sale properties on which Mr. Hartel relied to estimate the value of the subject property for fiscal year 2010: two of them are located in the congested downtown area, have considerably smaller parcels, and require extensive adjustment (50% each not including an additional time adjustment of 17% for one of them); another has a considerably smaller parcel and has more property characteristics in common with the downtown sale properties than the subject property; and the fourth was not well described by Mr. Hartel in either his summary report or in his testimony and required a gross adjustment of 35% for the parcel alone, without an adjustment for time.

The Board's Findings for the 44 Green Hollow Road Property

With respect to 27 Tower Hill Road, the Board found that Mr. Hartel failed to describe this sale property's waste disposal system and whether it was affected by any easements. In addition, without considering his time adjustments, Mr. Hartel's gross adjustments totaled 45% for the parcel alone. Because of this sale property's location next to a cemetery, questions about its waste disposal system and the presence of easements, and the percentage of Mr. Hartel's gross adjustments for the parcel alone, the Board found that this sale property was not sufficiently comparable to the subject property. Furthermore, Mr. Hartel's failure to adjust for the improvements' differences negated the Board's ability to consider this sale property in a conventional comparable-sales approach.

Moreover, even though this sale property's outdated improvements were razed after the sale, Mr. Hartel still subtracted their assessed values from the sale price in prescribing a land value to this sale property. Presumably, this sale property was sold with the razing and demolition costs in mind. Accordingly, and assuming all other things being equal, it was not appropriate for Mr. Hartel to adjust the sale price thought to be attributable to the land by subtracting the improvements' assessed values to ascertain an indicated value for the subject property's parcel.

With respect to 91 N. Water Street, the Board found, as it did in its comparison to the 48 Witchwood Lane property, that this sale property's noisier, in-town location, next to a hotel and near the Chappy ferry, as well as its significantly smaller parcel size -- 0.33 acres compared to the subject property's 1.14 acres, and its near complete lack of privacy rendered this sale property not fundamentally comparable to the subject property. In addition, this sale property

sold privately and was not marketed. Without considering his time adjustments, Mr. Hartel's adjustments for this sale property's parcel alone totaled 50%, indicating a lack of comparability.

With respect to 38 Cow Bay Road, the Board found, as it did in its comparison to the 48 Witchwood Lane property, that it is not waterfront property; it does not have access to a pier; and, unlike the subject property, it is located in an area of Edgartown that appeals to a non-boating, country club and golfing type of buyer. This sale property is also burdened by an 18-foot right of way, and its improvements are vastly different from the subject property's, negating the Board's ability to consider this sale property in a conventional sales-comparison approach. In addition, at the time of sale, these improvements totaled almost 30% of the overall assessment, which is inconsistent with the usual rationale and Mr. Hartel's reasoning for utilizing a valuation methodology which relies on a land-extraction analysis. Accordingly, the Board found that this sale property lacked basic comparability to the subject property and should not have been included in Mr. Hartel's methodology.

With respect to 12 Guernsey Lane, it was only a listing at all times relevant to the fiscal year 2008 and 2009 appeals, and the Board therefore limited its consideration here to the fiscal year 2010 appeal. For that fiscal year, Mr. Hartel applied gross adjustments totaling 35% to this sale property's parcel alone, which was improved with only two small cottages. The Board found that further adjustments would be needed to account for its improvement's differences with the subject property's. Because of this increased gross adjustment total and the limited description offered for this sale property, the Board found that it lacked basic comparability to the subject property.

Furthermore, and similar to what occurred with the sale property located at 27 Tower Hill Road, 12 Guernsey Lane's outdated improvements were razed after the sale and a new home was built. Notwithstanding this foreseeable development, Mr. Hartel still subtracted the improvements' assessed values from the sale price in developing an indicated value for the subject property's parcel. Presumably, this sale property was sold with the razing and demolition costs in mind. Accordingly, and assuming all other things being equal, it was not appropriate for Mr. Hartel to adjust the sale price by subtracting the assessed values of the improvements to ascertain an indicated value for the subject property's parcel.

With respect to 93 N. Water Street, it is located next to another sale property for fiscal years 2008 and 2009, 91 N. Water Street. Similar to that sale property, 93 N. Water Street is situated in the downtown area of Edgartown in a much busier, heavily trafficked, and less private section of town than the subject property. A hotel and the Chappy ferry are located nearby,

which exposes this sale property to significant additional traffic and congestion. Moreover, this sale property's parcel size is only 0.25 acres compared to the subject property's 1.14 acres. Excluding his time adjustment, Mr. Hartel's gross adjustments for this sale property's parcel alone totaled 50%. For these reasons, the Board found that this sale property lacked basic comparability to the subject property.

With respect to 65 N. Water Street, the Board found that, similar to the other N. Water Street sale properties, this sale property lacked basic comparability to the subject property because it is also located in the downtown area of Edgartown in a much busier and heavily trafficked area than the subject property. In addition, this sale property is improved with a classic antique captain's home situated near the street. Mr. Hartel's failure to adjust for the improvements' differences negated the Board's ability to consider this sale property in a conventional comparable-sales approach. This improvement's assessed value is nearly \$1 million, which represents approximately four times the assessed value of the subject property's improvements and almost 10% of the overall assessed value for this sale property. While not as pronounced a percentage as that for the 38 Cow Bay Road comparable sale property's improvement, it is still significant enough to undercut the usual rationale and Mr. Hartel's reasoning for using it in a valuation methodology that relies on a land-extraction analysis. Excluding his time adjustment, Mr. Hartel's gross adjustments for this sale property's parcel alone totaled 50%, a strong indication that it lacked comparability to the subject property.

With respect to 41 S. Water Street, the Board found, as it did in its comparison to the 48 Witchwood Lane property, that this sale property is situated much closer to the three N. Water Street sale properties than the subject property. It also has more property characteristics in common with them than the subject property, including a parcel size of only 0.26 acres compared to the subject property's 1.14 acres. Its improvements' assessed value is more than three-times that of the subject property's, and this sale property's improvements are substantially different from the subject property's, thereby evidencing a need for further adjustments for the Board to use it as evidence of value here; Mr. Hartel did not provide any. Even without a time adjustment, Mr. Hartel's gross adjustments for this sale property's parcel alone totaled 30%. For these reasons, the Board found that this sale property lacked basic comparability to the subject property.

On these bases and considering the infirmities with Mr. Hartel's valuation methodology and his purportedly comparable-sale properties, the Board found that the values which he proposed were unreliable, and there was insufficient evidence upon which the Board could rely

to develop the fair cash value of the subject property for fiscal years 2008, 2009, and 2010 using a comparable-sale or alternative method of valuation.

18 Menamsha Avenue – Fiscal Years 2008, 2009, & 2010

The subject property, identified as map 29, parcel 75 for assessing purposes, is located in the prestigious Tower Hill-Edgartown Harbor neighborhood of Edgartown, which is primarily composed of estate-like properties. The subject property consists of an approximately 2.77-acre waterfront parcel improved with a recently renovated two-story custom home which has 10,151 square feet of gross living area and 5,821 square feet of living area. The assessments for 18 Menamsha Avenue for the fiscal years at issue are summarized in the following table.

<u>Fiscal Year</u>	<u>Parcel Assessment</u>	<u>Improvements Assessment</u>	<u>Total Assessment</u>
2008	\$11,737,200	\$ 3,821,500	\$15,558,700
2009	\$11,777,600	\$ 3,594,300	\$15,371,900
2010	\$11,123,500	\$ 3,594,300	\$14,717,800

The house has 13 rooms, including five bedrooms, as well as four full modern bathrooms and two modern half bathrooms. According to the property record card, the kitchen style is “luxurious,” and the construction detail is graded as excellent plus. The residence has gas heat and central air conditioning. There is also an attached garage with living space above the car stalls. The interior walls of the residence are plaster and custom wood paneling, and the floors are hardwood with some carpeting. The exterior siding is wood shingle, as is the roof. Other amenities include several fireplaces, decks, an outbuilding with an outdoor shower, and a dock.

The home is situated on the parcel to maximize its privacy and its views of Edgartown Harbor. Also located on the subject property is a 575-square-foot deck constructed on a bluff overlooking the harbor. A heavy concentration of trees along the subject property’s northern and southern boundaries affords a significant degree of privacy. Trees also line either side of the driveway approaching the residence.

To estimate the value of the subject property for fiscal years 2008, 2009, and 2010, Mr. Hartel used the same purportedly comparable-sale properties that he used to value the two previously discussed properties, 48 Witchwood Lane and 44 Green Hollow Road.

Mr. Hartel’s updated adjustment grids for each of the fiscal years at issue are reproduced in the tables below.

Fiscal Year 2008

	<u>Subject</u>	<u>Comparable Sale 1</u>	<u>Comparable Sale 2</u>
Location	18 Menamsha Ave	27 Tower Hill Rd	91 N. Water St
Map & Parcel	29-75	29-127	20D-282
Parcel Size (acres)	2.77	1.50	0.33

Sale Price	n/a	\$ 7,413,500	\$ 9,000,000
Improvements AV	\$ 3,770,900	\$ 533,200	\$ 454,200
Extracted Land Value	n/a	\$ 6,880,300	\$ 8,545,800
Date of Sale	01/01/2007	04/14/2005	08/31/2006
Time Adjustment		\$ 1,169,651 (17%)	\$ 128,187 (1.5%)
Adjusted Subtotal		\$ 8,049,951	\$ 8,673,987
Location	Good	Inferior 5%	Superior -10%
Site Utility Size	Good	Similar 0%	Similar 0%
View	Average	Superior -10%	Superior -10%
Dock	Good	Similar 0%	Similar 0%
Net Adjustment		\$(402,498)- 5%	\$(1,734,797)-20%
Indicated Land Value		\$ 7,647,453	\$ 6,939,190
Rounded Land Value		\$ 7,600,000	\$ 6,900,000

Fiscal Year 2008 (cont.)

	<u>Subject</u>	<u>Comparable Sale 3</u>	<u>Comparable Sale 4</u>
Location	18 Menamsha Ave	38 Cow Bay Rd	12 Guernsey Ln
Map & Parcel	29-75	12-26	36-336
Parcel Size (acres)	2.77	2.60	2.10
Sale Price	n/a	\$10,280,000	\$ 8,500,000
Improvements AV	\$ 3,770,900	\$ 2,969,000	\$ 200,300
Extracted Land Value	n/a	\$ 7,311,000	\$ 8,299,700
Date of Sale	01/01/2007	04/07/2006	Listing
Time Adjustment		\$ 219,330 (3%)	(0%)
Adjusted Subtotal		\$ 7,530,330	\$ 8,299,700
Location	Good	Similar 0%	Inferior 5%
Site Utility Size	Good	Similar 0%	Similar 0%
View	Average	Superior - 5%	Superior - 5%
Dock	Good	Inferior 20%	Similar 0%
Net Adjustment		\$ 1,129,550 15%	0%
Indicated Land Value		\$ 8,659,880	\$ 8,299,700
Rounded Land Value		\$ 8,700,000	\$ 8,300,000

Mr. Hartel applied the most weight to comparable sale 3 and the least to comparable sale 4, in determining a rounded indicated land value for the subject property of \$7,900,000. He then added back the \$3,770,900 assessed value of the subject property's improvements and estimated the fair cash value of the subject property at \$11,670,900 for fiscal year 2008.

In sum, of the four purportedly comparable-sale properties on which Mr. Hartel relied to estimate the fair cash value of the subject property for fiscal year 2008: one of them is a mere listing; another is not a waterfront property; a third is located in the congested downtown area, has a considerably smaller parcel, far less privacy, and a much smaller residence; and the fourth has a time adjustment of 17%, a location next to a cemetery, and a home that is considerably smaller and has an assessed value approximately seven times less than the subject property's.

Mr. Hartel's updated adjustment grid for fiscal year 2009 is substantially reproduced in the two tables below.

Fiscal Year 2009

	<u>Subject</u>	<u>Comparable Sale 1</u>	<u>Comparable Sale 2</u>
Location	18 Menamsha Ave	93 N. Water St	91 N. Water St
Map & Parcel	29-75	20D-281	20D-282
Parcel Size (acres)	2.77	0.25	0.33
Sale Price	n/a	\$ 9,300,000	\$ 9,000,000
Improvements AV	\$ 3,539,400	\$ 416,000	\$ 454,200
Extracted Land Value	n/a	\$ 8,884,000	\$ 8,545,800
Date of Sale	01/01/2008	02/22/2007	08/31/2006
Time Adjustment		\$ -488,620 (-5.5%)	\$ -444,382 (-5.2%)
Adjusted Subtotal		\$ 8,395,380	\$ 8,101,418
Location	Good	Superior -10%	Superior -10%
Site Utility Size	Good	Similar 0%	Similar 0%
View	Average	Superior -10%	Superior -10%
Dock	Good	Similar 0%	Similar 0%
Net Adjustment		\$(1,679,076)-20%	\$(1,620,284)-20%
Indicated Land Value		\$ 6,716,304	\$ 6,481,134
Rounded Land Value		\$ 6,700,000	\$ 6,500,000

Fiscal Year 2009 (cont.)

	<u>Subject</u>	<u>Comparable Sale 3</u>	<u>Comparable Sale 4</u>
Location	18 Menamsha Ave	38 Cow Bay Rd	12 Guernsey Ln
Map & Parcel	29-75	12-26	36-336
Parcel Size (acres)	2.77	2.60	2.10
Sale Price	n/a	\$10,280,000	\$ 8,500,000
Improvements AV	\$ 3,539,400	\$ 2,969,000	\$ 200,300
Extracted Land Value	n/a	\$ 7,311,000	\$ 8,299,700
Date of Sale	01/01/2008	04/07/2006	Listing
Time Adjustment		\$ -263,196 (-3.6%)	(0%)
Adjusted Subtotal		\$ 7,047,804	\$ 8,299,700
Location	Good	Similar 0%	Inferior 5%
Site Utility Size	Good	Similar 0%	Similar 0%
View	Average	Superior - 5%	Superior - 5%
Dock	Good	Inferior 20%	Similar 0%
Net Adjustment		(\$1,057,171) 15%	0%
Indicated Land Value		\$ 8,104,975	\$ 8,299,700
Rounded Land Value		\$ 8,100,000	\$ 8,300,000

Mr. Hartel applied the most weight to comparable sale 3 and the least to comparable sale 4, in determining a rounded indicated land value for the subject property of \$7,400,000. He then added back the \$3,539,400 assessed value of the subject property's improvements and estimated the fair cash value of the subject property at \$10,939,400 for fiscal year 2009.

In sum, of the four purportedly comparable-sale properties on which Mr. Hartel relied to estimate the value of the subject property for fiscal year 2009: one of them is a mere listing; two of them are located in the congested downtown area, have considerably smaller parcels, and have vastly different improvements which have assessed values approximately seven to eight times less than the subject property's; and the fourth contains an improvement with an assessed value approaching 30% of the sale price, which undermines the usual rationale and Mr. Hartel's reasoning for using it in a land-extraction methodology.

Mr. Hartel's updated adjustment grid for fiscal year 2010 is substantially reproduced in the two tables below.

Fiscal Year 2010

	<u>Subject</u>	<u>Comparable Sale 1</u>	<u>Comparable Sale 2</u>
Location	18 Menamsha Ave	65 N. Water St	93 N. Water St
Map & Parcel	29-75	20D-293	20D-281
Parcel Size (acres)	2.77	0.33	0.25
Sale Price	n/a	\$11,750,000	\$ 9,300,000
Improvements AV	\$ 3,539,400	\$ 992,600	\$ 416,000
Extracted Land Value	n/a	\$10,757,400	\$ 8,884,000
Date of Sale	01/01/2009	01/23/2009	02/22/2007
Time Adjustment		(0%)	\$-1,510,280 (-17%)
Adjusted Subtotal		\$10,757,400	\$ 7,373,720
Location	Good	Superior -10%	Superior -10%
Site Utility Size	Good	Similar 0%	Similar 0%
View	Average	Superior -10%	Superior -10%
Dock	Good	Similar 0%	Similar 0%
Net Adjustment		\$(2,151,480)-20%	\$(1,474,744)-20%
Indicated Land Value		\$ 8,605,920	\$ 5,898,976
Rounded Land Value		\$ 8,600,000	\$ 5,900,000

Fiscal Year 2010 (cont.)

	<u>Subject</u>	<u>Comparable Sale 3</u>	<u>Comparable Sale 4</u>
Location	18 Menamsha Ave	41 S. Water St	12 Guernsey Ln
Map & Parcel	29-75	20D-328	36-336
Parcel Size (acres)	2.77	0.26	2.10
Sale Price	n/a	\$ 8,350,000	\$ 7,500,000
Improvements AV	\$ 3,539,400	\$ 731,700	\$ 293,000
Extracted Land Value	n/a	\$ 7,618,300	\$ 7,207,000
Date of Sale	01/01/2009	12/05/2008	01/28/2009
Time Adjustment		(0%)	(0%)
Adjusted Subtotal		\$ 7,618,300	\$ 7,207,000
Location	Good	Superior -10%	Inferior 5%
Site Utility Size	Good	Similar 0%	Similar 0%
View	Average	Superior -10%	Superior - 5%
Dock	Good	Similar 0%	Similar 0%
Net Adjustment		\$(1,523,660)-20%	0%
Indicated Land Value		\$ 6,094,640	\$ 7,207,000
Rounded Land Value		\$ 6,100,000	\$ 7,200,000

Mr. Hartel applied the most weight to comparable sale 4, in determining a rounded indicated land value for the subject property of \$7,000,000. He then added back the \$3,539,400 assessed value of the subject property's improvements and estimated the fair cash value of the subject property at \$10,539,400 for fiscal year 2010.

In sum, of the four purportedly comparable-sale properties on which Mr. Hartel relied to estimate the value of the subject property for fiscal year 2010: two of them are located in the congested downtown area, have considerably smaller parcels, and vastly different and smaller homes; another has a significantly smaller parcel and has more property characteristics in common with the downtown sale properties than the subject property; and the fourth was

improved with two smaller cottages at the time of sale compared to the subject property's recently renovated residence with approximately 5,800 square feet of living space and many amenities, plus an impressive free-standing deck set on a bluff with spectacular views.

The Board's Findings for the 18 Menamsha Avenue Property

With respect to 27 Tower Hill Road, the Board found that its location next to a cemetery and its outdated improvements, assessed at \$533,200 compared to the \$3,770,900 assessed value assigned to the subject property's improvements, which were razed after the sale, rendered this sale property not fundamentally comparable to the subject property. Mr. Hartel failed to provide the Board with recommendations for adjustments to account for the differences between the subject property's and this sale property's improvements thereby compromising the Board's ability to utilize this sale property in a conventional comparable-sales approach.

Moreover, even though this sale property's outdated improvements were razed after the sale, Mr. Hartel still subtracted their assessed values from the sale price in prescribing a land value to this sale property. Presumably, this sale property was sold with the razing and demolition costs in mind. Accordingly, and assuming all other things being equal, it was not appropriate for Mr. Hartel to adjust the sale price thought to be attributable to the land by subtracting the improvements' assessed values to ascertain an indicated value for the subject property's parcel.

With respect to 91 N. Water Street, the Board found that its noisier, in-town location, next to a hotel and near the Chappy ferry, as well as its significantly smaller parcel size - 0.33 acres compared to the subject property's 2.77 acres - and its improvement's age, style, and size - 1,914 square feet compared to the subject property's 10,151 square feet of gross living area and 5,821 square feet of living area - and its near complete lack of privacy, rendered this sale property not fundamentally comparable to the subject property. Furthermore, Mr. Hartel's failure to adjust for the improvements' differences negated the Board's ability to consider this sale property in a conventional comparable-sales approach. Moreover, this sale property sold privately and was not marketed.

With respect to 38 Cow Bay Road, the Board found that it is not waterfront property; it does not have access to a pier; and, unlike the subject property, it is located in an area of Edgartown that appeals to a non-boating, country club and golfing type of buyer. This sale property is also burdened by an 18-foot right of way, and its improvements at the time of sale totaled almost 30% of the overall assessment, which is inconsistent with the usual rationale and Mr. Hartel's reasoning for utilizing a valuation methodology that incorporates a land-extraction

analysis. Accordingly, the Board found that this sale property lacked basic comparability to the subject property and should not have been included in Mr. Hartel's methodology.

With respect to 12 Guernsey Lane, it was only a listing at all times relevant to the fiscal year 2008 and 2009 appeals, and the Board therefore limited its consideration to the fiscal year 2010 appeal. While the Board found that the parcel associated with 12 Guernsey Lane was reasonably comparable to the subject property's parcel, this sale property lacked overall basic comparability because it was improved with only two small cottages, while the subject property was improved with a home with 10,151 square feet of gross living area and 5,821 square feet of living area. Substantial adjustments would be necessary for the Board to use it as evidence of value here, and Mr. Hartel did not suggest any.

Furthermore, and similar to what occurred with the sale property located at 27 Tower Hill Road, 12 Guernsey Lane's outdated improvements were razed after the sale and a new home was built. Notwithstanding this foreseeable development, Mr. Hartel still subtracted the improvements' assessed values from the sale price in developing an indicated value for the subject property's parcel. Presumably, this sale property was sold with the razing and demolition costs in mind. Accordingly, and assuming all other things being equal, it was not appropriate for Mr. Hartel to adjust the sale price by subtracting the assessed values of the improvements to ascertain an indicated value for the subject property's parcel.

With respect to 93 N. Water Street, it is located next to another sale property for fiscal years 2008 and 2009, 91 N. Water Street. Similar to that sale property, 93 N. Water Street is situated in the downtown area of Edgartown in a much busier, heavily trafficked, and less private section of town than the subject property. A hotel and the Chappy ferry are located nearby, which expose this sale property to significant additional traffic and congestion. Moreover, this sale property's parcel size is only 0.25 acres compared to the subject property's 2.77 acres. At the time of sale, this sale property was improved with an approximately 1,900-square-foot residence with eight rooms, four bedrooms, as well as 2.5 bathrooms compared to the subject property's improvement which is approximately three times that size. Once again, additional adjustments would be required for the Board to be able to use this sale property for valuation purposes, and Mr. Hartel failed to provide any. For these reasons, the Board found that this sale property lacked basic comparability to the subject property.

With respect to 65 N. Water Street, the Board found that, similar to the other N. Water Street sale properties, this sale property lacked basic comparability to the subject property because it is located in the downtown area of Edgartown in a much busier and heavily trafficked

area than the subject property. In addition, this sale property is improved with a significantly smaller, classic antique captain’s home situated near the street, which would require additional adjustments for the Board to use it in a more traditional sales-comparison approach, and Mr. Hartel failed to recommend any. The improvement’s assessed value is nearly \$1 million, which represents almost 10% of the overall assessed value for this property. While not as pronounced a percentage as that for the 38 Cow Bay Road sale property’s improvement, it is still significant enough to undercut the usual rationale and Mr. Hartel’s reasoning for using it in a valuation methodology that relies on a land-extraction analysis.

With respect to 41 S. Water Street, the Board found that it is situated much closer to the three N. Water Street sale properties than the subject property. It also has more property characteristics in common with them than the subject property, including a parcel size of only 0.26 acres compared to the subject property’s 2.77 acres and an improvement considerably smaller than the subject property’s residence, which again would necessitate added adjustments for the Board to be able to use it in a conventional sales-comparison method, and Mr. Hartel failed to provide any such adjustments. For these reasons, the Board found that it lacked basic comparability to the subject property.

On these bases and considering the infirmities with Mr. Hartel’s valuation methodology and his purportedly comparable-sale properties, the Board found that the values which he proposed were unreliable, and there was insufficient evidence upon which the Board could rely to develop the fair cash value of the subject property for fiscal years 2008, 2009, and 2010 using a comparable-sale or alternative method of valuation.

35 Green Hollow Road – Fiscal Year 2008

The subject property, identified as map 29, parcel 136.1, for assessing purposes, is located in the prestigious Tower Hill section of Edgartown. Its 2.01-acre parcel is improved with multiple structures including a principal residence, a guest house, a boat house, and a garage/barn, along with a gunite swimming pool which was 90% complete as of the relevant valuation and assessment date. The appellant also owns the abutting property to the north, parcel 135.1. The relevant assessment information for fiscal year 2008 is repeated in the table below.

<u>Fiscal Year</u>	<u>Parcel Assessment</u>	<u>Improvements Assessment</u>	<u>Total Assessment</u>
2008	\$10,632,600	\$772,200	\$11,404,800

The principal residence, which as originally constructed in the late 1930s, has a gross building area of over 3,000 square feet and 2,273 square feet of living space, along with three

bedrooms, two bathrooms, central heat and air conditioning, and a wood deck. Despite its age, the subject property’s property record card reports and the Board’s view confirmed that the principal residence is in good condition. The guest house was built in 2001, and it has a gross building area in excess of 2,000 square feet and 946 square feet of gross living area with two bedrooms and two bathrooms. The guest house is heated, and it has central air conditioning and an unfinished basement. The 756-square-foot boat house is also a guest house with 400 square feet of living space and a 240-square-foot screened porch. The living quarters contain one bedroom and one bathroom, and have electric heat. The garage/barn is new as of the relevant valuation and assessment date and has approximately 1,000 square feet of space. The subject property also has a dock that was built about 1980.

The subject parcel is “bottle-shaped” with the bottle’s neck extending to the water’s edge and providing an approximate sixty-foot boundary with the water. The evidence indicates that the assessors reduced the standard waterfront condition factor to account for this “bottle-shape.” The views from the subject property are of Edgartown Harbor, the waterfront, and Chappaquiddick Island, and vary in quality, and possibly control because of easement issues, depending upon one’s location on the subject property.

To estimate the value of the subject property for fiscal year 2008, Mr. Hartel used the same purportedly comparable-sale properties that he used to value for that fiscal year the previously discussed subject properties, 18 Menamsha Avenue, 44 Green Hollow Road, and 48 Witchwood Lane.

Mr. Hartel’s adjustment grid for fiscal year 2008 is reproduced in the tables below.

Fiscal Year 2008

	<u>Subject</u>	<u>Comparable Sale 1</u>	<u>Comparable Sale 2</u>
Location	35 Green Hollow Rd	27 Tower Hill Rd	91 N. Water St
Map & Parcel	29-136.1	29-127	20D-282
Parcel Size (acres)	2.01	1.50	0.33
Sale Price	n/a	\$ 7,413,500	\$ 9,000,000
Improvements AV	\$ 734,400	\$ 533,200	\$ 454,200
Extracted Land Value	n/a	\$ 6,880,300	\$ 8,545,800
Date of Sale	01/01/2007	04/14/2005	08/31/2006
Time Adjustment		\$ 1,169,651 (17%)	\$ 128,187 (1.5%)
Adjusted Subtotal		\$ 8,049,951	\$ 8,673,987
Location	Average	Similar 0%	Superior -10%
Site Utility Size	Fair	Superior -20%	Superior -20%
View	Fair	Superior -10%	Superior -10%
Dock	Average	Similar <u>0%</u>	Similar <u>0%</u>
Net Adjustment		\$(2,414,985)-30%	\$(3,469,595)-40%
Indicated Land Value		\$ 5,634,966	\$ 5,204,392
Rounded Land Value		\$ 5,600,000	\$ 5,200,000

Fiscal Year 2008 (cont.)

	<u>Subject</u>	<u>Comparable Sale 3</u>	<u>Comparable Sale 4</u>
Location	35 Green Hollow Rd	38 Cow Bay Rd	12 Guernsey Ln
Map & Parcel	29-136.1	12-26	36-336
Parcel Size (acres)	2.01	2.60	2.10
Sale Price	n/a	\$10,280,000	\$ 8,500,000
Improvements AV	\$ 734,400	\$ 2,969,000	\$ 200,300
Extracted Land Value	n/a	\$ 7,311,000	\$ 8,299,700
Date of Sale	01/01/2007	04/07/2006	Listing
Time Adjustment		\$ 219,330 (3%)	(0%)
Adjusted Subtotal		\$ 7,530,330	\$ 8,299,700
Location	Average	Similar 0%	Inferior 5%
Site Utility Size	Fair	Superior -10%	Superior -20%
View	Fair	Superior -10%	Superior -10%
Dock	Average	Inferior <u>20%</u>	Similar <u>0%</u>
Net Adjustment		0%	\$(2,074,925)-25%
Indicated Land Value		\$ 7,530,330	\$ 6,224,775
Rounded Land Value		\$ 7,500,000	\$ 6,200,000

In his updated weighted average grid, Mr. Hartel applied the most weight, 50%, to comparable sale 1's rounded indicated land value, and the least weight, 10%, to comparable sale 4's, in recommending an estimated land value for the subject property of \$6,000,000. He then added back the \$734,400 assessed value of the subject property's improvements and estimated the fair cash value of the subject property at \$6,734,400 for fiscal year 2008.

In sum, of the four purportedly comparable-sale properties on which Mr. Hartel relied to estimate the fair cash value of the subject property for fiscal year 2008: one of them is a mere listing; another is not a waterfront property; a third is located in the congested downtown area, has a considerably smaller parcel, and far less privacy; and the fourth has a time adjustment of 17%, a location next to a cemetery, and outdated improvements.

The Board's Findings for the 35 Green Hollow Road Property

With respect to 27 Tower Hill Road, the Board found that its location next to a cemetery and its outdated improvements, which were razed after the sale, rendered this sale property not fundamentally comparable to the subject property.

Moreover, even though this sale property's outdated improvements were razed after the sale, Mr. Hartel still subtracted their assessed values from the sale price in prescribing a land value to this sale property. Presumably, this sale property was sold with the razing and demolition costs in mind. Accordingly, and assuming all other things being equal, it was not appropriate for Mr. Hartel to adjust the sale price thought to be attributable to the land by subtracting the improvements' assessed values to ascertain an indicated value for the subject property's parcel.

With respect to 91 N. Water Street, the Board found that its noisier, in-town location, next to a hotel and near the Chappy ferry, as well as its significantly smaller parcel size -- 0.33 acres compared to the subject property's 2.01 acres -- and its near complete lack of privacy rendered this sale property not fundamentally comparable to the subject property. Moreover, this sale property sold privately and was not marketed.

With respect to 38 Cow Bay Road, the Board found that it is not waterfront property, it does not have access to a pier, and, unlike the subject property, it is located in an area of Edgartown that appeals to a non-boating, country club and golfing type of buyer. This sale property is also burdened by an 18-foot right of way, and its improvements at the time of sale totaled almost 30% of the overall assessment, which is inconsistent with the usual rationale and Mr. Hartel's reasoning for utilizing a valuation methodology which relies on a land-extraction analysis. Furthermore, Mr. Hartel's failure to adjust for the improvements' differences negated the Board's ability to consider this sale property in a conventional comparable-sales approach. Accordingly, the Board found that this sale property lacked basic comparability to the subject property and should not have been included in Mr. Hartel's methodology.

With respect to 12 Guernsey Lane, it was only a listing at all times relevant to the fiscal year 2008 and 2009 appeals, and the Board therefore found and ruled that it was not appropriate to include it in the subject property's valuation for fiscal year 2008.

On these bases and considering the infirmities with Mr. Hartel's valuation methodology and his purportedly comparable-sale properties, the Board found that the values which he proposed were unreliable, and there was insufficient evidence upon which the Board could rely to develop the fair cash value of the subject property for fiscal year 2008 using a comparable-sale or alternative method of valuation.

31 Tower Hill Road – Fiscal Year 2008

The subject property, identified as map 29, parcel 159, for assessing purposes, is located in the prestigious Tower Hill section of Edgartown. Its approximate 1.70-acre waterfront parcel, which is situated on Edgartown Harbor, is improved with three buildings – a main house with approximately 4,027 square feet of living area, an approximate 192-square-foot, seasonal, cabin-like structure with plumbing and a small porch and deck, and an approximate 200-square-foot boat house that is used primarily for storage. In addition, the subject property has a deep water dock and an impressive sandy beach. The relevant assessment information for fiscal year 2008 is repeated in the table below.

<u>Fiscal</u> <u>Year</u>	<u>Parcel</u> <u>Assessment</u>	<u>Improvements</u> <u>Assessment</u>	<u>Total</u> <u>Assessment</u>
2008	\$11,187,200	\$857,100	\$12,044,300

The seasonal main house contains eight bedrooms and five bathrooms and has an approximate 300-square-foot porch with a second floor deck above it. There is also a two-car garage. This home is situated on a rise and has spectacular views of Edgartown Harbor and Chappaquiddick. The main house also has a new septic system that was installed in 2001-2002 to accommodate an eight-bedroom home. Photographs of the interior of the home indicate that it is appropriately finished for the neighborhood which is composed primarily of large seasonal homes.

The subject parcel is relatively long with a width of about 166 feet at the water's edge where it terminates in a private sandy beach area. The subject property is also very private with heavily vegetated and treed undeveloped land to the west and south, Edgartown Harbor to the east, and an ancient and rarely visited cemetery and a sole neighbor, 27 Tower Hill Road, to the north. This northern boundary also contains heavy vegetation and trees. A 16-foot wide right of way runs along the northern boundary of the subject property from Green Hollow Road to the waterfront. Legal access to the right of way is limited to the owners of the abutting property, 27 Tower Hill Road.

To estimate the value of the subject property for fiscal year 2008, Mr. Hartel used the same purportedly comparable-sale properties that he used to value for that fiscal year the previously discussed subject properties, 35 Green Hollow Road, 18 Menamsha Avenue, 44 Green Hollow Road, and 48 Witchwood Lane.

Mr. Hartel's adjustment grid for fiscal year 2008 is reproduced in the tables below.

Fiscal Year 2008

	<u>Subject</u>	<u>Comparable Sale 1</u>	<u>Comparable Sale 2</u>
Location	31 Tower Hill Rd	27 Tower Hill Rd	91 N. Water St
Map & Parcel	29-159	29-127	20D-282
Parcel Size (acres)	1.70	1.50	0.33
Sale Price	n/a	\$ 7,413,500	\$ 9,000,000
Improvements AV	\$ 785,800	\$ 533,200	\$ 454,200
Extracted Land Value	n/a	\$ 6,880,300	\$ 8,545,800
Date of Sale	01/01/2007	04/14/2005	08/31/2006
Time Adjustment		\$ 1,169,651 (17%)	\$ 128,187 (1.5%)
Adjusted Subtotal		\$ 8,049,951	\$ 8,673,987
Location	Average	Similar 0%	Superior -10%
Site Utility Size	Average/Fair	Superior -10%	Superior -10%
View	Good	Similar 0%	Superior - 5%
Dock	Average	Similar <u>0%</u>	Similar <u>0%</u>
Net Adjustment		\$(804,995)-10%	\$(2,168,497)-25%
Indicated Land Value		\$ 7,244,956	\$ 6,505,490
Rounded Land Value		\$ 7,200,000	\$ 6,500,000

Fiscal Year 2008 (cont.)

	<u>Subject</u>	<u>Comparable Sale 3</u>	<u>Comparable Sale 4</u>
Location	31 Tower Hill Rd	38 Cow Bay Rd	12 Guernsey Ln
Map & Parcel	29-159	12-26	36-336
Parcel Size (acres)	1.70	2.60	2.10
Sale Price	n/a	\$10,280,000	\$ 8,500,000
Improvements AV	\$ 785,800	\$ 2,969,000	\$ 200,300
Extracted Land Value	n/a	\$ 7,311,000	\$ 8,299,700
Date of Sale	01/01/2007	04/07/2006	Listing
Time Adjustment		\$ 219,330 (3%)	(0%)
Adjusted Subtotal		\$ 7,530,330	\$ 8,299,700
Location	Average	Similar 0%	Inferior 5%
Site Utility Size	Average/Fair	Superior -10%	Superior -10%
View	Good	Similar 0%	Inferior 5%
Dock	Average	Inferior <u>20%</u>	Similar <u>0%</u>
Net Adjustment		\$ 753,033 10%	0%
Indicated Land Value		\$ 8,283,363	\$ 8,299,700
Rounded Land Value		\$ 8,300,000	\$ 8,300,000

In his updated weighted average grid, Mr. Hartel applied the most weight, 35% and 30%, to the rounded indicated land values for comparable sale 1 and comparable sale 2, respectively, and the least weight, 10%, to comparable sale 4's, in recommending an estimated land value for the subject property of \$7,400,000. He then added back the \$785,800 assessed value of the subject property's improvements and estimated the fair cash value of the subject property at \$8,185,800 for fiscal year 2008.

In sum, of the four purportedly comparable-sale properties on which Mr. Hartel relied to estimate the fair cash value of the subject property for fiscal year 2008: one is a mere listing; another is not a waterfront property; a third is located in the congested downtown area, has a considerably smaller parcel, and far less privacy; and the fourth, while sharing some similar attributes, has a time adjustment of 17%, outdated improvements, and other differences for which Mr. Hartel did not adequately account.

The Board's Findings for the 31 Tower Hill Road Property

With respect to 91 N. Water Street, the Board found that its noisier, in-town location, next to a hotel and near the Chappy ferry, as well as its significantly smaller parcel size - 0.33 acres compared to the subject property's 1.70 acres - and its near complete lack of privacy rendered this sale property not fundamentally comparable to the subject property. Moreover, this sale property sold privately and was not marketed.

With respect to 38 Cow Bay Road, the Board found that it is not waterfront property, it does not have access to a pier, and, unlike the subject property, it is located in an area of Edgartown that appeals to a non-boating, country club and golfing type of buyer. This sale property is also burdened by an 18-foot right of way, and its improvements at the time of sale

totaled almost 30% of the overall assessment, which is inconsistent with the usual rationale and Mr. Hartel's reasoning for utilizing a valuation methodology which relies on a land-extraction analysis. Furthermore, Mr. Hartel's failure to adjust for the improvements' differences negated the Board's ability to consider this sale property in a conventional comparable-sales approach. Accordingly, the Board found that this sale property lacked basic comparability to the subject property and should not have been included in Mr. Hartel's methodology.

With respect to 12 Guernsey Lane, it was only a listing at all times relevant to this appeal, and the Board therefore found and ruled that it was not appropriate to include it as a comparable sale property in the valuation for fiscal year 2008.

With respect to 27 Tower Hill Road, the Board found that while it abuts the subject property and shares some similar attributes with the subject property, Mr. Hartel did not adequately account for its differences with the subject property for such factors as view and the stigma associated with their location next to a cemetery. Unlike Mr. Hartel, the Board found that the site size and utility of these two properties were similar. Moreover, and consistent with all of his analyses, Mr. Hartel did not account for differences between this sale property's and the subject property's improvements (except for their interests in docks). This sale property also required a time adjustment of 17%.

Moreover, even though this sale property's outdated improvements were razed after the sale, Mr. Hartel still subtracted their assessed values from the sale price in prescribing a land value to this sale property. Presumably, this sale property was sold with the razing and demolition costs in mind. Accordingly, and assuming all other things being equal, it was not appropriate for Mr. Hartel to adjust the sale price thought to be attributable to the land by subtracting the improvements' assessed values to ascertain an indicated value for the subject property's parcel.

On these bases and considering the infirmities with Mr. Hartel's valuation methodology and his purportedly comparable-sale properties, the Board found that the values which he proposed were unreliable, and there was insufficient evidence upon which the Board could rely to develop the fair cash value of the subject property for fiscal year 2008 using a comparable-sales or alternative method of valuation.

52 Witchwood Lane – Fiscal Years 2008, 2009, & 2010

This 1.5-acre vacant parcel of waterfront land, which is identified for assessing purposes as map 36, parcel 303.13, is improved with a dock but is otherwise completely undeveloped. It is the northern and only undeveloped parcel of a multi-parcel family compound, which the

owners purchased from their family. The subject property is situated within the exclusive and private Witchwood Lane subdivision which is located off of Katama Road and described in the section of the Findings discussing 48 Witchwood Lane. The relevant assessment information for each of the fiscal years at issue is repeated in the table below.

<u>Fiscal Year</u>	<u>Parcel Assessment</u>	<u>Improvements Assessment</u>	<u>Total Assessment</u>
2008	\$ 9,036,100	n/a	\$ 9,036,100
2009	\$ 9,036,100	n/a	\$ 9,036,100
2010	\$ 8,713,500	n/a	\$ 8,713,500

Heavy vegetation and long driveways provide privacy for the properties located within the subdivision from both the road and each other. The dock that is located on the subject property is shared with other Witchwood Lane waterfront property owners, while a dock on an abutting property is shared with the owners of the subject property, among others. There are easements providing access to the docks. Residents of this small neighborhood also share common tennis facilities.

The subject property’s view to the north benefits from a view easement over part of the abutting 48 Witchwood Lane property, while its view to the east profits from a view easement over sixty percent of the subject property’s coastal bank that is for the benefit of 48 Witchwood Lane. The precise breadth and extent of the views available from the possible locations of a dwelling on the subject property were never properly described.

To estimate the value of the subject property for fiscal year 2008, Mr. Hartel used as his purportedly comparable-sale properties in his methodology: 27 Tower Hill Road (comparable sale 1); 25 Leland’s Path (comparable sale 2); 38 Cow Bay Road (comparable sale 3); 153 Cow Bay Road (comparable sale 4); and 139 & 145 Cow Bay Road (comparable sale 5). Mr. Hartel also used 27 Tower Hill Road and 38 Cow Bay Road to estimate the values of the other subject properties. Descriptions of these two properties are contained in a preceding section of the Findings discussing 48 Witchwood Lane.

Comparable sale 2, 25 Leland’s Path, is an approximately 16.4-acre waterfront parcel, improved with a 7,191-square-foot dwelling. The parcel is very long and narrow. The dwelling, which was built in 1999, is a New England custom-style home in excellent condition that contains ten rooms, including six bedrooms, as well as six bathrooms. Comparable sale 2 was purchased in November, 2005, for \$7,500,000 after being marketed for about 7.5 months. Excluding his time adjustment of 8.13%, Mr. Hartel’s gross adjustments totaled 75%.

Comparable sale 4, 153 Cow Bay Road, is an approximately 7.00-acre, technically non-waterfront parcel, which abuts the partially eroded Cow Bay Association beach, and is improved with several buildings. One is a 3,567-square-foot, 1.5-story, Cape Cod-style dwelling, with four bedrooms and 2.5 bathrooms; another is a 2,481-square-foot, 1.5-story, Cape Cod-style dwelling, with three bedrooms and two bathrooms; and the third is a 336-square-foot camp that contains one bedroom and one bathroom. Comparable sale 4 was purchased in January, 2007 for \$13,875,000. In his appraisal report, Mr. Hartel acknowledged that “[t]his property was not exposed to the open market.” Mr. Hartel asserted that this sale property was part of an assemblage with his comparable sale 5, thus creating plottage value which was reflected in the sale price. Mr. Hartel therefore adjusted the sale price of this property downward by 25% to account for this condition of sale and then by another 35% in gross to account for differences with the subject property.

Comparable sale 5, 139 & 145 Cow Bay Road, are a combined 6.50 acres in size. Similar to comparable sale 4, this sale property is technically a non-waterfront property which abuts the partially eroded Cow Bay Association beach. This sale property is improved with a 1,678-square-foot, 1.5-story, Cape Cod-style dwelling with three bedrooms and one bathroom. Comparable sale 5 was purchased in January, 2007, on the same day that comparable sale 4 was purchased. Nominally different entities with the same address purchased comparable sales 4 and 5. Mr. Hartel asserted that this sale property was part of an assemblage with his comparable sale 4, but he did not adjust for any plottage value with respect to this comparable, instead relying solely on his adjustment to comparable sale 4 as adequately accounting for this factor. Without any time adjustment, Mr. Hartel’s gross adjustments totaled 25%.

Mr. Hartel’s adjustment grid for fiscal year 2008 is substantially reproduced in the two tables below.

Fiscal Year 2008

	<u>Subject</u>	<u>Comparable Sale 1</u>	<u>Comparable Sale 2</u>
Location	52 Witchwood Ln	27 Tower Hill Rd	25 Leland’s Path
Map & Parcel	36-303.13	29-127	35-42.1
Parcel Size (acres)	1.50	1.50	16.40
Sale Price	n/a	\$ 7,413,500	\$ 7,500,000
Improvements AV	n/a	\$ 841,500*	\$ 3,439,100
Extracted Land Value	n/a	\$ 6,572,000	\$ 4,060,90000
Condition of Sale		(0%)	(0%)
Date of Sale	01/01/2007	04/14/2005	11/08/2005
Time Adjustment		\$ 1,248,680 (19%)*	\$ 330,151 (8.13%)
Adjusted Subtotal		\$ 7,820,680	\$ 4,391,051
Location	Good	Similar 0%	Inferior 50%
Site Utility Size	Fair	Superior - 5%	Superior -10%
View	Average	Superior -10%	Superior -10%

Dock	Shared Right	Superior <u>-15%</u>	None <u>5%</u>
Net Adjustment		\$(2,346,204)-30%	\$ 1,536,868 35%
Indicated Land Value		\$ 5,474,476	\$ 5,927,919
Rounded Land Value		\$ 5,500,000	\$ 5,900,000

* According to the property record cards in evidence and Mr. Hartel's fiscal year 2008 adjustment grids for the other subject properties, which included 27 Tower Hill Road as a comparable, the fiscal year 2008 assessed value for this sale's improvements is \$533,200 and his time adjustment is only 17%.

Fiscal Year 2008 (cont.)

	<u>Comparable Sale 3</u>	<u>Comparable Sale 4</u>	<u>Comparable Sale 5</u>
Location	38 Cow Bay Road	153 Cow Bay Rd	139 & 145 Cow Bay Rd
Map & Parcel	12-26	13-3	13-1 & 13-2
Parcel Size (acres)	2.60	7.00	6.50
Sale Price	\$ 10,280,000	\$ 13,875,000	\$ 6,125,000
Improvements AV	\$ 2,969,000	\$ 788,500	\$ 182,900
Extracted Land Value	\$ 7,311,000	\$ 13,086,500	\$ 5,942,100
Condition of Sale²¹	(0%)	\$ 3,468,750 (25%)	(0%)
Date of Sale	04/07/2006	01/18/2007	01/18/2007
Time Adjustment	\$ 219,330 (3%)	(0%)	(0%)
Adjusted Subtotal	\$ 7,530,330	\$ 9,617,750	\$ 5,942,100
Location	Similar 0%	Similar 0%	Similar 0%
Site Utility Size	Superior - 5%	Superior -20%	Superior -10%
View	Superior - 5%	Superior -10%	Superior -10%
Dock	None <u>5%</u>	None <u>5%</u>	None <u>5%</u>
Net Adjustment	\$ (376,517) - 5%	\$ (2,404,438)-25%	\$ (891,315)-15%
Indicated Land Value	\$ 7,530,330	\$ 7,213,313	\$ 5,050,785
Rounded Land Value	\$ 7,500,000	\$ 7,200,000	\$ 5,100,000

In his weighted average grid, Mr. Hartel applied the most weight, 60%, to comparable sale 1's rounded indicated land value, and the least weight, 10% each, to his other four comparable-sale properties, in recommending a rounded indicated land value for the subject property of \$5,700,000. Relying on this value, he estimated the fair cash value of the subject property at \$5,700,000 for fiscal year 2008.

In sum, of the five purportedly comparable-sale properties on which Mr. Hartel relied to estimate the fair cash value of the subject property for fiscal year 2008: two of them necessitated excessive adjustments; several others are technically not, or are not, waterfront properties and are part of an assemblage that was not appropriately analyzed; another contained contradictory information and a time adjustment of 19% and gross adjustments for the parcel alone, not considering time, totaling 35%.

To estimate the value of the subject property for fiscal year 2009, Mr. Hartel continued to use as his purportedly comparable-sale properties in his methodology: 153 Cow Bay Road (comparable sale 1); 139 & 145 Cow Bay Road (comparable sale 2); and 38 Cow Bay Road

²¹ Mr. Hartel applied this adjustment to the sale price of the entire property and not simply the extracted land value.

(comparable sale 3); but replaced 27 Tower Hill Road and 25 Leland’s Path with 103 Chappaquiddick Road (comparable sale 4) and 12 Caleb Pond Lane (comparable sale 5).

Comparable sale 4 for this fiscal year, 103 Chappaquiddick Road, is located on Chappaquiddick Island near the Chappy ferry. Comparable sale 4 has a 1.00-acre, beachfront parcel that does not conform to current zoning regulations. At the time of sale, it was improved with an approximately 1,468-square-foot, 1.5-story, cottage with four bedrooms and one bathroom. This sale property was purchased in September, 2007 for \$3,100,000. Excluding his time adjustment of 1.94%, Mr. Hartel’s gross adjustments totaled 65%.

Comparable sale 5 for this fiscal year, 12 Caleb Pond Lane, is also located on Chappaquiddick Island near the Chappy ferry. Comparable sale 5 has a 2.10-acre waterfront parcel that, at the time of sale, was improved with multiple structures including: an approximately 1,577-square-foot main house with two bedrooms and two bathrooms; an approximately 544-square-foot guest cottage with two bedrooms and one bathroom; an approximately 378-square foot artist’s studio; as well as a lap pool and croquet court. This sale property, which sits on a promontory, has, in the words of Mr. Hartel, “unfettered views both down harbor to South Beach and to the inner harbor.” It was purchased in October, 2007 for \$5,000,000. Excluding his time adjustment of 1.67%, Mr. Hartel’s gross adjustments totaled 85%.

Mr. Hartel’s adjustment grid for fiscal year 2009 is substantially reproduced in the two tables below.

Fiscal Year 2009

	<u>Subject</u>	<u>Comparable Sale 1</u>	<u>Comparable Sale 2</u>
Location	52 Witchwood Ln	153 Cow Bay Rd	139 & 145 Cow Bay Rd
Map & Parcel	36-303.13	13-3	13-1 & 13-2
Parcel Size (acres)	1.50	7.00	6.50
Sale Price	n/a	\$ 13,875,000	\$ 6,125,000
Improvements AV	n/a	\$ 788,500	\$ 182,900
Extracted Land Value	n/a	\$ 13,086,500	\$ 5,942,100
Condition of Sale²²		\$ 3,468,750 (25%)	(0%)
Date of Sale	01/01/2008	01/18/2007	01/18/2007
Time Adjustment		(0%)	(0%)
Adjusted Subtotal		\$ 9,617,750	\$ 5,942,100
Location	Good	Similar 0%	Similar 0%
Site Utility Size	Fair	Superior -20%	Superior -10%
View	Average	Superior -10%	Superior -10%
Dock	Shared Right	None 5%	None 5%
Net Adjustment		\$(2,404,438)-25%	\$(891,315)-15%
Indicated Land Value		\$ 7,213,313	\$ 5,050,785
Rounded Land Value		\$ 7,200,000	\$ 5,100,000

²² See the preceding footnote, *supra*.

Fiscal Year 2009 (cont.)

	<u>Comparable Sale 3</u>	<u>Comparable Sale 4</u>	<u>Comparable Sale 5</u>
Location	38 Cow Bay Road	103 Chappaquiddick Rd	12 Caleb Pond Lane
Map & Parcel	12-26	30-67.2	30-36
Parcel Size (acres)	2.60	1.00	2.10
Sale Price	\$ 10,280,000	\$ 3,100,000	\$ 5,000,000
Improvements AV	\$ 2,969,000	\$ 160,800	\$ 454,400
Extracted Land Value	\$ 7,311,000	\$ 2,939,200	\$ 4,545,600
Condition of Sale	(0%)	(0%)	(0%)
Date of Sale	04/07/2006	09/17/2007	10/05/2007
Time Adjustment	\$ (263,196) (3.6%)	\$ 57,020 (1.94%)	\$ (75,912) (1.67%)
Adjusted Subtotal	\$ 7,047,804	\$ 2,882,180	\$ 4,469,688
Location	Similar 0%	Inferior 50%	Inferior 50%
Site Utility Size	Superior - 5%	Superior - 5%	Superior -10%
View	Superior - 5%	Superior - 5%	Superior -10%
Dock	None <u>5%</u>	None <u>5%</u>	Superior <u>-15%</u>
Net Adjustment	\$ (352,390) - 5%	\$ 1,296,981 45%	\$ 670,453 15%
Indicated Land Value	\$ 6,695,414	\$ 4,179,160	\$ 5,140,142
Rounded Land Value	\$ 6,700,000	\$ 4,200,000	\$ 5,100,000

In his weighted average grid, Mr. Hartel applied equal weight, 20%, to all of his purportedly comparable-sale properties, in recommending a rounded indicated land value for the subject property of \$5,700,000. Relying on this value, he estimated the fair cash value of the subject property at \$5,700,000 for fiscal year 2009.

In sum, of the five purportedly comparable-sale properties on which Mr. Hartel relied to estimate the value of the subject property for fiscal year 2009: two of them are located on Chappaquiddick Island and required excessive adjustments, excluding time adjustments; several others are technically not, or are not, waterfront properties and are part of an assemblage that was not appropriately analyzed; and the fifth contains an improvement with an assessed value approaching 30% of the sale price, which undermines the usual rationale and Mr. Hartel's reasoning for using it in a land-extraction methodology.

To estimate the value of the subject property for fiscal year 2010, Mr. Hartel continued to use as his purportedly comparable-sale properties in his methodology: 103 Chappaquiddick Road (comparable sale 1) and 12 Caleb Pond Lane (comparable sale 4); but replaced 153 Cow Bay Road, 38 Cow Bay Road, and 139 & 145 Cow Bay Road with 12 Guernsey Lane (comparable sale 2), which he also used as a comparable sale in his appraisal of the other subject properties and is described in the section of the Findings discussing 48 Witchwood Lane, and 36 Down Harbor Road (comparable sale 3).

Comparable sale 3 for fiscal year 2010, 36 Down Harbor Road, is an approximately 1.60-acre, non-waterfront parcel with impressive views, which was unimproved at the time of sale but approved for the construction of a four-bedroom main residence with a swimming pool and two-

car carriage house. This sale property is associated with the Down Harbor Association whose amenities include a shared dock and private beach on which this sale property fronts. This sale property was purchased in June, 2008 for \$3,050,000. Excluding his time adjustment of 6.38%, Mr. Hartel's gross adjustments totaled 25%.

The assessors classified the sale of this property as a non-arm's-length transaction because it involved unconventional financing -- a private mortgage from an abutter in exchange for a view easement. Moreover, the sale of this property resulted from an assignment of an option agreement to the eventual purchaser, which had been originally granted to an abutter for \$400,000 some 7.5 months prior to the actual sale of this property for the price recited in the option agreement.

Mr. Hartel's adjustment grid for fiscal year 2010 is substantially reproduced in the two tables below.

Fiscal Year 2010

	<u>Subject</u>	<u>Comparable Sale 1</u>	<u>Comparable Sale 2</u>
Location	52 Witchwood Ln	103 Chappaquiddick Rd	12 Guernsey Lane
Map & Parcel	36-303.13	30-67.2	36-336
Parcel Size (acres)	1.50	1.00	2.10
Sale Price	n/a	\$ 3,100,000	\$ 7,500,000
Improvements AV	n/a	\$ 160,800	\$ 293,000
Extracted Land Value	n/a	\$ 2,939,200	\$ 7,207,000
Condition of Sale		(0%)	(0%)
Date of Sale	01/01/2008	09/17/2007	01/28/2009
Time Adjustment		\$ (398,556) (13.56%)	\$ (79,277) (1.1%)
Adjusted Subtotal		\$ 2,540,644	\$ 7,127,723
Location	Good	Inferior 50%	Similar 0%
Site Utility Size	Fair	Superior - 5%	Superior -10%
View	Average	Superior - 5%	Superior -10%
Dock	Shared Right	None 5%	Superior -15%
Net Adjustment		\$ 1,143,290 45%	\$(2,494,703)-35%
Indicated Land Value		\$ 3,683,934	\$ 4,633,020
Rounded Land Value		\$ 3,700,000	\$ 4,600,000

Fiscal Year 2010 (cont.)

	<u>Subject</u>	<u>Comparable Sale 3</u>	<u>Comparable Sale 4</u>
Location	52 Witchwood Ln	36 Down Harbor Road	12 Caleb Pond Lane
Map & Parcel	36-303.13	36-339	30-36
Parcel Size (acres)	1.50	1.60	2.10
Sale Price	n/a	\$ 3,050,000	\$ 5,000,000
Improvements AV	n/a		\$ 454,400
Extracted Land Value	n/a	\$ 3,050,000	\$ 4,545,600
Condition of Sale		(0%)	(0%)
Date of Sale	01/01/2008	06/11/2008	10/5/2007
Time Adjustment		\$(194,590) (6.38%)	\$(599,565) (13.19%)
Adjusted Subtotal		\$ 2,855,410	\$ 3,946,035
Location	Good	Similar 0%	Inferior 50%
Site Utility Size	Fair	Inferior 10%	Superior -10%
View	Average	Superior - 5%	Superior -10%
Dock	Shared Right	Inferior 10%	Superior -15%
Net Adjustment		\$ 428,312 15%	\$ 591,905 15%

Indicated Land Value	\$ 3,283,722	\$ 4,537,941
Rounded Land Value	\$ 3,300,000	\$ 4,500,000

In his weighted average grid, Mr. Hartel applied the most weight, 70%, to comparable sale 2, and equal weight, 10%, to his remaining three comparable-sale properties, in recommending a rounded indicated land value for the subject property of \$4,400,000. Relying on this value, he estimated the fair cash value of the subject property at \$4,400,000 for fiscal year 2010.

In sum, of the four purportedly comparable-sale properties on which Mr. Hartel relied to estimate the value of the subject property for fiscal year 2010: two of them required extensive adjustment (65% and 85%, not including additional time adjustments of 13.56% and 13.19%, respectively); another was non-waterfront property and involved unconventional financing and an option agreement for which Mr. Hartel did not account; and the fourth required a gross adjustment of 35% for the parcel alone, not considering time, and Mr. Hartel’s analysis of the improvements’ value was flawed.

The Board’s Findings for the 52 Witchwood Lane Property

With respect to 27 Tower Hill Road, the Board found that Mr. Hartel’s analysis included a different time adjustment and a different assessed value for this sale property’s improvement than those included in his previous analyses for the other subject properties. Even though this sale property’s outdated improvements were razed after the sale, Mr. Hartel still subtracted their assessed values from the sale price in estimating the value of the subject property – a vacant parcel. Presumably, this sale property was sold with the razing and demolition costs in mind. Accordingly, and assuming all other things being equal, it was not appropriate for Mr. Hartel to adjust the sale price by subtracting the improvements’ assessed values to ascertain an indicated value for the subject vacant parcel. In addition, Mr. Hartel’s gross adjustments totaled nearly 40%, including his time adjustment. For these reasons, the Board found that Mr. Hartel’s analysis of this comparable sale property was fatally flawed.

With respect to 25 Leland’s Path, its improvements at the time of sale, accounted for almost 50% of this sale property’s overall assessed value, which is inconsistent with the usual rationale and Mr. Hartel’s reasoning for utilizing a valuation methodology which relies on a land-extraction analysis. In addition, Mr. Hartel’s gross adjustments here, for the parcel alone, totaled 75% - well beyond the customary mark for rejecting comparability. For these reasons, the Board found that this sale property lacked basic comparability to the subject property.

With respect to 38 Cow Bay Road, the Board found that it is not waterfront property, it does not have access to a pier, and, unlike the subject property, it is located in an area of Edgartown that appeals to a non-boating, country club and golfing type of buyer. Moreover, this sale property's improvements at the time of sale totaled almost 30% of the overall assessment, which, like the previous sale property, is inconsistent with the usual rationale and Mr. Hartel's reasoning for utilizing a valuation methodology which relies on a land-extraction analysis. For these reasons, the Board found that this sale property was not comparable to the subject property and should not have been included in Mr. Hartel's methodology.

With respect to 153 Cow Bay Road, it is seven acres compared to the subject property's 1.5-acre parcel; it is technically non-waterfront property; it contains several improvements while the subject property has none; and, as Mr. Hartel admits, it was "not exposed to the open market." Moreover, including his 25% "plottage" adjustment, Mr. Hartel's gross adjustments for this sale property totaled 60%. Mr. Hartel proposed a "plottage" adjustment for this sale property because of its purported assemblage with his next comparable sale property, 139 & 145 Cow Bay Road, which contains 6.5 acres compared to the subject property's 1.5-acre parcel and is also technically a non-waterfront property. Curiously, Mr. Hartel did not apply any plottage value to the sale price of this sale property despite using it as a separate comparable sale. For all of these reasons, the Board found that these sale properties, considered either separately as two or as an assemblage, were not comparable to the subject property.

With respect to 103 Chappaquiddick Road, it is a one-acre parcel located on Chappaquiddick Island near the Chappy ferry. Excluding his time adjustment, Mr. Hartel's gross adjustments totaled 65%, strongly indicating that this sale property is not comparable to the subject property, which the Board so found.

With respect to 12 Caleb Pond Lane, it is also located on Chappaquiddick Island. Excluding his time adjustment, Mr. Hartel's gross adjustments totaled 85%. Moreover, at the date of sale, this sale property's improvements were assessed at between 9% and 10% of the sale property's overall assessed value. As previously discussed regarding several other sale properties, this improvement percentage is significant enough to undercut the usual rationale and Mr. Hartel's reasoning for using it in a valuation methodology premised on land extraction. For these reasons the Board found that this sale property was not comparable to the subject property and should not have been used in Mr. Hartel's methodology.

With respect to 12 Guernsey Lane, the Board noted that Mr. Hartel also used this sale property to value the subject property's neighbor -- 48 Witchwood Lane -- for fiscal year 2010,

as well as earlier fiscal years. The Board found that 48 Witchwood Lane's parcel and the subject property's parcel were similar. Oddly, Mr. Hartel's percentage adjustments for this sale property's parcel when compared to the subject property's parcel are more than double those that he proposed when compared to 48 Witchwood Lane's parcel. The effect of this discrepancy is to reduce this sale property's sale price by \$2,500,000 when compared to the subject property, as opposed to only \$1,000,000 when compared to its neighbor. In addition, and similar to what occurred with the sale property located at 27 Tower Hill Road, 12 Guernsey Lane's outdated improvements were razed after the sale and a new home was built. Notwithstanding this foreseeable development, Mr. Hartel still subtracted the improvements' assessed values from the sale price in developing an indicated value for the subject property -- a vacant parcel. Presumably, this sale property was sold with the razing and demolition costs in mind. Accordingly, and assuming all other things being equal, it was not appropriate for Mr. Hartel to adjust the sale price by subtracting the assessed values of the improvements to ascertain an indicated value for the subject vacant parcel. For these reasons, the Board found that Mr. Hartel's analysis of this sale property was gravely flawed.

With respect to 36 Down Harbor Road, the assessors classified the sale of this sale property as a non-arm's-length transaction because the sale resulted from unconventional financing -- a private mortgage from an abutter in exchange for a view easement -- and the assignment of an option agreement for which the assignor had paid \$400,000 approximately 7.5 months before the sale. The Board likewise found that these anomalies required at least some consideration and adjustment. Mr. Hartel, however, did not adjust, account for, or even consider the effects of the option agreement or private unconventional financing on the sale price. Because of these omissions, the Board found that Mr. Hartel's inclusion and treatment of this sale property in his analysis was faulty.

On these bases and considering the infirmities with Mr. Hartel's valuation methodology and his purportedly comparable-sale properties, the Board found that the values which he proposed were unreliable, and there was insufficient evidence upon which the Board could rely to develop the fair cash value of the subject property for fiscal years 2008, 2009, and 2010 using a comparable-sale or alternative method of valuation.

Ms. Resendes' Testimony

The appellants also called Edgartown's Principal Assessor, JoAnn Resendes, to testify. During the appellants' examination of her, Ms. Resendes admitted that there were errors in the town's LA-3 report submitted to the Department of Revenue (the "DOR") in connection with

Edgartown's fiscal year 2008 Triennial Certification process. These errors included the inadvertent omission of a sale and the inclusion of an invalid sale. Even assuming that these and other omissions, additions, or misclassifications occurred and may have affected the town's valuations, the appellants concede that: "It is not . . . possible [relying on this information] for [appellants], or anyone else for that matter, to prove the exact amount of overvaluation" See appellants' Post-Hearing Memoranda. Without significantly more evidence on how and the extent to which the errors raised by the appellants likely affected assessed values throughout Edgartown or, more particularly, the assessed values of the subject properties for the fiscal years at issue, the Board was unable to draw any reasonable valuation conclusions or determine any valuation abatements relying on the record in this regard.

Conclusion

On these bases, the Board found that the appellants failed to prove that the subject properties were overvalued for the fiscal years at issue. Accordingly, the Board decided these appeals for the assessors and herewith promulgates decisions for the appellee.

OPINION

The assessors have a statutory and constitutional obligation to assess all real property at its full and fair cash value. Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth; art. 10 of the Declaration of Rights; G.L. c. 59, §§ 38, 52. See *Coomey v. Assessors of Sandwich*, 367 Mass. 836, 837 (1975)(citations omitted). Fair cash value means fair market value, which 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).

The 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 [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 board is entitled to 'presume that the valuation made by the assessors [is] valid unless the taxpayers sustain[] the burden of proving 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, 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)).

With respect to “exposing flaws or errors in assessors’ method of valuation,” taxpayers do not conclusively establish a right to abatement merely by showing that their land, or a portion of it, is overvalued. “The tax on a parcel of land and the building thereon is one tax . . . although for statistical purposes they may be valued separately.” *Assessors of Brookline v. Prudential Insurance Co.*, 310 Mass. 300, 316-17 (1941). In abatement proceedings, “the question is whether the assessment for the parcel of real estate, including both the land and the structures thereon, is excessive. The component parts, on which that single assessment is laid, are each open to inquiry and revision by the appellate tribunal in reaching the conclusion whether that single assessment is excessive.” *Massachusetts General Hospital v. Belmont*, 238 Mass. 396, 403 (1921). See also *Buckley v. Assessors of Duxbury*, Mass. ATB Findings of Fact and Reports 1990-110, 119; *Jernegan v. Assessors of Duxbury*, Mass. ATB Findings of Fact and Reports 1990-39, 48-49; *Everhart v. Assessors of Dalton*, Mass. ATB Findings of Fact and Reports 1985-49, 54.

In the present appeals, the appellants and their real estate valuation expert attempted to show that the subject properties were overvalued for the fiscal years at issue by demonstrating that the assessed values associated with the land components were excessive thereby causing the overall assessed values to exceed the subject properties’ fair cash values. The Board found and ruled, however, that the real estate valuation expert failed to confirm the assessed values of the improvements with the market, to use properly developed values, or to appropriately adjust his purportedly comparable-sale properties’ improvements in comparison with the subject properties’ improvements. Consequently, he did not prove that “the assessment[] for the parcel[s] of real estate, including both the land and the structures thereon, [were] excessive.” *Massachusetts General Hospital*, 238 Mass. at 403. Because of these failings, the Board found and ruled that his analyses were flawed. Furthermore, to the extent that the appellants raised the specter of mistakes in the assessors’ individual assessments of the subject properties, the Board found and ruled that they failed to adequately quantify them.

In addition, the appellants failed to demonstrate that Edgartown’s assessments as a whole or those attributable to the subject properties were unsound or erroneous because of errors or omissions in the town’s LA-3 reports or because the underlying data and methodology, which the assessors employed in the valuation process, were flawed and unreliable. Notwithstanding the existence of several omissions, additions, or misclassifications, the appellants concede that

“[i]t is not possible . . . to prove the exact amount of overvaluation.” The appellants failed to prove whether, or to what extent, these errors led to the overvaluation of the subject properties. Accordingly, the Board found and ruled that the appellants did not demonstrate that the assessed values attributed to the subject properties were unreliable or excessive as a result of errors or mistakes in the assessors’ valuation methodology.

Real estate valuation experts, the Massachusetts courts, and this Board rely primarily upon three approaches to determine a property’s fair cash value: income-capitalization, sales comparison, and depreciated reproduction or replacement cost. *Correia v. New Bedford Redevelopment Authority*, 375 Mass. 360, 362 (1978). “The Board is not required to adopt any particular method of valuation.” *Pepsi-Cola Bottling Co. v. Assessors of Boston*, 397 Mass. 447, 449 (1986). The fair cash value of property may often best be determined by recent sales of comparable properties in the market. See *Correia*, 375 Mass. at 362; *McCabe v. Chelsea*, 265 Mass. 494, 496 (1929). Actual sales generally “furnish strong evidence of market value, provided they are arm’s-length transactions and thus fairly represent what a buyer has been willing to pay for the property to a willing seller.” *Foxboro Associates v. Assessors of Foxborough*, 385 Mass. 679, 682 (1982); *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 469 (1981); *First National Stores, Inc. v. Assessors of Somerville*, 358 Mass. 554, 560 (1971). Sales of comparable realty in the same geographic area and within a reasonable time of the assessment date contain credible data and information for determining the value of the property at issue. See *McCabe*, 265 Mass. at 496. “A major premise of the sale comparison approach is that an opinion of the market value of a property can be supported by studying the market’s reaction to comparable and competitive properties.” APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 297 (13th ed., 2008). When comparable sales are used, however, allowance must be made for various factors which would otherwise cause disparities in the comparable prices. See *Pembroke Industrial Park Co., Inc. v. Assessors of Pembroke*, Mass. ATB Findings of Fact and Reports 1998-1072, 1082. “Adjustments for differences are made to the price of each comparable property to make that property equivalent to the subject in market appeal on the effective date of the opinion of value.” THE APPRAISAL OF REAL ESTATE at 430.

In the instant appeals, the appellants’ real estate valuation expert eschewed a traditional sales-comparison approach and instead elected to employ what can best be described as a blended or combined, comparable-sales, land-extraction, and cost (assessment) approach. Essentially, and as explained in the Board’s findings above, the appellants’ real estate valuation expert first identified four to six purportedly comparable-sale properties for the corresponding

fiscal years at issue for each of the subject properties. He then backed-out the assessed values of the improvements from each of the sale prices, and then adjusted the extracted land values for five factors: time; location; site utility and size; view; and caliber of interest in a dock or pier. After completing these steps, he derived an indicated land value for each comparable, which he then rounded and weighted to garner an estimated land value for the subject property. As a final step, the appellants' real estate valuation witness added back the assessed values of the subject property's improvements to determine his estimated fair cash value for the subject property.²³ The appellants' real estate valuation expert did not rely upon a separate, appropriately prepared, cost analysis for either the subject properties' or his purportedly comparable properties' improvements, and he did not attempt to confirm the improvements' assessed values with any relevant market data. The appellants' real estate valuation expert admitted that he simply relied on the assessed values as being reasonable estimates of the improvements' values as "placeholders."

As stated previously in the Findings above, a similar methodology is described in THE APPRAISAL OF REAL ESTATE, in the section detailing alternative techniques for valuing "[v]acant parcels of land." *Id.* at 366 (emphasis added). It is an alternative technique for valuing vacant parcels of land when sales of comparable vacant land are so rare that their values cannot be estimated reliably by direct comparison or with sufficient comparable data. *Id.* The treatise cautions that "extraction methods should be used with extreme care and only when lack of market data prevents application of more direct methods and procedures." *Id.* at 368.

The Board found that, in the present appeals, the appellants' real estate valuation expert's methodology takes the land-extraction method even further than that described in the treatise; he used it, with only one exception, to value *improved* waterfront properties, not simply vacant parcels or large tracts of rural land with negligible value in or no improvements. Moreover, the Board found that the appellants' real estate valuation expert relied on this approach despite not convincingly demonstrating a dearth of market data or that a more traditional or conventional sales-comparison approach was incapable of valuing the subject properties for the fiscal years at issue. Furthermore, and as stated above, the appellants' real estate valuation expert also failed to use appropriately developed values for the improvements or to confirm the assessed values with market data.

The Board has previously rejected indicated values developed using a land-extraction (or land-allocation) methodology to value *vacant lots* because "[the real estate valuation expert] did

²³ The sole exception is 52 Witchwood Lane, which, at all relevant times, was vacant, undeveloped land.

not provide market evidence to demonstrate that the comparable properties' land and building assessment allocation was indicative of the property's fair market value." *Salem Traders Way Realty, LLC*, Mass. ATB Findings of Fact and Reports at 2009-64. In the instant appeals, the appellants' real estate valuation expert similarly calculated his extracted land values by subtracting the assessed values of his comparable-sale properties' improvements from their sale prices without verifying the assessment component with the market or using an appropriately developed cost analysis. He further compounded the problem, with respect to all of the subject properties save one, by adding the subject property's improvement assessment to his indicated land value to ascertain his estimate of the subject property's fair cash value.

The appellants can point to no previous appeal where the Board has adopted a similar blended methodology that relies primarily on a land-extraction technique to value improved, or for that matter even vacant, parcels. Other jurisdictions are similarly cautious in accepting a land-extraction approach. *See, e.g. Sharps v. Benton County Assessor*, Oregon Tax Court, Magistrate Division, TC-MD 070467D 18 (March 31, 2008)("[t]he extraction method is less reliable than the direct comparison approach and should be used with caution," [citation omitted] and only "with a large sample of properties within the same neighborhood."). The purportedly comparable-sale properties utilized by the appellants' real estate valuation expert do not constitute a "large sample of properties within the same neighborhood." *Id.*

For all of the preceding reasons, the Board found and ruled that Mr. Hartel's methodology is flawed and unreliable.

In deciding these appeals, the Board was not required to believe the testimony of any particular witness or to adopt any particular method of valuation that a witness suggested. Rather, the Board could accept those portions of the evidence that the Board determined had more convincing weight. *Foxboro Associates*, 385 Mass. at 683; *New Boston Garden Corp.*, 383 Mass. at 473; *Board of Assessors of Lynnfield v. New England Oyster House, Inc.*, 362 Mass. 696, 701-702 (1972). In considering whether, and to what extent, a property is overvalued, the Board may take its view of the premises and its view of comparable properties into account. *Westport v. Bristol County Commissioners*, 246 Mass. 556, 563 (1923); *Avco Manufacturing Corp. v. Assessors of Wilmington*, Mass. ATB Findings of Fact and Reports 1990-142, 165-66; *Arthur D. Little, Inc. v. Assessors of Cambridge*, Mass. ATB Findings of Fact and Reports, 1982-363, 374. Given the unique character of Martha's Vineyard, Edgartown, and the subject and comparable properties, the Board found its view particularly helpful in determining the comparability of the purportedly comparable-sale properties.

The Board need not specify the exact manner in which it arrived at its decision. *Jordan Marsh Co. v. Assessors of Malden*, 359 Mass. 106, 110 (1971). The fair cash value of property cannot be proven with “mathematical certainty and must ultimately rest in the realm of opinion, estimate and judgment.” *Assessors of Quincy v. Boston Consol. Gas Co.*, 309 Mass. 60, 72 (1941). “The credibility of witnesses, the weight of evidence, and inferences to be drawn from the evidence are matters for the [B]oard.” *Cummington School of the Arts, Inc. v. Assessors of Cummington*, 373 Mass. 597, 605 (1977).

In the present appeals, the Board found and ruled that the appellants failed to demonstrate that subject properties were overvalued. On this basis, the Board decided these appeals for the appellee.

APPELLATE TAX BOARD

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

A true copy,
Attest: _____
Clerk of the Board



THE COMMONWEALTH OF MASSACHUSETTS
Appellate Tax Board
100 Cambridge Street
Suite 200
Boston, Massachusetts 02114

(617) 727-3100
(617) 727-6234 FAX

Docket No. F314713

ROBERT ZANIBONI
Appellant.

BOARD OF ASSESSORS OF
THE TOWN OF PEMBROKE
Appellee.

DECISION WITH FINDINGS

This appeal involves the assessors’ refusal to abate a roll-back tax assessed under G.L. c. 61A, § 13. On the basis of the uncontroverted evidence of record, the Board makes the following findings and rulings.

At all material times, appellant owned an 88-acre parcel of land which was used as cranberry bogs and related land (“subject property”). For fiscal years 2007 through and including 2011, the subject property was classified, valued and taxed under G.L. c. 61A as agricultural/horticultural land.

In early 2011, appellant entered into an agreement to sell the agricultural and development rights for 58.839 acres of the subject 88 acres to the United States of America, acting by and through the Commodity Credit Corporation, for the benefit of the Natural Resources Conservation Services of the United States Department of Agriculture (“NRCS”). As part of its title examination, the NRCS determined that there was an outstanding lien recorded in favor of the Town, as provided by G.L. c. 61A, § 9. In order to release the lien, the Town required that appellant pay a roll-back tax in the amount of \$89,284.92. Appellant paid the disputed roll-back tax to the Town and executed a warranty easement deed to NRCS on September 23, 2011.

The easement deed to NRCS provides that:

The purpose of this easement is to restore, protect, manage, maintain, and enhance the functional values of wetlands and other lands, and for the conservation of natural values including fish and wildlife and their habitat, water quality improvement, flood water retention, groundwater recharge, open space, aesthetic values, and environmental education. It is the intent of NRCS to give the Landowner the opportunity to participate in the restoration and management activities on the easement area. By signing this deed, the Landowner agrees to the restoration of the Easement Area and grants the right to carry out such restoration to the United States.

The easement deed prohibits the appellant from any activity that would adversely impact or degrade vegetation, wildlife, water quality and flow, or “other wetland functions and values of the easement area.” Appellant retained the right to “undeveloped recreational use” of the easement land, including hunting and fishing and leasing the land for such purposes in accordance with state and federal regulations. The undeveloped recreational uses must be “consistent with the long-term protection and enhancement of the wetland and other natural values of the easement area.” The undeveloped recreational use may include hunting equipment such as tree stands and hunting blinds that are “rustic and customary for the locale as determined by NRCS.” Appellant may not, however, use the easement land for “developed recreation” which includes, but is not limited to: “camping facilities, recreational vehicle trails and tracks, sporting clay operations, skeet shooting operations, firearm range operations and the

infrastructure to raise, stock, and release captive raised waterfowl, game birds and other wildlife for hunting or fishing.”

Appellant argues that there has not been a change in use of the subject property sufficient to trigger the imposition of a roll-back tax under G.L. c. 61A, § 13. Specifically, appellant relies on that part of § 13 which provides that “[n]o roll-back tax imposed by this section will be assessed on land that meets the definition of . . . recreational land under section 1 of chapter 61B.” Under G.L. c. 61B, § 1, land qualifies as recreation land if it is not less than 5 acres and:

is retained in substantially a natural, wild, or open condition . . . in such manner as to allow to a significant extent the preservation of wildlife and other natural resources, including, but not limited to, ground or surface water resources, clean air, vegetation, rare or endangered species, geologic features, high quality soils, and scenic resources.

Because the terms of the easement deed require that the subject property be retained in an open and natural state in order to preserve wildlife and natural resources, appellant argues that the subject property meets the definition of recreational land under G.L. c. 61B, § 1 and is therefore not subject to a roll-back tax under G.L. c. 61A, § 13.

In response, the assessors focus extensively on the need to maintain a lien in place to ensure that the Town is protected for “potential taxes” assessed under Chapter 61A. The assessors also maintain that the language in § 13 which excludes property that would qualify as recreation land from the roll-back tax does not apply to this appeal because the roll-back was assessed under G.L. c. 61A, § 16. Finally, the assessors argue that even if § 13 were to apply, the subject property would not qualify as recreation land because the permitted uses under the easement deed are broader than those allowed under G.L. c. 61B, § 1.

With regard to the assessors’ lien argument, G.L. c. 61A, § 9 provides that a lien be recorded with respect to land which qualifies under Chapter 61 “for such taxes as may be levied under the provisions of this chapter.” The lien insures that taxes levied under Chapter 61, including roll-back taxes, are paid. However, the lien does not create a tax liability; rather, it provides security for the Town that the tax will be paid, if it is due. In fact, § 9 provides that a lien for roll-back taxes is to be released “upon its being so established that no roll-back taxes have become due.” The issue remains, then, whether the easement deed to NRCS constituted a change in use triggering the imposition of a roll-back tax. If no roll-back was due, the assessors cannot demand payment of the roll-back as a condition for releasing the lien.

On the basis of the undisputed facts, the Board finds and rules that no roll-back tax was due on the appellant’s deeding of an easement to NRCS. Under the terms of the deed outlined

above, the subject property must be retained in a substantially natural, wild, or open condition in a manner which preserved wildlife, water, and other natural resources. Accordingly, the subject property meets the definition of recreational land under G.L. c. 61B, § 1 and therefore is not subject to a roll-back tax under G.L. c. 61A, § 13.

The assessors' argument that the disputed roll-back tax was assessed under § 16, rendering the § 13 exclusion inapplicable, is without merit. Section 16 provides that a roll-back tax, "determined pursuant to section 13," shall be the obligation of the owner of the land at the time the property no longer qualifies for Chapter 61A classification. Section 16 makes clear that qualification for Chapter 61A classification "shall depend upon continuance of such land in agricultural or horticultural use . . . not upon continuance in the same owner of title to such land." Accordingly, if land classified under Chapter 61A is transferred by the original applicant to a new owner, and the land no longer qualifies for Chapter 61A classification after the transfer, the roll-back tax under § 13 "shall be the obligation of the then owner of the land." Section 16 does not impose a separate roll-back tax, but merely identifies the person liable for the § 13 roll-back tax. Accordingly, the § 13 exclusion from the roll-back tax for property which meets the recreation land definition under G.L. c. 61B, § 1 is applicable to this appeal.

The assessors' attempt to draw a distinction between the activities permitted under the easement deed and the definition of recreation land under G.L. c. 61B, § 1 is unavailing. The stated purpose of the easement deed, and the specific use prohibitions listed in the deed, are clearly meant to preserve the subject property in its natural state so as to protect the quality of the water, vegetation, and wildlife on the subject property and surrounding land. The environmental benefits protected by the easement deed fit squarely within the language of G.L. c. 61B, § 1.

Finally, consideration of the legislative purpose behind the enactment of the roll-back tax makes clear that no roll-back tax is due in the present circumstances. By providing favorable tax treatment for farmland, the Legislature was attempting to prevent the loss of farmland to development. *See Adams v. Assessors of Westport*, 76 Mass. App. Ct. 180, 184 (2010). However, the Legislature was concerned that reduced taxation of farmland could "accelerate the worrisome loss of farmland to speculators and developers who would acquire and hold agricultural property at a low rate of taxation while awaiting the opportunity to convert or sell the land for development." *Id.*, quoting *Sudbury v. Scott*, 439 Mass. 288, 299-300 (2003). The roll-back tax, as well as the conveyance tax and right-of-first provisions of Chapter 61A "were enacted to address those concerns." *Adams*, 76 Mass. at 184. Clearly, the granting of an easement to NCRS, which protected the subject property's natural resources by prohibiting

disturbance of the water, vegetation, and wildlife on the subject property, is not the type of speculation or development which the roll-back tax was intended to address.

For all of the foregoing reasons, the Board ruled that that no roll-back tax was due from appellant. Accordingly, the decision is for the appellant and an abatement is granted in the amount of \$89,284.92.

APPELLATE TAX BOARD

_____ Chairman
_____ Commissioner
_____ Commissioner
_____ Commissioner
_____ Commissioner

Attest: _____
Clerk of the Board

Date: January 24, 2014
(Seal)

NOTICE: Either party to these proceedings may appeal this decision to the Massachusetts Appeals Court by filing a Notice of Appeal with this Board in accordance with the Massachusetts Rules of Appellate Procedure. Pursuant to G.L. c. 58A, § 13, no further findings of fact or report will be issued by the Board.